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Petition to Modify Decree Nisi.

(Filed June 6, 1944)

IN CHANCERY OF NEW JERSEY.

126/219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

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The petition of Marion Helen O'Hara of Maplewood, Essex County, State of New Jersey, respectfully shows:

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1. On the 20th day of April, 1938, a *decree nisi* for divorce was entered in the above cause in favor of petitioner, and among other things, said decree approved of an agreement as by reference to said *decree nisi* will more fully appear. Annexed hereto and made a part hereof is a copy of the said *decree nisi* and of the said agreement, all of which forms a part of the *decree nisi* in the above entitled cause.

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2. Said *decree nisi* became final on the 21st day of July, 1938, and a copy of the said final decree is also annexed hereto and made a part of this petition.

3. Petitioner further says that Marion Irene O'Hara, daughter of the parties hereto, who is now Marion Irene Evans, and is mentioned in the said *decree nisi* and agreement is now over

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Petition to Modify Decree Nisi.

the age of 21 years and has received a deed for the lands and premises known as No. 49 Sommer Avenue, Maplewood, Essex County, New Jersey, and presently petitioner is living with her daughter in said premises.

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4. The petitioner further says and charges that the lump sum payment of \$7,000.00 set forth in said agreement has been expended by her for the payment of doctor bills and other expenses and she now has approximately the sum of \$150.00 remaining therefrom and otherwise has no money or assets except an automobile which is valued at about \$100.00, and certain personal property.

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5. The petitioner further says that she has been receiving the sum of \$55.00 a week from the defendant which is inadequate for her maintenance and support and wholly less than a proper sum that she should be the recipient of by reason of the affluence, wealth, income and capital assets of the defendant.

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6. Petitioner further says that the said payment was awarded to her at a time when alimony received by a wife was not subject to income tax and the law having been thereafter amended to require that a wife pay income tax on alimony received, deprives her of the sum which the defendant agreed to pay to her and by reason of the said change in the income tax law has created such a substantial change in her circumstances as to require a corresponding modification of the decree because of the fact that the defendant's net income has not declined to such an extent as

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to render this inequitable, but on the contrary, the defendant's net income has been greatly increased and by reason of the demise of his father, petitioner believes and therefore charges it to be true that he has come into a business and has thereby acquired additional capital assets and additional income greater than his income as of the time of the said decree, the true amount of which is presently unknown to your petitioner. 10

7. Petitioner further says that due to the increased cost of living, she is unable to properly maintain and provide for herself in the manner indicated by the terms of the agreement and decree and is entitled to live in a fashion and style in accordance with the means, income and capital assets of the defendant to provide for her accordingly. She charges that she is presently entitled to a greater sum than \$55.00 a week because of the income tax and the high cost of living and further because of the defendant's change for the better in his financial position, all of which should inure to the benefit and advantage of your petitioner. 20

8. Petitioner further says that she is 43 years of age and is presently under the doctor's care and is unable to be gainfully employed. 30

9. Petitioner further says that the true intent and meaning of the agreement made a part of said *decree nisi* is that as long as petitioner and her said daughter, Marion Irene O'Hara, live in the said premises known as 49 Sommer Avenue, Maplewood, New Jersey, the said defendant is obliged to pay for the taxes and upkeep of said 40

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home as indicated in the said agreement and that if she, the said petitioner, lives elsewhere, he is bound to pay to her the sum of One Hundred Dollars per month, to provide for the rental of a home elsewhere.

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10. Petitioner further says that the true meaning of the said agreement is that, in addition to the specified amount for her support as set forth in said contract, it was intended that the petitioner be provided with a home at a rental of One Hundred Dollars and petitioner cannot continue to live in said home unless she and her daughter are able to maintain it and pay the taxes and income. Unless she receives the sum of One Hundred Dollars a month, which was intended to be for her use as rent, she will be compelled to move elsewhere and accordingly would also be entitled to One Hundred Dollars a month, for her rent in addition to the amount to be paid to her for her support.

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11. Petitioner further says that the defendant is abundantly able to maintain and provide for her and that according to her station in life and the defendant's financial income and assets that he is well able to provide for her in the sum of \$75.00 a week and in addition, pay to her the sum of \$100.00 a month to be utilized by her for the payment of rent or its equivalent and the petitioner further says that by reason of the law of the State of New Jersey, she is not bound by any agreement and that defendant is well able to pay to her the sum of \$75.00 a week, in addition, the sum of \$100.00 as and for rent, use and occupation for a home for petitioner.

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Petitioner therefore prays that the Court may by its Order direct:

1. That the defendant pay to the petitioner an additional sum of \$600.00 per annum for income tax requirements. 10

2. That the defendant make discovery under oath of his income and assets in his name or held in trust for him.

3. That the defendant pay to petitioner a larger sum, to wit, \$75.00 a week for her support.

4. That the defendant pay to the petitioner the sum of One Hundred Dollars a month as and for her rent and for the use and occupation of a home for petitioner. 20

5. That the defendant pay her costs and counsel fees.

6. That the petitioner may have such further and other relief as to this Court shall be deemed meet in the premises.

7. That an order to show cause issue directed to the defendant to show cause at a time and place to be designated in said order why she should not have the relief prayed for. 30

MARION HELEN O'HARA,
Petitioner.

LEVENSON & LEVENSON,
*Solicitors for Petitioner on
This Application.* 40

Petition to Modify Decree Nisi.

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

10 MARION HELEN O'HARA, of full age, being duly
 sworn according to law, upon her oath deposes
 and says:

1. I am the petitioner named in the foregoing
 petition. The things and matters therein con-
 tained are true to the best of my knowledge and
 belief.

MARION HELEN O'HARA.

20 Sworn and subscribed to before me,
 this 2nd day of June, 1944.

WALTER G. SEYMOUR,
Notary Public of N. J.

My Commission Expires Apr. 13, 1947.

(SEAL)

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Petition to Modify Decree Nisi.

IN CHANCERY OF NEW JERSEY.

126/219.

Between :

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

10

On Petition
for Divorce.
Decree Nisi.

This cause coming on to be heard in the presence of Edward A. Markley, Esq., of counsel with petitioner, and no one appearing for the defendant, on petition and proofs taken in open court, and the Court having duly considered the pleadings and proofs and having heard and considered the argument of counsel, from all of which it appears to the Chancellor that the petitioner and the defendant were married on the Tenth day of December, Nineteen Hundred and Eighteen, as alleged in said petition; and that the defendant has been guilty of willful, continued and obstinate desertion of the petitioner for the term of two years as alleged in said petition, and that at the time the cause of action for divorce for the said desertion arose the petitioner and the defendant were *bona fide* residents of this State, and that the said petitioner has continued so to be down to the time of the commencement of this action, and that the petitioner for the two years next preceding the commencement of this action was a *bona fide* resident of this State; and

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It further appearing that jurisdiction herein has been acquired by personal service of process upon the defendant within this State; and

10 It further appearing that subject to the approval of this Court the petitioner and defendant have entered into an agreement dated February 21, 1938, whereby the petitioner agrees to accept and the defendant agrees to pay a sum in lieu of alimony, temporary or permanent, support and maintenance, past, present or future, and also for the support of the infant child of the said marriage, to wit, Marion Irene O'Hara, and also for counsel fees and costs; and

20 Whereas the Court has considered the said agreement and position and circumstances of the parties and made due investigation and is of the opinion that the said provisions in the said agreement for the petitioner and the child of the marriage, are for their benefit and are suitable and adequate for their support and maintenance:

30 It is thereupon on this 20th day of April, 1938, by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor by virtue of the power and authority of this Court and of the acts of the Legislature in such case made and provided, does hereby ORDER, ADJUDGE and DECREE that the said petitioner, Marion Helen O'Hara and the said defendant, George Kenneth O'Hara, be divorced from the bonds of matrimony for the cause of desertion as aforesaid, and that the said parties and each of them be freed and discharged
40 from the obligations thereof, unless within three

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months from the date hereof sufficient cause be shown why this decree should not be made absolute.

It is FURTHER ORDERED, ADJUDGED and DECREED, that the care and custody of Marion Irene O'Hara, the infant child of said marriage, be awarded to the petitioner until the further order of this Court. 10

It is FURTHER ORDERED, ADJUDGED and DECREED that the agreement aforesaid between the petitioner and the defendant, dated February 21, 1938, a copy of which is hereto annexed and made a part hereof, is for the benefit of the petitioner and the child of the marriage and is suitable and adequate for their support and maintenance, and that said agreement be approved and that the terms of said agreement be carried out, and that said agreement be and the same hereby is ORDERED, ADJUDGED and DECREED to be in effect as of the date of this *Decree Nisi*. 20

Leave to the above named petitioner, Marion Helen O'Hara to resume her maiden name of Marion Helen Burnett is reserved.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendant do pay to the said petitioner her costs of this suit incurred and to be incurred to be taxed, together with the counsel fee of \$500 and that the said petitioner have execution therefor according to the practice of this Court. 30

Respectfully advised,

THOMAS J. STANTON,

A. M.

LUTHER A. CAMPBELL,

C.

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Petition to Modify Decree Nisi.

IN CHANCERY OF NEW JERSEY.

103-129

10	Between: MARION HELEN O'HARA, <i>Complainant,</i> and GEORGE KENNETH O'HARA, <i>Defendant.</i>	} On Bill for } Separate } Maintenance, } &c. } Agreement to } Accept Service } in Lieu of Sep- } arate Mainte- } nance and Pro- } viding for } Maintenance } of the Child of } the Marriage.
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20 AGREEMENT Made this Twenty-first day of February, Nineteen Hundred and Thirty-eight, BETWEEN the complainant, Marion Helen O'Hara, the defendant, George Kenneth O'Hara, and Edward A. Markley, as Trustee for said Marion Helen O'Hara :

WHEREAS, a final decree was entered in the above suit under date of February 24, 1937, wherein among other things it was Ordered, Adjudged, and Decreed that

30 "the defendant, George Kenneth O'Hara, do pay to the complainant, Marion Helen O'Hara, \$72.00 semi-monthly, that is, on or about the 5th and 20th of each month, for her support and maintenance and for the support and maintenance of the infant child of their said marriage, and in addition thereto the sum of \$20.00 on said dates for the services of a maid while the complainant

40 resides at her present residence; * * *."

Petition to Modify Decree Nisi.

And, WHEREAS, said decree further Ordered, Adjudged and Decreed that

“either party be at liberty to apply, upon a future change of the circumstances of the parties, for a variance or modification of this decree concerning the support or the maintenance of the complainant and her child as shall be just and equitable.” 10

And, WHEREAS, the said Marion Helen O’Hara is about to institute suit in the Court of Chancery of the State of New Jersey against the said George Kenneth O’Hara for divorce upon the ground of desertion;

And, WHEREAS, in said suit said Marion Helen O’Hara was going to apply for a modification of said decree aforesaid so as to increase the amounts thereof to more properly provide for the support and maintenance of herself and the child of said marriage; 20

And, WHEREAS, the parties desire to settle the question of alimony, counsel fee, costs, etc., by agreement to be approved by the Court: 30

Now, THEREFORE, this agreement witnesseth, that the said George Kenneth O’Hara agrees to pay to the said Marion Helen O’Hara, as settlement in full and for all alimony, temporary or permanent, support and maintenance, past, present, or future, and also for the support of the infant child of said marriage, Marion Irene O’Hara, and also for counsel fees, the following: 40

Petition to Modify Decree Nisi.

10 1. A lump sum payment of Seven Thousand (\$7,000) Dollars, to be paid upon the execution of this agreement to the said Trustee, Edward A. Markley, to be held in escrow by him pending the approval of this agreement by the Chancellor. Upon the signing of the *decree nisi* for absolute divorce in the said action to be brought, the said sum of Seven Thousand (\$7,000) Dollars is to be paid by the said Edward A. Markley, Trustee, to the said Marion Helen O'Hara. Upon the written order of the said George Kenneth O'Hara, said Trustee will be authorized at any time to advance to the said Marion Helen O'Hara the sum of One Thousand (\$1,000) Dollars of said Seven Thousand (\$7,000) Dollars.

30 2. A weekly payment of Sixty-eight (\$68) Dollars to said Marion Helen O'Hara, which is to include support money for the daughter, Marion Irene O'Hara. If the said Marion Helen O'Hara in the future should remarry, this weekly payment is to cease and there will be paid to her for the benefit of the daughter, Marion Irene O'Hara, the sum of Forty (\$40) Dollars per week until she marries. If the said Marion Helen O'Hara should predecease her daughter then said Forty (\$40) Dollars is to be payable to the general guardian of the daughter until she attains the age of twenty-one years, when the same is to be payable directly to her. If the said daughter should marry, then there is to be paid to the said Marion Helen O'Hara during the time that she remains unmarried, the sum of Fifty-five (\$55) Dollars per week.

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Petition to Modify Decree Nisi.

3. The said Marion Helen O'Hara and the said Marion Irene O'Hara are to have the right as long as they desire, to reside in the property known as 49 Sommer Avenue, Maplewood, Essex County, New Jersey, which includes all of the land now enclosed by a hedge, consisting of the said residence and two lots. All of the expense of upkeep and maintenance of said property, including all repairs, renewals and redecorations inside and out, and also all payments for taxes and assessments, water rents and insurance premiums so long as the said Marion Helen O'Hara and said Marion Irene O'Hara reside in said property, are to be paid by the said George Kenneth O'Hara. Said George Kenneth O'Hara is also to provide reasonably and properly for the upkeep of the grounds and the periodic cutting of the lawns of the said premises. In the event that the said Marion Helen O'Hara and said Marion Irene O'Hara no longer desire to reside in said premises, or if for any reason they have to vacate the said premises, the said premises are to be sold and the proceeds of the sale are to be put in a trust fund in the Hudson Trust Company of New Jersey and the income therefrom is to be used together with sufficient additional funds to make up the sum of One Hundred (\$100) Dollars per month which is to be paid monthly on the first day of each and every month by the said George Kenneth O'Hara, to the said Marion Helen O'Hara to provide for the rental of a home elsewhere. When the said Marion Irene O'Hara is twenty-one years of

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Petition to Modify Decree Nisi.

age, the said property is to be deeded to her, free and clear and thereafter she is to be the absolute owner thereof to do with the same as she pleases. It is also provided that the
10 said George Kenneth O'Hara will carry fire insurance upon all of the contents of said house at 49 Sommer Avenue, Maplewood, N. J., said policy to be put in the name of Marion Helen O'Hara.

4. It is further provided that said Marion Helen O'Hara is to be general guardian of the person and property of said Marion Irene O'Hara until she arrives at the age of twenty-one years.

20 5. All bills for eye, medical and dental care for the said Marion Irene O'Hara are to be paid by the said George Kenneth O'Hara.

6. All of the household furniture, goods and chattels and utensils of every nature and description in the said property known as 49 Sommer Avenue, Maplewood, N. J., are to be the property of Marion Helen O'Hara.

30 7. It is further agreed that the said George Kenneth O'Hara will provide a new oil burner heating system for the said premises known as 49 Sommer Avenue, Maplewood, N. J., as soon as this agreement is approved by the Court of Chancery.

40 8. The said Marion Helen O'Hara is to have the right to direct and to determine the course of the education of the said Marion Irene O'Hara, and the expense of said edu-

Petition to Modify Decree Nisi.

ation is to be borne by the said George Kenneth O'Hara.

9. Said Marion Helen O'Hara is to be appointed as general guardian of the person and property of the said Marion Irene O'Hara and the expense of said appointment is to be borne by the said George Kenneth O'Hara, and any moneys that said child may be entitled to before she attains the age of twenty-one years, are to be paid to the said Marion Helen O'Hara as said guardian of the person and property of the said minor.

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10. The said George Kenneth O'Hara will take out upon his own life a policy of life insurance in the face amount of Ten Thousand (\$10,000) Dollars, with double indemnity in case of accidental death. The said policy is to be a straight life policy payable upon death. The irrevocable beneficiary in the said policy is to be the said Marion Helen O'Hara, and in the event of her death, it is to be payable to Marion Irene O'Hara. If the said Marion Helen O'Hara should remarry then the irrevocable beneficiary of said policy is to be the said Marion Irene O'Hara. The premiums on said policy are to be paid by the said George Kenneth O'Hara. The said George Kenneth O'Hara will also take out an accident policy in the Commercial Travelers of Utica, New York, which is to be made payable irrevocable to the said Marion Helen O'Hara, and to the said Marion Irene O'Hara in the same way as the aforesaid life policy. The premiums

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Petition to Modify Decree Nisi.

on said policy are likewise to be paid by the said George Kenneth O'Hara.

10 11. Upon the execution of this agreement, the said George Kenneth O'Hara agrees to pay to the said Edward A. Markley, Trustee, for the services of himself and his firm, Messrs. Collins & Corbin, the sum of Five Hundred (\$500) Dollars, and later when they have been ascertained, any and all out of pocket expenses or disbursements which may be incurred by either of them.

20 12. *The performance of the terms of this agreement by the said George Kenneth O'Hara, is to be guaranteed by his father, George O'Hara, aforesaid, but said guaranty is to be binding only upon him and not upon his estate.** This agreement, however, is to be binding not only upon the said George Kenneth O'Hara, the defendant, but also upon his estate, and his heirs and assigns.

30 13. The payments aforesaid and provisions aforesaid for the said Marion Helen O'Hara and the said Marion Irene O'Hara, are to be taken and accepted by the said Marion Helen O'Hara as settlement in full for all alimony, temporary or permanent,

* Words in *italics* were crossed out and initialed:

40 M. H. O'H.
G. K. O'H.
E. A. M.

Petition to Modify Decree Nisi.

support and maintenance, past, present or future, not only for herself, but for her said daughter, Marion Irene O'Hara, and also as settlement in full for counsel fees, costs, etc., such payments and provisions further to be as settlement in full for all claims and demands whatsoever of every kind, nature or description, that the said Marion Helen O'Hara may now have against the said George Kenneth O'Hara, growing out of the marital relations, including dower and right of dower, and the said Marion Helen O'Hara agrees to accept said payments and provisions in full for all alimony, temporary or permanent, support or maintenance, past, present or future, and for counsel fees, costs, etc., and for the support, maintenance and education of her said daughter, and does agree to execute and deliver at the time of the taking of the final decree in said divorce action, a release to the said George Kenneth O'Hara releasing him from all claims, demands, actions, causes of action, etc., which against him she ever had, now has, or which she may in the future have by reason of any matter or thing done or suffered, or which may be done or suffered in the future, which claims, demands, causes of action, etc., or any of them which may be based on rights incident to the marital relations of the said Marion Helen O'Hara and George Kenneth O'Hara, including dower and right of dower, and also releasing the said George Kenneth O'Hara from any claim of any kind whatsoever which the said Marion Helen O'Hara may have, or which her executors or admini-

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Petition to Modify Decree Nisi.

10 strators hereafter can, shall or may have, in, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of the said release, excepting such obligations as may be recognized by virtue of this agreement.

14. It is further agreed that in case of the death of the said Marion Helen O'Hara before the making of the *decree nisi*, the moneys on deposit with the said Edward A. Markley, Trustee, shall be repaid by the said Trustee to the said George Kenneth O'Hara, and all of the rights of the said Marion Helen O'Hara under this agreement shall cease; in case of the death of the said George Kenneth O'Hara before the taking of the said *decree nisi* herein, the said Trustee shall immediately pay said moneys on deposit to the said Marion Helen O'Hara. Any accumulations on the said Seven Thousand (\$7,000) Dollars deposited as aforesaid with the said Trustee, Edward A. Markley, shall be the property of the said Marion Helen O'Hara, unless she dies before said sum is payable to her, in which event said accumulations shall belong to the said husband. If no *decree nisi* should be entered in said divorce action, said Seven Thousand (\$7,000) Dollars to be deposited with the said Trustee, Edward A. Markley, together with any accumulations, are to be returned to the said George Kenneth O'Hara, and all rights under this agreement of the said Marion Helen O'Hara shall cease.

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Petition to Modify Decree Nisi.

This agreement shall in no way become binding upon the parties hereto until the same shall have been approved by the Court of Chancery and in case same is not approved and the Court shall refuse to approve same, then the moneys so as aforesaid deposited, shall be forthwith returned to the said George Kenneth O'Hara, and the obligations of this agreement shall be at an end and there shall be in force the provisions of the final decree dated February 24, 1937, made in the above entitled cause. 10

The said Trustee, Edward A. Markley, for the said Marion Helen O'Hara, agrees to act as Trustee under this agreement and to see to it that this agreement is enforced. 20

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

MARION HELEN O'HARA (L. S.)
Wife.

GEORGE KENNETH O'HARA (L. S.)
Husband.

EDWARD A. MARKLEY (L. S.)
Trustee. 30

Signed, Sealed and Delivered
in the Presence of:

ANNA D. GREENSPAN.

Petition to Modify Decree Nisi.

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

10 BE IT REMEMBERED, that on this Twenty-first day of February, Nineteen Hundred and Thirty-eight, before me the subscriber, personally appeared Marion Helen O'Hara, to me known and known to me to be the person named in the foregoing instrument, and I having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as and for her voluntary act and deed, for the uses and purposes therein expressed.

20 (Seal) ANNA D. GREENSPAN,
 Notary Public of N. J.

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

30 BE IT REMEMBERED, that on this Twenty-first day of February, Nineteen Hundred and Thirty-eight, before me the subscriber, personally appeared George Kenneth O'Hara, to me known and known to me to be the person named in the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as and for his voluntary act and deed, for the uses and purposes therein expressed.

(Seal) ANNA D. GREENSPAN,
 Notary Public of N. J.

Petition to Modify Decree Nisi.

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

BE IT REMEMBERED, that on this Twenty-first day of February, Nineteen Hundred and Thirty-eight, before me the subscriber, personally appeared Edward A. Markley, to me known and known to me to be the person named in the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as and for his voluntary act and deed, for the uses and purposes therein expressed.

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(Seal) ANNA D. GREENSPAN,
 Notary Public of N. J.

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Petition to Modify Decree Nisi.

I, EDW. L. WHELAN, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the DECREE NISI in the cause wherein Marion Helen O'Hara, is petitioner, and George Kenneth O'Hara, is defendant, now on the files of my office.

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IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court, at Trenton, this 22nd day of April, A. D. nineteen hundred and thirty-eight.

EDW. L. WHELAN,
 Clerk.

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Petition to Modify Decree Nisi.

IN CHANCERY OF NEW JERSEY.

Between :

10

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition
for Divorce.
Final Decree.

20 The Court having in this cause by a *decree nisi*,
bearing date and entered on the 20th day of April,
A. D. nineteen hundred and thirty-eight, ORDERED,
ADJUDGED AND DECREED that the petitioner, Marion
Helen O'Hara, and the defendant, George Ken-
neth O'Hara, be divorced from the bonds of
matrimony for the cause of desertion, unless suf-
ficient cause be shown to the Court why said
decree should not be made absolute within three
months from the date thereof; and application
30 being now made to the Court by the petitioner
for an order that the said *decree nisi* be made
absolute and that a final and absolute decree be
entered; and no cause to the contrary being
shown or appearing;

40 IT IS THEREUPON, on this 21st day of July, A. D.
nineteen hundred and thirty-eight, by his Honor,
Luther A. Campbell, Chancellor of the State of
New Jersey, ORDERED, ADJUDGED AND DECREED and
the said Chancellor, by virtue of the power and
authority of this Court, and of the acts of the
Legislature in such case made and provided, doth

Petition to Modify Decree Nisi.

hereby ORDER, ADJUDGE AND DECREE that the said *Decree Nisi* be made and become absolute, and that the said petitioner, Marion Helen O'Hara, and the said defendant, George Kenneth O'Hara, are divorced from the bonds of matrimony for the cause aforesaid and the marriage between the said petitioner and the said defendant is hereby dissolved accordingly, and the said parties and each of them are and is hereby freed and discharged from the obligations thereof. 10

And it is further ORDERED, ADJUDGED AND DECREED that the petitioner be and she is hereby permitted to resume her maiden name.

LUTHER A. CAMPBELL, 20
C.

I, EDW. L. WHELAN, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Final Decree of Divorce in the cause wherein Marion Helen O'Hara is petitioner, and George Kenneth O'Hara is defendant, now on the files of my office. 30

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court, at Trenton, this 22nd day of July, A. D. nineteen hundred and thirty-eight.

EDW. L. WHELAN, 40
Clerk.

Order to Show Cause.

(Filed June 6, 1944)

IN CHANCERY OF NEW JERSEY.

126/219.

10 Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
*Defendant.*On Petition,
&c.

20 This matter being opened to the Court by Abe D. Levenson, of counsel with Petitioner, on this application, and upon reading and filing the petition to modify and the affidavit annexed thereto, and application being made for an Order to Show Cause;

It is, on this 6th day of June, 1944, ORDERED that the defendant, George Kenneth O'Hara, show cause before the Chancellor, at the Chancery
30 Chambers, No. 1 Exchange Place, Jersey City, New Jersey, on Friday, the 23rd day of June, 1944, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the petitioner should not have the relief prayed for in her petition to modify *decree nisi*, and it is further ORDERED that a true copy of the petition, affidavit and of this order to show cause (all of which may be certified as true copies by the
40 solicitors of the petitioner on this application)

Alias Order to Show Cause.

be served personally upon the defendant, George Kenneth O'Hara, within seven days from the date hereof.

Respectfully advised:

MARSHALL VAN WINKLE, 10
A. M.

LUTHER A. CAMPBELL, C.

Alias Order to Show Cause.

(Filed June 14, 1944)

IN CHANCERY OF NEW JERSEY. 20

126-219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

30

Application having heretofore been made for an order to show cause in the above entitled cause, based upon a petition to Modify *Decree Nisi* and affidavit, duly filed on June 6th, 1944, and said order to show cause having been granted; and it now being represented to the

40

Alias Order to Show Cause.

Court that service upon the defendant could not be made within the time limited in said order, and application being made for an alias order to show cause;

10 It is, on this 14th day of June, 1944, ORDERED, that the defendant, George Kenneth O'Hara, do show cause before the Chancellor, at Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, on Friday, the 7th day of July, 1944, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the petitioner should not have the relief prayed for in her petition to modify *decree nisi*; and for such other and further relief as may be equitable and just;

20 And it is further ORDERED, that a true copy of this order, together with a true copy of the Petition to Modify *Decree Nisi* and affidavit filed on June 6, 1944, and which copies may be certified to be such true copies by the solicitors of the petitioner on this application, be served upon the said defendant, George Kenneth O'Hara, personally, within 7 days from the date hereof.

30 Respectfully advised:

MARSHALL VAN WINKLE,
A. M.

LUTHER A. CAMPBELL,
C.

40

Alias Order to Show Cause.

(Filed June 26, 1944)

IN CHANCERY OF NEW JERSEY.

126/219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
*Defendant.*On Petition,
&c.

10

Application having heretofore been made for
 an order to show cause in the above entitled
 cause, based upon a petition to modify *Decree*
Nisi and affidavit, duly filed on June 6th, 1944,
 and said order to show cause having been
 granted; and it appearing that service thereof
 could not be made within the time limited, and
 it further appearing that on June 14th, 1944, an
 Alias Order to Show Cause was entered, to be
 served upon the defendant within seven days,
 and that service could not be made within the
 time limited in said order, and application being
 made for a further Alias Order to Show Cause;

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It is, on this 26th day of June, 1944, ORDERED,
 that the defendant, George Kenneth O'Hara, do
 show cause before the Chancellor, at the Chan-
 cery Chambers, No. 1 Exchange Place, Jersey
 City, New Jersey, on the 21st day of July, 1944,
 at ten o'clock in the forenoon, or as soon there-

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Alias Order to Show Cause.

after as counsel can be heard, why the petitioner should not have the relief prayed for in her petition to modify *decree nisi*; and for such other and further relief as may be equitable and just;

10 And it is further ORDERED, that a true copy of this order, together with a true copy of the Petition to Modify *Decree Nisi* and affidavit filed on June 6, 1944, and also a true copy of the Alias Order to Show Cause entered herein on June 14th, 1944, which copies may be certified as true by the solicitors of the petitioner on this application, be served upon the said defendant, George Kenneth O'Hara, within 15 days from the date hereof.

20 Respectfully advised:

MARSHALL VAN WINKLE,

A. M.

LUTHER A. CAMPBELL,

C.

30

40

Order.

(Filed September 15, 1944)

IN CHANCERY OF NEW JERSEY.

126/219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

10

On Petition,
Counterclaim,
etc.

Application being made by the Defendant, 20
George Kenneth O'Hara, to file a Counterclaim
herein against Petitioner and third parties,
Marion Irene Evans, Waldo Evans and Julia A.
O'Hara, and the Court having examined the
proposed Counterclaims, and it appearing to the
Court that such Counterclaim will affect the
matter of alimony and that the same is advisable
to avoid multiplicity of suits;

It is on this 15th day of September, 1944, on 30
motion of Hopkins, Vorburger & Dickson, Solici-
tors of Defendant, George Kenneth O'Hara,
ORDERED that the said Defendant have leave to
file said Counterclaim against Petitioner and
third parties defendants, Marion Irene Evans,
Waldo Evans and Julia A. O'Hara, and that the
same be filed herewith.

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Answer to Petition to Modify Decree Nisi and Counterclaim.

Respectfully advised:

THOMAS J. STANTON,
A. M.

10

LUTHER A. CAMPBELL,
C.

Answer to Petition to Modify Decree Nisi and Counterclaim.

(Filed September 15, 1944)

IN CHANCERY OF NEW JERSEY.

20

126/219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

30

Defendant, residing at Blue Mill Road, in the Town of Morristown, in the County of Morris, and State of New Jersey, answering the Petition to modify *Decree Nisi* filed in the above Court, says that:

1. He admits the allegations contained in paragraphs 1, 2 and 3 of the Petition.

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*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

2. He denies the allegations contained in paragraph 4 of the Petition.

3. He admits that Petitioner has been receiving the sum of Fifty-five (\$55.00) Dollars a week in accordance with the terms and conditions of said *Decree Nisi* and the Agreement approved thereby since his daughter married on or about July 3, 1943, but denies the remaining allegations of paragraph 5 of the Petition. 10

4. He admits that the payments provided for in said *Decree Nisi* were awarded to Petitioner at a time when alimony received by a wife was not subject to the Federal income tax, but denies the remaining allegations contained in paragraph 6 of the Petition. 20

5. He denies the allegations contained in paragraph 7 of the Petition.

6. He admits that Petitioner is 43 years of age, but denies the remaining allegations contained in paragraph 8 of the Petition.

7. He denies the allegations contained in paragraphs 9, 10 and 11 of the Petition. 30

FIRST ANSWER IN LIEU OF PLEA.

This Defendant, by way of Answer in Lieu of Plea to so much of Petitioner's Petition as seeks an increase in the amount of alimony awarded under said *Decree Nisi*, says that on February 21, 1938, the parties entered into a lump sum settlement of all present and future alimony to 40

Answer to Petition to Modify Decree Nisi and Counterclaim.

10 which the said Petitioner might at any time be entitled, which settlement this Court by its *Decree Nisi* dated April 20, 1938, and its Final Decree dated July 21, 1938, found to be suitable and adequate for the support and maintenance of the said Petitioner and duly approved.

That all of the terms and provisions of said *Decree Nisi* and Final Decree and said Agreement have been fully and completely performed by the Defendant and Petitioner is estopped, precluded and barred from maintaining these proceedings.

SECOND ANSWER IN LIEU OF PLEA.

20 This Defendant, by way of Answer in Lieu of Plea to so much of Petitioner's Petition as seeks an increase in the amount of alimony awarded under said *Decree Nisi*, says that on July 25, 1938, after the Final Decree was made herein on July 21, 1938, and when Petitioner and Defendant were no longer man and wife, the said Petitioner executed and delivered to the Defendant a General Release which released the said
 30 George Kenneth O'Hara, his heirs, executors and administrators from all claims, demands, actions, causes of actions, etc., which against him she ever had, then had, or which she may in the future have by reason of any matter or thing, done or suffered, or which may be done or suffered in the future, which claims, demands, causes of action, etc., or any of them may be based on rights incident to the marital relation between the said Marion Helen O'Hara and the said George Ken-
 40 neth O'Hara, including dower and right of dower,

Answer to Petition to Modify Decree Nisi and Counterclaim.

and also releasing the said George Kenneth O'Hara from any claims of any kind whatsoever which the said Marion Helen O'Hara may have or which her executors or administrators hereafter can, shall or may have, in, upon or by reason of any matter, cause or thing whatever, from the beginning of the world to the date of the date of said Release, excepting such obligations as may be recognized by virtue of the aforesaid Agreement dated February 21, 1938, and the *Decree Nisi* and Final Decree of this Court approving the same. 10

THIRD ANSWER IN LIEU OF PLEA.

The Petition shows that the Petitioner is not in destitute or necessitous circumstances, and Petitioner is not entitled to any relief. 20

BY WAY OF COUNTERCLAIM against the Petitioner, Marion Helen O'Hara and third parties, Marion Irene Evans, Waldo Evans and Julia A. O'Hara, this Defendant says that:

1. Defendant repeats the allegations contained in paragraphs 1 and 2 of the Petition to modify *Decree Nisi*. 30

2. Defendant further says that in reliance on the validity of said Agreement and the said *Decree Nisi* and Final Decree of this Court approving the same, and said General Release, this Defendant fully and completely performed all of the things required of him to be done and performed under the aforesaid Agreement, *Decree Nisi* and Final Decree. 40

Answer to Petition to Modify Decree Nisi and Counterclaim.

10 3. At the time said Agreement was made, this Defendant was not in a financial position to pay either the Seven Thousand (\$7,000.00) Dollars therein provided to be paid or make the payments of alimony, and the other payments therein provided for, but relying upon the validity of said Agreement and the said *Decree Nisi* and Final Decree of this Court approving the same and believing that Petitioner would keep and perform said Agreement, Defendant borrowed the said sum of Seven Thousand (\$7,000.00) Dollars and the extra amounts needed by him to make up and pay the alimony and other payments required under said Agreement and Decrees of this Court, 20 from his father who loaned him said monies also relying upon the validity of said Agreement and the *Decree Nisi* and Final Decree of this Court approving the same.

30 4. The property at 49 Sommer Avenue, Maplewood, Essex County, New Jersey, was not owned by Defendant when said Agreement and said Decrees were made or at any other time. Said property had always been owned by Defendant's mother, Julia A. O'Hara, and Defendant had no interest of any kind or nature whatsoever therein.

40 5. Relying upon the validity of said Agreement and said *Decree Nisi* and Final Decree of this Court, defendant prevailed upon his mother, the said Julia A. O'Hara, to permit the Petitioner and her said daughter to continue to reside in said property, rent free, and to agree to convey said property to the said Marion Irene O'Hara

Answer to Petition to Modify Decree Nisi and Counterclaim.

as provided for in said Agreement and Decrees, without receiving any consideration from Defendant or the said Marion Irene O'Hara in order that Defendant could perform said Agreement.

6. On or about July 3, 1943, the said Marion Irene O'Hara was married to Waldo Evans. 10

7. On February 21, 1944, after the said Marion Irene Evans, formerly Marion Irene O'Hara, had attained the age of 21 years, and before the present proceedings were instituted, the said Julia A. O'Hara did, in fact, execute and deliver a Deed to Marion Irene Evans conveying said premises to her as provided for in said Agreement and the Decrees of this Court, without receiving any consideration from the said Marion Irene Evans or her husband, Waldo Evans, or from Defendant, for the same. 20

8. Defendant further says that in reliance on the validity of said Agreement and *Decree Nisi* and Final Decree of this Court approving the same and said General Release, and believing that Petitioner would perform said Agreement, he did, in fact, pay her the lump sum payment of Seven Thousand (\$7,000.00) Dollars as provided for in said Agreement and also paid Petitioner the sum of Sixty-eight (\$68.00) Dollars per week until the marriage of his said daughter to Waldo Evans on or about July 3, 1943, since which time Defendant has paid the Petitioner the sum of Fifty-five (\$55.00) Dollars per week as provided for in said Agreement. Defendant has also paid or provided for the payment for the maintenance, 30 40

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

upkeep and carrying charges of the property at
No. 49 Sommer Avenue, Maplewood, Essex
County, New Jersey, as provided for in said
Agreement, and also paid all bills for eye, medical
10 and dental care for his said daughter, Marion
Irene O'Hara. Defendant has also given Peti-
tioner all of the household furniture, goods and
chattels and utensils of every nature and de-
scription in said property at No. 49 Sommer
Avenue, Maplewood, Essex County, New Jersey,
and also provided a new oil burning heating
system for said property and paid the expenses
incident to having the said Marion Helen O'Hara
appointed as general guardian of the person and
20 property of his said daughter, Marion Irene
O'Hara, and Defendant also took out a straight
life insurance policy in the New York Life Insur-
ance Company on his life, in the face sum of
Ten Thousand (\$10,000.00) Dollars with double
indemnity in case of accidental death, making the
irrevocable beneficiary in the said policy the said
Marion Helen O'Hara and in the event of her
death, making the same payable to Marion Irene
O'Hara with the provision that if the said Marion
30 Helen O'Hara should remarry, then the irrevoc-
able beneficiary of said policy is to be the said
Marion Irene O'Hara, and has paid the pre-
miums on said policy to date, and also took out
an accident policy in the Commercial Travelers,
Utica, New York, made payable irrevocably to
the said Marion Helen O'Hara and to the said
Marion Irene O'Hara in the same way as the
aforesaid life policy, and has paid the premiums
thereon to date. Defendant also paid Edward A.
40 Markley, Trustee, for the services of himself and

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

his firm, Messrs. Collins and Corbin, the sum of Five Hundred (\$500.00) Dollars, and also their out-of-pocket expenses and disbursements. Defendant has also permitted the said Marion Helen O'Hara to be the general guardian of the person and property of the said Marion Irene O'Hara until she attained the age of 21 years, and also permitted the said Marion Helen O'Hara to direct and determine the course of the education of the said Marion Irene O'Hara and has caused the expense therefor to be paid, all as provided in said Agreement, and in all other respects this Defendant fully and completely performed all of the things required of him to be done and performed under the aforesaid Agreement, *Decree Nisi* and Final Decree.

9. By the institution of these proceedings, Petitioner has violated and repudiated said permanent alimony agreement and the consideration for the aforesaid payment of Seven Thousand (\$7,000.00) Dollars and the other payments, and said conveyance has failed.

The Defendant, therefore, prays:

1. That Petitioner may by the Order of this Court be directed to specifically perform the aforesaid Agreement of February 21, 1938, and accept the payments therein provided as settlement in full for all alimony, temporary or permanent, support and maintenance, past, present or future, and also as a settlement in full of counsel fees, costs, etc., and the other terms and conditions of said Agreement required to be performed by her.

Answer to Petition to Modify Decree Nisi and Counterclaim.

10 2. That the said Marion Irene Evans and Waldo Evans, her husband, be enjoined from conveying, mortgaging or otherwise encumbering or disposing of said real estate conveyed to the said Marion Irene Evans by Julia A. O'Hara until the final determination of this cause.

 3. That in the event the said permanent alimony agreement is found to be illegal or for any reason unenforceful or not binding on Petitioner, that the said Marion Irene Evans and Waldo Evans, her husband, be directed to reconvey said real estate to the said Julia A. O'Hara.

20 4. That in the event the said permanent alimony agreement is found to be illegal or for any reason unenforceable and not binding on Petitioner, that Petitioner be directed by the Order of this Court to repay to Defendant the said sum of Seven Thousand (\$7,000.00) Dollars and the other amounts paid by him under said Agreement, together with interest thereon, or if Petitioner is unable to repay said monies in a lump sum, that the same be offset against any future alimony awarded to Petitioner and that a reasonable amount of any future alimony awarded be retained by this Defendant until the entire sum of Seven Thousand (\$7,000.00) Dollars and interest is repaid to this Defendant.

30

 5. That in the event the said permanent alimony Agreement is found to be illegal or for any reason unenforceable or not binding on Petitioner, that the same may be cancelled and rescinded and the Defendant relieved from any

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*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

obligations thereunder on his part to be performed.

6. That Marion Helen O'Hara and third parties, Marion Irene Evans, Waldo Evans and Julia A. O'Hara may answer this Counterclaim and each statement herein made. 10

7. That a Writ of Subpoena may issue commanding said third parties, Marion Irene Evans, Waldo Evans and Julia O'Hara to answer this Counterclaim and to abide by said Decree as this Court may make in the premises.

HOPKINS, VORBURGER & DICKSON, 20
By HERMAN G. VORBURGER,
*Solicitors for and of Counsel with
Defendant.*

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**Answer to Petition to Modify *Decree Nisi* and
Counterclaim.**

IN CHANCERY OF NEW JERSEY.

126-219

10

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

Affidavit.

20

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

GEORGE KENNETH O'HARA, of full age, being duly sworn according to law, on his oath deposes and says:

30

I am the Defendant in the above entitled matter and have read the foregoing Counterclaim and the facts therein stated are true of my own knowledge, except as to such facts therein stated to be on information and belief, and to those facts, I believe them to be true.

40

On April 20, 1938, a *Decree Nisi* for divorce was entered in this cause, in an uncontested suit on the ground of desertion, in favor of the Petitioner, and among other things, said Decree ORDERED, ADJUDGED AND DECREED that a certain Agreement providing for permanent alimony between Petitioner and Defendant, dated February 21, 1938, a copy of which was annexed to the

Answer to Petition to Modify Decree Nisi and Counterclaim.

Decree Nisi and made a part thereof, is for the benefit of the Petitioner and the child of the marriage and is suitable and adequate for their support and maintenance, and that said Agreement be approved, and that the terms of said Agreement be carried out, and that said Agreement be and the same is hereby ORDERED, ADJUDGED AND DECREED to be in effect as of the date of this *Decree Nisi*, a copy of said Agreement and said *Decree Nisi* are annexed to the Petition to modify *Decree Nisi* filed herein. 10

That, among other things, said *Decree Nisi* and Agreement provided that this Defendant should pay the said Marion Helen O'Hara a lump sum payment of Seven Thousand (\$7,000.00) Dollars and in addition thereto, the sum of Sixty-eight (\$68.00) Dollars per week which was to include support money for his daughter, Marion Irene O'Hara. That if the said daughter should marry, then there should be paid to the said Marion Helen O'Hara, during the time that she remains unmarried, the sum of Fifty-five (\$55.00) Dollars per week. 20

That the said Marion Helen O'Hara and said daughter, Marion Irene O'Hara, should have the right to reside in the property at No. 49 Sommer Avenue, Maplewood, Essex County, New Jersey. That the cost of maintaining said property should be paid for by this Defendant. That in the event the said Marion Helen O'Hara and said Marion Irene O'Hara no longer desire to reside in said premises, or if for any reason they have to vacate the said premises, the said premises should be sold and the proceeds of sale should be put in a trust fund in the Hudson Trust 30 40

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

10 Company of Hoboken, New Jersey, and the in-
come together with such additional funds as
might be necessary should be paid monthly, on
the first day of each and every month, by Defend-
ant to the said Marion Helen O'Hara to provide
for the rental of a home elsewhere. That when
the said Marion Irene O'Hara attains the age of
twenty-one years, the said property should be
deeded to her. That all of the household furni-
ture, goods and chattels, and utensils of every
nature and description in the said property
should be the property of Marion Helen O'Hara.
That the Defendant should provide a new oil
burning heating system for said premises. That
20 the defendant should take out a life insurance
policy in the sum of Ten Thousand (\$10,000.00)
Dollars and an accident insurance policy, with
the irrevocable beneficiaries the said Marion
Helen O'Hara and in the event of her death, the
said daughter, Marion Irene O'Hara, and pay the
premiums on said policies.

30 That the said Marion Helen O'Hara on her
part agreed that the aforesaid payments and the
other provisions of said Agreement and the said
Decree Nisi should be taken and accepted by her
as settlement in full for all alimony, temporary
or permanent, support and maintenance, past,
present or future, not only for herself but for
her said daughter, and in full settlement for all
claims and demands whatsoever that the said
Marion Helen O'Hara might have against the
said George Kenneth O'Hara growing out of the
marital relations, including dower and right of
dower, and agreed to execute and deliver to the
40 said George Kenneth O'Hara a General Release

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

releasing him from all claims excepting obligations arising out of said Agreement and *Decree Nisi*.

That on July 21, 1938, a Final Decree was entered in this cause. 10

That on or about July 25, 1938, after the Final Decree was made herein and when the parties were no longer man and wife, the Petitioner executed and delivered to Defendant a General Release in accordance with the terms and provisions of said Agreement.

That in reliance on the validity of said Agreement and said *Decree Nisi* and Final Decree of this Court approving the same, and the said General Release, and that the Petitioner would keep and perform the same and abide by said Agreement, this Defendant fully and completely performed all of the things required of him to be done and performed thereunder. 20

That at the time said Agreement was made, this Defendant did not have the Seven Thousand (\$7,000.00) Dollars therein provided to be paid, nor was his income sufficient for him to make the payments of alimony and the other payments therein required to be made by him. That relying upon the validity of said Agreement and the said *Decree Nisi* and Final Decree of this Court approving the same, and believing that Petitioner would keep and perform said Agreement, Defendant borrowed the said sum of Seven Thousand (\$7,000.00) Dollars and the extra amounts needed by him from time to time to make the payments required under said Agreement and Decree of this Court, from his father, and actually made the payments required there- 30 40

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

10 under. That he kept his father fully informed of all of the provisions of said Agreement and the *Decree Nisi* and Final Decree aforesaid, the receipt by him of said General Release, and his father loaned him said monies relying upon the validity of said Agreement and the Decrees of this Court approving the same, and believing
15 Petitioner would keep and perform said Agreement on her part to be performed.

20 That the property at No. 49 Sommer Avenue, Maplewood, Essex County, New Jersey, was never owned by Defendant. That said property was owned by Defendant's mother, Julia A. O'Hara, who received a Deed therefor from Arline Arnold Herbert and husband, dated November 1, 1919. That after acquiring said property, his said mother and father occupied the same as their own home until they acquired another property at Short Hills, New Jersey. That when they moved from said property in order to assist this Defendant whose earnings at that time were not more than Fifty (\$50.00) Dollars per week, they permitted Defendant and his family to occupy
25 said property rent free. That Defendant personally never owned nor did he have any interest of any kind or nature whatsoever therein.

30 That relying upon the validity of said Agreement and the Decrees of this Court approving the same and that Petitioner would keep and perform the same, Defendant prevailed upon his said mother to permit Petitioner and her daughter to continue to reside in said property rent free and to agree to convey said property to Marion Irene O'Hara as provided for in said
40 Agreement and the Decrees approving the same

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

in order that Defendant might carry out and perform said Agreement. That Defendant paid no consideration of any kind to his said mother nor did his daughter, Marion Irene O'Hara, pay any consideration therefor to his said mother. 10

That on or about July 3, 1943, the said Marion Irene O'Hara was married to Waldo Evans.

That on February 21, 1944, after his said daughter had attained the age of twenty-one years and before these present proceedings were instituted, the said Julia A. O'Hara at the request of this Defendant, executed and delivered a Deed to the said Marion Irene Evans conveying said premises to her so that Defendant could comply with the terms and conditions of said Agreement and the Decrees of this Court. That the said Julia A. O'Hara received no consideration of any kind from Defendant or the said Marion Irene Evans or her husband, Waldo Evans, for said conveyance. 20

That in addition to the aforesaid sum of Seven Thousand (\$7,000.00) Dollars, I paid the said Marion Helen O'Hara the sum of Sixty-eight (\$68.00) Dollars per week until the marriage of my daughter to Waldo Evans on or about July 3, 1943, since which time I have paid her the sum of Fifty-five (\$55.00) Dollars per week. I have also paid or provided for the payment of the maintenance, upkeep and carrying charges of the property at No. 49 Sommer Avenue, Maplewood, Essex County, New Jersey, as provided for in said Agreement. I have also paid all bills for eye, medical and dental care for my daughter, Marion Irene O'Hara. I have also given my said wife all of the household furniture, goods and 30 40

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

chattels and utensils of every nature and description in the aforesaid real estate.

10 I have also provided a new oil burning heating system for said property. I have also paid the expenses incident to having the said Marion Helen O'Hara appointed as general guardian of the person and property of my daughter, Marion Irene O'Hara. I have also taken out a straight life insurance policy in the New York Life Insurance Company on my life, in the face sum of Ten Thousand (\$10,000.00) Dollars with double indemnity in case of accidental death, making the irrevocable beneficiary in the said policy the said Marion Helen O'Hara and in the event of her death, making the same payable to Marion Irene
20 O'Hara with the provision that if the said Marion Helen O'Hara should remarry, then the irrevocable beneficiary of said policy is to be the said Marion Irene O'Hara, and have paid the premiums on said policy to date.

I have also taken out an accident policy in the Commercial Travelers, Utica, New York, made payable irrevocably to the said Marion Helen O'Hara and to the said Marion Irene O'Hara in
30 the same way as the aforesaid life policy, and have paid the premiums thereon to date.

I have also paid Edward A. Markley, Trustee, for the services of himself and his firm, Messrs. Collins and Corbin, the sum of Five Hundred (\$500.00) Dollars, and also their out-of-pocket expenses and disbursements.

I have permitted the said Marion Helen O'Hara to be the general guardian of the person and property of the said Marion Irene O'Hara
40 until she attained the age of twenty-one years.

*Answer to Petition to Modify Decree Nisi and
Counterclaim.*

I have also permitted the said Marion Helen O'Hara to direct and determine the course of the education of the said Marion Irene O'Hara and have caused the expense therefor to be paid, all as provided for in said Agreement. 10

That by the institution of these proceedings and Petitioner's failure to abide by and perform the terms and conditions of said permanent alimony Agreement, the consideration for the aforesaid lump sum payment of Seven Thousand (\$7,000.00) Dollars and said conveyance to Marion Irene Evans, has completely failed.

GEORGE KENNETH O'HARA.

Sworn and subscribed to before me, this 11th day of September, 1944. 20

RUTH A. WEBER,
Notary Public of New Jersey.

We hereby certify that the foregoing is a true copy.

HOPKINS, VORBURGER & DICKSON, 30
By HERMAN G. VORBURGER,
*Solicitors for and of Counsel with
Defendant, George Kenneth O'Hara.*

Subpoena.

(Filed April 28, 1945)

NEW JERSEY, to wit:

THE STATE OF NEW JERSEY to JULIA A.
O'HARA, MARION IRENE EVANS and WALDO
EVANS, *Greeting:*

10

Whereas a Counterclaim has lately been exhib-
ited against you in our Court of Chancery by
George Kenneth O'Hara to be relieved touching
the matters therein contained:

20

Therefore, we command you, if you intend to
make a defense, that you file an answer to said
Counterclaim in the office of the Clerk of our said
court at Trenton, within twenty days after serv-
ice upon you of this Writ, and in default thereof
such order or decree will be made against you as
the court shall think equitable and just.

WITNESS, his Honor, LUTHER A. CAMPBELL, our
Chancellor, at Trenton, the 16th day of Septem-
ber, in the year of our Lord one thousand nine
hundred and Forty-four.

EDW. L. WHELAN,
Clerk.

30

HOPKINS, VORBURGER & DICKSON,
By HERMAN G. VORBURGER,
Solicitors.

Service of the within Subpoena is hereby ac-
knowledged this 16th day of September, 1944.

SAMUEL J. DAVIDSON,
Solicitor of Defendant,
Julia A. O'Hara.

40

Subpoena.

September 18th, 1944.

Served the within Sub. ad Resp. upon the defendant Marion Irene Evans by delivering to her a true copy thereof at 49 Sommer Ave., Maplewood, New Jersey.

Within named defendant Waldo Evans returned "non est."

10

GEORGE H. BECKER,
Sheriff, Essex County,

EUGENE J. SKIRO,
Spl. Deputy Sheriff.

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40

Subpoena.

IN CHANCERY OF NEW JERSEY.

Between:

10

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant,

Sub. ad. resp.

and

20

JULIA A. O'HARA, MARION IRENE
EVANS and WALDO EVANS,
Third Parties to Counterclaim,
*Defendants.*HOPKINS, VORBURGER & DICKSON,
Solicitors of Defendant,
51 Newark St., Hoboken, N. J.

30

NEW JERSEY, ESSEX COUNTY, ss.:

EUGENE J. SKIRO, Special Deputy Sheriff of
the County of Essex, being duly sworn according
to law, on his oath saith: That he has inquired
for Waldo Evans, one of the Defendants named
in the above stated and hereto annexed writ for
the purpose of serving him therewith, and has
not been able to find the said Defendant Waldo
Evans, in his county, and this deponent is credi-
bly informed and verily believes that the said

40

Order.

Defendant resides out of the State of New Jersey.

EUGENE J. SKIRO,
Special Deputy Sheriff.

Sworn to and subscribed before me, this 10
Nineteenth day of September, 1944.

ALBERT WOLFMAN
Notary Public of New Jersey.

Order.

(Filed September 15, 1945)

IN CHANCERY OF NEW JERSEY. 20
126-219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
Counterclaim,
etc.

30

On reading and filing the duly verified Answer
to Petition to Modify *Decree Nisi* and Counter-
claim herein, it is on this 15th day of September,
1944, on motion of Hopkins, Vorburger & Dick-
son, Solicitors of Defendant and Counterclaimant,
George Kenneth O'Hara, ORDERED that Marion 40
Irene Evans and Waldo Evans, her husband,

Order.

show cause before this Court on Friday, the 29th day of September, 1944, why they should not be enjoined from conveying, mortgaging or otherwise encumbering or disposing of the real estate known by the street number 49 Sommer Avenue, Maplewood, Essex County, New Jersey, conveyed to the said Marion Irene Evans by Julia A. O'Hara on or about February 21, 1944, until the final determination of this cause; and

10

It is FURTHER ORDERED that in the meantime and until further Order of the Court be made herein, the said Marion Irene Evans and Waldo Evans, her husband, be and they are hereby enjoined and restrained from conveying, mortgaging or otherwise encumbering or disposing of the real estate known by the street number 49 Sommer Avenue, Maplewood, Essex County, New Jersey; and

20

It is FURTHER ORDERED that a copy of this Order and the Answer to Petition to Modify *Decree Nisi* and Counterclaim, both of which may be certified by the Solicitors of Defendant as true copies, be served on the said Marion Irene Evans, personally, or by leaving a copy thereof at her place of abode with a member of her family above the age of fourteen years, within 3 days from the date hereof, and that a copy of said papers, certified as aforesaid, be served on the said Waldo Evans by mailing the same to him, within said time, at his address:

30

T/Sgt. Waldo Evans — 14063563
19th Prov. Utility Sec. T-2
Barracks 1249
Geiger Field, Washington

40

Proof of Mailing.

and the result of such mailing to be shown by affidavit.

Respectfully advised:

THOMAS J. STANTON,

A. M.

10

LUTHER A. CAMPBELL,

C.

Proof of Mailing.

(Filed October 2, 1944)

IN CHANCERY OF NEW JERSEY.

126-219.

20

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant,

and

JULIA A. O'HARA, et als.,
Third Parties Defendants.

On Petition,
&c.

30

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

RUTH A. WEBER, of full age, being duly sworn according to law, on her oath deposes and says:

40

Proof of Mailing.

On September 15, 1944, I deposited in the United States mail, in the City of Hoboken, in the County of Hudson aforesaid, a true copy of the Answer and Counterclaim, Order permitting the filing of the same and Order to Show Cause, filed
 10 herein, by registered mail, with proper postage prepaid thereon, addressed as follows:

T/Sgt. Waldo Evans — 14063563
 19th Prov. Utility Sec. T-2
 Barracks 1249
 Geiger Field, Washington

the return receipt of which is hereto annexed.

20 RUTH A. WEBER.

Sworn and subscribed to before me,
 this 29th day of September, 1944.

BEULAH H. BAXTER,
Notary Public of New Jersey.

—
 COPY

30

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. WALDO EVANS

(signature or name of addressee)

40

Affidavit of Service.

2. SGT. WALTER CALDWELL (Signed)
 (signature of addressee's agent — Agent
 should enter addressee's name on line
 ONE above) 10
 Date of delivery Sep 18 44

Affidavit of Service.
 (Filed October 2, 1944)

IN CHANCERY OF NEW JERSEY.
 126-219.

Between:		20
MARION HELEN O'HARA, <i>Petitioner,</i>	}	
and		
GEORGE KENNETH O'HARA, <i>Defendant,</i>	}	On Petition, &c.
and		
JULIA A. O'HARA, et als., <i>Third Parties Defendants.</i>	}	30

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

KATHLEEN KEMP, of full age, being duly sworn
 according to law, on her oath deposes and says: 40

Affidavit of Service.

On September 15, 1944, I served a true copy of the Answer and Counterclaim, Order permitting the filing of the same and Order to Show Cause, filed herein, personally on Marion Irene Evans, one of the Third Parties Defendants, at her usual place of abode, No. 49 Sommer Avenue, Maplewood, New Jersey.

KATHLEEN KEMP.

Sworn and subscribed to before me,
this 29th day of September, 1944.

BEULAH H. BAXTER,
Notary Public of New Jersey.

20

30

40

Order.

(Filed October 2, 1944)

IN CHANCERY OF NEW JERSEY.

126-219.

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant,

and

JULIA A. O'HARA, et als.,
*Third Parties Defendants.*On Petition,
&c.

10

20

This matter being opened to the Court by Hopkins, Vorburger & Dickson, Solicitors of the Defendant, George Kenneth O'Hara, and it appearing to the Court that the Order to Show Cause made herein on September 15, 1944, returnable today, was served as therein directed;

It is on this 29th day of September, 1944, on motion as aforesaid, ORDERED that the said Marion Irene Evans and Waldo Evans, her husband, be and they are hereby enjoined and restrained from conveying, mortgaging or otherwise encumbering or disposing of the real estate known by the street number 49 Sommer Avenue,

30

40

Notice of Motion.

Maplewood, Essex County, New Jersey, until further order of the Court be made herein.

Respectfully advised:

10 THOMAS J. STANTON,
A. M.

LUTHER A. CAMPBELL,
C.

Notice of Motion.

(Filed September 29, 1944)

20

IN CHANCERY OF NEW JERSEY.

126-219

Between:

30 MARION HELEN O'HARA,
Petitioner,
and
GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

40 TAKE NOTICE that we will move before the Chancellor at the Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, on the 29th day of September, 1944, at 10 A. M. o'clock, or as soon thereafter as counsel can be heard, to strike the 1st, 2nd, 3rd answers in lieu of plea, that said motion be made in behalf of Marion

Notice of Motion.

Helen O'Hara, petitioner in the above entitled cause, and that the grounds of said motion are that said answers are not proper defenses cognizable in this Court, and the said alleged answers in lieu of plea are no defense to the petitioner's application for modification of the *de-
 cree nisi* in this cause, and 10

TAKE FURTHER NOTICE, that a motion will be made in behalf of the petitioner, Marion Helen O'Hara, to strike out the counterclaim against her on the ground that said counterclaim is not cognizable as a cause of action under the rules and decisions of this Court, and

TAKE FURTHER NOTICE, that a motion will be made at the same time and place to strike out the counterclaim against the said alleged third party defendant, Marion Irene Evans, on the ground that said counterclaim does not set forth a cause of action against her cognizable in this Court. 20

Respectfully,

LEVENSON & LEVENSON,
*Solicitors of Petitioner, Marion Helen
 O'Hara, and of Third Party, Marion
 Irene Evans.* 30

Notice.

(Filed February 28, 1945)

IN CHANCERY OF NEW JERSEY.

126-219

10

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
*Defendant.*On Petition,
&c.

20

To: Defendant, GEORGE KENNETH O'HARA, and
HOPKINS, VORBURGER & DICKSON, Solicitors
of Defendant,
51 Newark St.,
Hoboken, N. J.

SIRS:

30

PLEASE TAKE NOTICE that on February 16th,
1945, at the Chancery Chambers, No. 1 Exchange
Place, Jersey City, New Jersey, at ten o'clock in
the forenoon, or as soon thereafter as counsel
can be heard, we shall apply to the Chancellor to
enter an order in the above entitled matter in
connection with petitioner's motion made to
strike out the 1st, 2nd and 3rd answers in lieu
of plea and counterclaim of said defendant, a

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Notice.

copy of which order is annexed hereto and made a part hereof.

LEVENSON & LEVENSON,
Solicitors of Petitioner, Marion Helen
O'Hara, and of Third Party, Marion
Irene Evans.

10

Notice.

IN CHANCERY OF NEW JERSEY,
126-219

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
Defendant.

On Petition,
&c.

Order.

20

This matter being opened to the Court by Levenson & Levenson, solicitors of the petitioner, Marion Helen O'Hara, and of third party, Marion Irene Evans, upon notice of motion to strike the first, second and third answers in lieu of plea as contained in Answer to Petition to Modify *Decree Nisi* and Counterclaim filed in this cause by the defendant, and to strike out the counterclaim against the petitioner, Marion Helen O'Hara, and to strike out the counterclaim against

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Notice.

10 third party, Marion Irene Evans, for the reasons set forth in said notice of motion in connection therewith, and in the presence of Hopkins, Vorburger & Dickson, solicitors of said defendant, and the Court having considered the pleadings and argument of counsel on said motion,

It is, on this day of February, 1945, ORDERED that the counterclaim of the defendant, George Kenneth O'Hara, against the third party, Marion Irene Evans, be and the same is hereby stricken for the reason that it does not set forth a cause of action against her.

20 And it is further ORDERED that the Second Answer in Lieu of Plea contained in said Answer of said defendant, be and the same is hereby stricken;

30 And it is further ORDERED that the motion of petitioner to strike the First Answer in Lieu of Plea and Third Answer in Lieu of Plea, and to strike the counterclaim against her, be and the same is hereby continued until final hearing of this cause.

Respectfully Advised:

40

Order.

(Filed February 16, 1945)

IN CHANCERY OF NEW JERSEY.

126-219

Between:

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
*Defendant.*On Petition,
&c.

10

This matter being opened to the Court by Levenson & Levenson, solicitors of the petitioner, Marion Helen O'Hara, and of third party, Marion Irene Evans, upon notice of motion to strike the first, second and third answers in lieu of plea as contained in Answer to Petition to Modify *Deceree Nisi* and Counterclaim filed in this cause by the defendant, and to strike out the counterclaim against the petitioner, Marion Helen O'Hara, and to strike out the counterclaim against third party, Marion Irene Evans, for the reasons set forth in said notice of motion in connection therewith, and in the presence of Hopkins, Vorburger & Dickson, solicitors of said defendant, and the Court having considered the pleadings and argument of counsel on said motion,

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30

It is, on this 16th day of February, 1945, ORDERED that the counterclaim of the defendant, George Kenneth O'Hara, against the third party, Marion Irene Evans, be and the same is hereby

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Notice of Appeal.
(Filed March 13, 1945)

IN CHANCERY OF NEW JERSEY.

126-219

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

10

On Petition to
Modify Decree
Nisi, etc.

20

The Defendant, George Kenneth O'Hara, hereby appeals from so much of an Order made in the above entitled matter by the Chancellor on advice of Advisory Master Thomas J. Stanton on the 16th day of February, 1945, which orders "that the counterclaim of the defendant, George Kenneth O'Hara, against the Third Party, Marion Irene Evans, be and the same is hereby stricken for the reason that it does not set forth a cause of action against her" and also the paragraph which orders "that the second answer in lieu of plea contained in said answer of said defendant, be and the same is hereby stricken."

30

HOPKINS, VORBURGER & DICKSON,
Solicitors of Defendant-Appellant.

HERMAN G. VORBURGER,
Of Counsel.

40

Notice of Appeal.

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

HERMAN G. VORBURGER,
Of Counsel with Defendant-Appellant.

10

Service of the within Notice of Appeal is hereby acknowledged this 12th day of March, 1945.

LEVENSON & LEVENSON,
*Solicitors of Marion Helen O'Hara,
Petitioner-Respondent and Marion
Irene Evans, Third Party Defendant-Respondent.*

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Petition of Appeal.
(Filed March 31, 1945)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

10

On Petition
for Divorce.

On Appeal
from
Chancery.

20

TO THE HONORABLE COURT OF ERRORS AND APPEALS,
in the last resort in all causes:

The Petition of George Kenneth O'Hara, De-
fendant-Appellant, in the above stated cause, re-
spectfully shows:

That your Petitioner finds himself aggrieved 30
by portions of an Order made in the Court of
Chancery by his Honor, Luther A. Campbell,
Chancellor of the State of New Jersey, on the
advice of Advisory Master Thomas J. Stanton,
bearing date the 16th day of February, 1945, in
a cause entitled as above in these respects, to wit:

That the said Order orders, "That the Counter-
claim of the Defendant, George Kenneth O'Hara,
against the third party, Marion Irene Evans, be 40

Petition of Appeal.

and the same is hereby stricken for the reason that it does not set forth a cause of action against her," and also that said Order orders, "That the second answer in lieu of plea contained in said answer of said Defendant, be and the same is hereby stricken."

Your Petitioner appeals from the aforesaid portions of said Order on the ground that the same are erroneous in that:

1. Said counterclaim does, in fact, set forth a cause of action against the third party, Marion Irene Evans.

Said counterclaim, among other things, alleges that on February 21, 1938, Defendant-Appellant, George Kenneth O'Hara, entered into a written agreement with the Petitioner-Respondent, Marion Helen O'Hara, wherein and whereby he agreed to pay to the said Marion Helen O'Hara, as settlement in full for all alimony, temporary or permanent, support and maintenance, past, present or future, and also for the support of the infant child of said marriage, Marion Irene O'Hara, and also for counsel fees, the following:

a lump sum payment of Seven Thousand (\$7,000.00) Dollars, and a weekly payment of Fifty-five (\$55.00) Dollars on the marriage of the said Marion Irene O'Hara, to cause to be conveyed to the said Marion Irene O'Hara the property at 49 Sommer Avenue, Maplewood, Essex County, New Jersey, when she attained the age of twenty-one years, and also to do and perform certain other things in said agreement more particularly enumerated, and in consideration of said conveyance and the performance of the other terms and con-

Petition of Appeal.

ditions of said agreement by the said George Kenneth O'Hara, the said Marion Helen O'Hara agreed to take and accept the conveyance of said real estate as aforesaid and the performance by the said George Kenneth O'Hara of the other terms and conditions of said agreement as settlement in full for all alimony, temporary or permanent, support and maintenance, past, present or future, not only for herself but for her said daughter, Marion Irene O'Hara, and also as settlement in full for counsel fees, costs, etc. 10

That said agreement was approved by a *Decree Nisi* for divorce entered in this cause on April 20, 1938, which *Decree Nisi* became final on July 21, 1938, copies of which *Decree Nisi*, the contract in question and the Final Decree are annexed to the Petition to Modify *Decree Nisi* filed herein. 20

That the said George Kenneth O'Hara, in reliance on the validity of said agreement and said *Decree Nisi* and Final Decree of the Court of Chancery approving the same, fully and completely performed all of the things required to be done or performed by him under the terms and provisions of the aforesaid agreement, *Decree Nisi* and Final Decree and particularly that on February 21, 1944, in performance of said agreement, *Decree Nisi* and Final Decree, after the said Marion Irene Evans, formerly Marion Irene O'Hara, had attained the age of twenty-one years, caused the aforesaid real estate known by the street number 49 Sommer Avenue, Maplewood, Essex County, New Jersey, to be conveyed to her by his mother, Julia A. O'Hara. 30

That on or about July 3, 1943, the said Marion Irene O'Hara was married to Waldo Evans. 40

Petition of Appeal.

That neither the said George Kenneth O'Hara nor his mother, Julia A. O'Hara, received any consideration from the said Marion Irene Evans or her husband, Waldo Evans, for the said conveyance.

10 That by the institution of these proceedings, the said Marion Helen O'Hara, the Petitioner-Respondent, has violated and repudiated said permanent alimony agreement and the consideration for the aforesaid lump sum payment of Seven Thousand (\$7,000.00) Dollars and said conveyance has failed.

20 Said counterclaim briefly prayed that the said Marion Helen O'Hara specifically perform said agreement that Marion Irene Evans and Waldo Evans, her husband, be enjoined from conveying, mortgaging or otherwise encumbering or disposing of said real estate until the final determination of the cause; that in the event that said permanent alimony agreement should be found to be illegal or for any reason unenforceable and not binding on the Petitioner, Marion Helen O'Hara, that the said Marion Irene Evans and Waldo Evans, her husband, be directed to reconvey said real estate to the said Julia A. O'Hara; that in
30 the event the said permanent alimony agreement is found to be illegal or for any reason unenforceable and binding on Petitioner, that the same might be cancelled and rescinded and the Defendant be relieved from any obligations thereunder on his part to be performed; that the said Marion Helen O'Hara and third parties, Marion Irene Evans, Waldo Evans and Julia A. O'Hara, might answer said counterclaim and each statement therein made; that a writ of subpoena might issue
40 commanding said third parties, Marion Irene

Petition of Appeal.

Evans, Waldo Evans and Julia A. O'Hara, to answer said counterclaim.

Your Petitioner respectfully represents that said counterclaim sufficiently sets forth that said conveyance was made to the said Marion Irene Evans solely because of and in performance of said agreement; that she paid no consideration therefor and was in fact a nominee for the said Marion Helen O'Hara—a mere volunteer; that because of the repudiation of said agreement by the said Marion Helen O'Hara, the consideration for the making of said conveyance has wholly failed. 10

That the recital of said facts sets forth all of the essential allegations required to be pleaded for a rescission and cancellation of said contract either on the ground of failure of consideration or because of mistake as to the legality or enforceability of the same. 20

On such cancellation and rescission, the benefits received by the said Marion Helen O'Hara, directly or through her nominee, the said Marion Irene O'Hara, should in equity and good conscience be returned to the said George Kenneth O'Hara and Julia A. O'Hara and the parties placed in *status quo*. 30

Julia A. O'Hara, who was the owner of the property prior to its transfer, is made a third party defendant to the proceedings and her Solicitor has acknowledged service of the subpoena and raised no objection to said counterclaim. In fact, he intends to file an answer joining in the prayer of the Defendant-Appellant, for a reconveyance of said property if the Order to strike the counterclaim is vacated.

There is nothing in the allegations of said 40

Petition of Appeal.

10 counterclaim to show or imply a gift of said real estate to the said Marion Irene Evans, or that said property was conveyed to her for any other reason than a performance by the said George Kenneth O'Hara of his obligations under said agreement.

20 2. The second answer in lieu of plea briefly sets forth that on July 25, 1938, after the Final Decree was made herein and when Petitioner and Defendant were no longer man and wife, the Petitioner executed and delivered to the Defendant a General Release which released him from all claims of every kind or nature which she might have against him excepting only those embodied in said agreement of February 21, 1938.

Your Petitioner respectfully represents that there is no prohibition contained in Section 2:50-37 Revised Statutes of New Jersey which authorized the Court of Chancery to review alimony awards prohibiting a wife who is *sui juris* from releasing and relinquishing the benefits of said Statute.

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

HOPKINS, VORBURGER & DICKSON,
Solicitors of Defendant-Appellant.

HERMAN G. VORBURGER,
Of Counsel.

Affidavit of Service.

(Filed April 28, 1945)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

10

On Petition
for Divorce.On Appeal
from
Chancery.

20

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

KATHLEEN KEMP, of full age, being duly sworn according to law, on her oath deposes and says:

On April 2, 1945, at about 2:25 P. M., I served a copy of the Petition of Appeal, in the above entitled cause, on Levenson & Levenson, Esqs., Solicitors for Marion Helen O'Hara, Petitioner-Respondent, and Marion Irene Evans, Third Party Defendant-Respondent, herein, by leaving the same at their office, No. 400 38th Street, Union City, Hudson County, New Jersey, with Mr. Cecil Woolsey.

30

KATHLEEN KEMP.

40

Notice of Hearing.

Sworn and subscribed to before
me this 4th day of April, 1945.

RUTH A. WEBER,
Notary Public of New Jersey.

10

Notice of Hearing.
(Filed May 1, 1945)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between:

20

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

30

On Petition
for Divorce.

On Appeal
from
Chancery.

To: MARION HELEN O'HARA, Petitioner-Respondent, and

MARION IRENE EVANS, Third Party Defendant-Respondent.

TAKE NOTICE that the argument of the appeal
in the above entitled cause will be brought on at
40 the next term of the Court of Errors and Ap-

Notice of Hearing.

peals, to be held at the State House, Trenton, on May 15th, 1945, at the hour of eleven o'clock in the forenoon or as soon thereafter as counsel can be heard.

HOPKINS, VORBURGER & DICKSON, 10
Solicitors of Defendant-Appellant.

HERMAN G. VORBURGER,
Of Counsel.

Due service of a copy of the within Notice of Hearing is hereby acknowledged this 26th day of April, 1945.

LEVENSON & LEVENSON, 20
*Solicitors of Marion Helen O'Hara
and Marion Irene Evans.*

30

40

**Comment on Opinion to Be Filed by Advisory
Master Stanton.**

We understand that Advisory Master Stanton intends to file an opinion in this matter, but it has not been filed in time to include it in the State of the Case.

10 Should he file the same we respectfully ask permission to file a Supplement to the State of the Case, containing the opinion and a Supplementary Brief to comment on the same.

HOPKINS, VORBURGER & DICKSON,
Solicitors for Defendant-Appellant.

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SUPPLEMENT TO STATE OF CASE.

Opinion of Advisory Master Stanton.

IN CHANCERY OF NEW JERSEY.

126/219

10

Between

MARION HELEN O'HARA,
Petitioner,

and

GEORGE KENNETH O'HARA,
*Defendant.*On Petition,
etc.

Conclusions.

(Not for publi-
cation in any
report pending
appeal.)

20

Appearances:

LEVENSON AND LEVENSON, Esqs.,
*Solicitors of Petitioner.*HOPKINS, VORBURGER & DICKSON, Esqs.,
Solicitors of Defendant.

STANTON, A.M.:

30

An appeal having been taken from part of the order made on February 16, 1945, by the Chancellor, on my advice, it is requisite that the reasons for the order be written down.

Decree Nisi was entered on April 20, 1938, and became final in due course. Annexed to it is an agreement between petitioner, defendant, and the former's trustee, which was dealt with by the Court in the decree as follows: "It is further

40

Opinion of Advisory Master Stanton.

Ordered, Adjudged and Decreed that the agreement aforesaid between the petitioner and the defendant, dated February 21, 1938, a copy of which is hereto annexed and made a part hereof, is for the benefit of the petitioner and the child of the marriage and is suitable and adequate for their support and maintenance; and that said agreement be approved and that the terms of said agreement be carried out and that said agreement be and the same hereby is ordered, adjudged and decreed to be in effect as of the date of this *decree nisi*."

The agreement among other things required the defendant: (1) to pay petitioner \$7,000 upon the signing of the decree, (2) to pay petitioner \$68 weekly for the support of herself and the daughter, and upon latter's marriage \$55 weekly for petitioner as long as she remains unmarried, (3) to make the property known as 49 Sommer Avenue, Maplewood, available to petitioner and the daughter for their home as long as they desire, and in the meantime to pay all taxes and maintenance charges in connection therewith, (4) to cause the said premises to be conveyed free and clear of all encumbrances, to the daughter upon attaining her majority, (5) to pay all bills for the medical and dental care of the daughter, (6) to give all furniture and furnishings in the Sommer Avenue home to petitioner, (7) to provide a new oil burner heating system in the Sommer Avenue home, (8) to pay for the education of the daughter, (9) to take out and pay premiums on a life insurance policy in the amount of \$10,000 on his life and an accident insurance policy on himself for the benefit of petitioner and the daughter, (10) to pay a counsel fee of \$500

Opinion of Advisory Master Stanton.

and certain disbursements to petitioner's solicitors.

Petitioner now seeks a modification of the decree. The daughter has reached the age of twenty-one and has married. Petitioner concedes that defendant has met all his obligations under the agreement with one exception, namely that he has failed to pay the taxes and upkeep of the Sommer Avenue home after its transfer to the daughter. Defendant contends that the agreement does not require him to do so. 10

Petitioner prays that defendant be ordered (a) to pay to her \$600 annually to meet her income tax, (b) to make discovery of his property and income, (c) to pay petitioner \$75 weekly instead of \$55, and (d) to pay her \$100 monthly with which to rent a home. 20

She seeks this relief for the following reasons: (1) that the lump sum of \$7,000 which she received from defendant has been spent except for about \$150, (2) that the weekly sum of \$55 is inadequate for her support in the light of defendant's means, (3) that the change in the federal law with respect to income tax on alimony has imposed a burden on her which was not contemplated at the time decree was made, (4) that since decree defendant's income has increased and an inheritance has come to him from his father, (5) that the cost of living has increased since the decree and she is unable to maintain herself on \$55 weekly, (6) that she is unwell and is unable to engage in a gainful occupation, (7) that the agreement requires him to pay the taxes and upkeep of the Sommer Avenue home or if she lives elsewhere to pay her \$100 monthly to be used for rent of a home. 30 40

Opinion of Advisory Master Stanton.

In his answer, defendant among other things denies (a) petitioner's need of additional alimony, (b) any increase in his financial means, (c) that he is under any obligation to pay increased alimony because that is now taxable under Federal Statutes, (d) that she is ill and unable to be gainfully employed, and (e) that he is under any obligation to pay taxes and maintenance charges on the Sommer Avenue home after its transfer to the daughter or in lieu thereof to pay her \$100 monthly as rent for a home elsewhere.

In addition, defendant set up answers in lieu of plea as follows: (1) The agreement, annexed to and approved in the decree, is a bar to this proceeding, (2) That after final decree, petitioner executed and delivered to defendant a general release excepting only his obligations under the said agreement, and (3) That petitioner is not destitute or in necessitous circumstances.

Defendant filed a counterclaim against petitioner, the daughter now Marion Evans, the latter's husband Waldo Evans, and defendant's mother Julia O'Hara, and in it alleges that relying on its validity he fully performed all his obligations under the agreement annexed to the decree, that to do so he borrowed money from his father and induced his mother who was the owner of the Sommer Avenue property to allow petitioner the use of same and to convey the same to the daughter upon reaching her majority and that by instituting this proceeding petitioner has repudiated the said agreement. In it he prays, among other things, (1) that petitioner be ordered to specifically perform the agreement, (2) that the daughter and her husband be enjoined, *pendente*

Opinion of Advisory Master Stanton.

lite, from conveying or encumbering the Sommer Avenue property, (3) that in the event the agreement is illegal or unenforceable or not binding on petitioner, the daughter and her husband be ordered to convey the Sommer Avenue property to defendant's mother, (4) that, in the event last mentioned, petitioner be ordered to repay to defendant all monies received under the agreement with interest, and if she is unable to repay the same in a lump sum that the same be offset against any alimony allowed to petitioner in the future, and (5) that, in the same event, the agreement should be cancelled and defendant relieved from further obligation thereunder. 10

Petitioner moved to strike out the answers in lieu of plea and the counterclaim and Mrs. Evans likewise moved to strike out the counterclaim. 20

Thereafter, it was ordered that the counterclaim against Mrs. Evans be stricken out because it did not set forth a cause of action against her and that the second answer in lieu of plea be stricken out. The motions of petitioner addressed to the counterclaim and the first and third answers in lieu of plea were continued to final hearing.

The defendant appeals from this order. 30

Revised Statutes 2:50-37 authorizes the Court of Chancery after decree of divorce to make and revise orders for alimony. Does a general release given by a former wife to a former husband after final decree bar her right to obtain an order for alimony or for the revision of an existing alimony order? Counsel have cited no reported case dealing with this and I have found none in our reports. 40

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We can get some light on the question from cases discussing the nature and character of alimony and agreements affecting the same. In *Irwin v. Irwin*, 98 N. J. Eq. 454, affirmed 100 N. J. Eq. 347, Vice-Chancellor Leaming in passing upon an agreement between husband and wife for the payment of a sum of money in gross in full settlement of all future claims against defendant for support, said in part:

“ ‘In *Hires v. Hires*, 91 N. J. Eq. 366; affirmed, 92 N. J. Eq. 451, adjudications are reviewed which disclose that, while such agreements may be enforced against the husband, the wife cannot preclude herself by her agreement from invoking the aid of the court to obtain more than has been agreed upon, in the event of necessity. Nor can the payment of a gross sum, which the wife has agreed to accept in discharge of her future claims to support, be regarded as standing on a different plane from agreements contemplating periodical payments.’ and, further ‘Consistently with that view our Court of Errors and Appeals in *Lynde v. Lynde*, 64 N. J. Eq. 736, has defined a wife’s claim for an allowance of alimony as a purely personal right, and not, in any sense, a property right, as a right in its nature not susceptible of assignments by the wife to another, nor capable of enjoyment by her in anticipation. From this conception of alimony as the just expression of a matrimonial duty, it seems clear that what the court cannot admeasure as a finality the husband cannot limit by the purchase of im-

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munity from future liability, should conditions arise in which justice impels a reassertion of the rights of the wife.' ”

Recently, in *Applegate v. Applegate*, 135 N. J. Eq. 29, the Court of Errors and Appeals passed upon the bill of a former wife for the specific performance of an agreement for support. In its opinion, it discussed the nature of alimony and agreements affecting it and reviewed many cases on the subject. The Court there reaffirmed the doctrine expressed as follows in *Apfelbaum v. Apfelbaum*, 111 N. J. Eq. 529:

“Our decisions hold uniformly that alimony is a subject specifically committed to the Court of Chancery, and arising from the present or past status of the parties as husband and wife. The jurisdiction not only exists while that relation persists, but by the express language of the Divorce Act (Comp. Stat. p. 2035, sec. 25) continues after decree of divorce; and it necessarily includes the power, in cases where the wife is entitled to alimony, to regulate the amount of such alimony from time to time, to supervise agreements between the parties in that regard, to enforce them if deemed just, and to decline to recognize them otherwise. *Calame v. Calame*, 25 N. J. Eq. 548. But these powers grow out of the existing or pre-existing marital status, and are not controlled by the rules of specific performance of contracts.”

From the language of the Statute and the philosophy behind it, as interpreted in the reported cases, it seems clear that a general release from

Opinion of Advisory Master Stanton.

a former wife does not bar the Court from considering the revision of an alimony order. The deprivation of the court of jurisdiction by such a release is contrary to public policy.

10 Defendant contends that if the agreement is not binding upon petitioner, he should be placed in *statu quo ante*, not only with respect to what he has given her under it but also as to the home conveyed by his mother to his daughter. We are concerned now only with his claim against the daughter. In his argument with respect to this, defendant cites numerous cases, but they all deal with situations where relief is sought against a party to the agreement. The daughter was not a party to the agreement here under considera-

20 tion. There is no allegation that she is holding the property for her mother. So far as this conveyance is concerned, there is no privity between petitioner and her daughter. The counterclaim makes no charge of wrong-doing against the daughter. It seems beyond question that the conveyance made in February, 1944, is a completed gift to the daughter who was the natural object of defendant's bounty. He has shown no reason or ground for disturbing that gift.

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New Jersey Court of Errors and Appeals

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

On Petition
for Divorce.

On Appeal
from
Chancery.

BRIEF OF DEFENDANT-APPELLANT.

Statement of the Case.

This is an appeal from an Order of the Chancellor advised by Advisory Master Thomas J. Stanton on February 16, 1945, striking the Second Answer in Lieu of Plea and the Counterclaim of the Defendant, George Kenneth O'Hara, against Third Party, Marion Irene Evans, which were contained in the Answer and Counterclaim of George Kenneth O'Hara, Defendant-Appellant, to a Petition of Marion Helen O'Hara, Petitioner-Respondent, to modify the *Decree Nisi* in this cause.

On February 21, 1938, George Kenneth O'Hara, Defendant-Appellant, and Marion Helen O'Hara, Petitioner-Respondent, entered into an alimony settlement agreement, which, among other things, provided for a lump sum payment of Seven Thousand (\$7,000.00) Dollars by the said George

Kenneth O'Hara to the said Marion Helen O'Hara; the conveyance of real estate at 49 Sommer Avenue, Maplewood, New Jersey, to Marion Irene O'Hara, the daughter of the parties, when she attained her majority; also for the payment of Sixty-eight (\$68.00) Dollars per week to Marion Helen O'Hara, which payment was to include support money for the daughter, Marion Irene O'Hara, and should cease in case the said Marion Helen O'Hara should remarry; and then she would receive Forty (\$40.00) Dollars per week for the support of the daughter until the marriage of the daughter, and that should the said Marion Helen O'Hara remain single and the daughter marry, then there should be paid to Marion Helen O'Hara for her own support during the time she remains unmarried Fifty-five (\$55.00) Dollars per week; and wherein and whereby the said Marion Helen O'Hara agreed to accept and take said payments and the other provisions in said contract as settlement in full for all alimony, temporary or permanent, support, and maintenance, past, present or future, and deliver to the said George Kenneth O'Hara, at the time of the taking of the Final Decree in said divorce action, a General Release releasing him from all claims she might have against him excepting only those arising out of the said agreement of February 21, 1938.

After the agreement was made, it was submitted to the Court of Chancery for approval and the *Decree Nisi* herein dated April 20, 1938, among other things, after reciting that the Court had considered the said agreement and position and circumstances of the parties and made due investigation and is of the opinion that said provisions in said agreement for Petitioner and child of the marriage, are for their benefit

and are suitable and adequate for their support and maintenance, ORDERED, ADJUDGED AND DECREED that said agreement, a copy of which was annexed to the *Decree Nisi*, is for the benefit of the Petitioner and the child of the marriage and is suitable and adequate for their support and maintenance, and that said agreement be approved; and that the terms of said agreement be carried out, and that said agreement be, and the same was ORDERED, ADJUDGED AND DECREED to be in effect as of the date of the *Decree Nisi*.

The *Decree Nisi* was made positive by Final Decree dated July 21, 1938. The agreement and the approval of the same by the Court of Chancery, was in strict conformity with the law with respect to such agreements as then enunciated by the Courts.

Vice-Chancellor Bigelow, in the case of *Glasco v. Glasco*, 112 N. J. Eq. 114 (decided December 29, 1932), after reviewing the cases of *Sobel v. Sobel*, 99 N. J. Eq. 376 and *Greenberg v. Greenberg*, 99 N. J. Eq. 461, said:

“From these two cases can be gathered the law on the subject. An order of chancery approving a settlement between the parties to a divorce suit, for alimony in gross, concludes the wife as well as the husband, when the order is based on a finding by the court that the settlement is for her benefit. The order in the instant case contains a recital of such a finding by the court and therefore concludes petitioner. Her present application will be denied.”

On or about June 6, 1944, Marion Helen O'Hara, Petitioner-Respondent, filed a Petition in this cause to modify the *Decree Nisi*, which,

after admitting performance of the agreement by the Defendant-Appellant, among other things, alleged that by reason of the change in the income tax law requiring a wife to pay income tax on alimony; that because the Defendant inherited a business from his father, and because of the increased cost of living, the Petitioner is unable to live in a fashion and style in accordance with the means and assets of the Defendant-Appellant, and that the weekly payments of Fifty-five (\$55.00) Dollars should be increased to Seventy-five (\$75.00) Dollars, and in addition thereto, that she should be paid the sum of One Hundred (\$100.00) Dollars a month for rent or its equivalent, and that by reason of the law of the State of New Jersey, she is not bound by the said alimony agreement of February 21, 1938.

The Petition is in effect a Petition for the rescission of the said alimony agreement on the ground of illegality.

To this Petition, the Defendant-Appellant filed an Answer, which, among other things, contained a Second Answer in Lieu of Plea setting forth that after the Final Decree of Divorce was made and when Petitioner and Defendant were no longer man and wife, Petitioner executed and delivered to Defendant a General Release releasing him from all claims and demands she might have against him excepting only those arising out of the aforesaid alimony agreement of February 21, 1938.

It also contained a Counterclaim against Petitioner, and Third Parties, the daughter, Marion Irene Evans, formerly Marion Irene O'Hara, Waldo Evans, her husband, and Julia A. O'Hara, the mother of Defendant-Appellant, and grantor of the real estate at 49 Sommer Avenue, Maplewood, New Jersey.

This Counterclaim set forth the making of the agreement, the proper approval of the same by the Court of Chancery; complete performance of the agreement by the Defendant-Appellant including the conveyance of the real estate at 49 Sommer Avenue, Maplewood, New Jersey, to Marion Irene Evans in accordance with this agreement; an allegation that by the filing of said Petition to modify the *Decree Nisi*, the Petitioner-Respondent violated and repudiated said permanent alimony agreement, and that the consideration for the payment of the said sum of Seven Thousand (\$7,000.00) Dollars, the other payments and the conveyance of said real estate had failed; and praying, among other things, that in the event that said permanent alimony agreement is found to be illegal and unenforceable, that Marion Irene Evans and Waldo Evans, her husband, be directed to reconvey the real estate to Julia A. O'Hara from whence it came, and that said agreement of February 21, 1938, be cancelled and rescinded.

The Petitioner-Respondent, on due notice, moved to strike out the first, second and third Answers in Lieu of Plea and the Counterclaim contained in said Answer. The motion and arguments of the respective Solicitors was duly heard and Briefs were submitted and on February 16, 1945, an Order was advised by Advisory Master Thomas J. Stanton striking the Second Answer in Lieu of Plea and the Counterclaim of the Defendant, George Kenneth O'Hara, against Third Party, Marion Irene Evans, for the reason it does not set forth a cause of action against her.

Specifications of errors.

Defendant-Appellant respectfully contends that the aforesaid Order of February 16, 1945, is erroneous in that the Counterclaim of the Defendant, George Kenneth O'Hara, against Third Party, Marion Irene Evans, does, in fact, set forth an equitable cause of action against the said Marion Irene Evans and should not have been stricken, and in that the Second Answer in Lieu of Plea setting forth a General Release executed and delivered by the said Marion Helen O'Hara to the said George Kenneth O'Hara after the Final Decree of divorce was made in said cause, wherein and whereby the said Marion Helen O'Hara released the said George Kenneth O'Hara from all claims and demands she might have against him excepting only those arising out of the aforesaid alimony agreement of February 21, 1938, was good and effectual in law and a bar to her said action.

Counterclaim sets forth a valid cause of action.

"In a proceeding for rescission or cancellation, the court will award complete, just, and equitable relief, whether such relief is equitable or legal in nature, with a view to restoring the parties to the status quo and equitably adjusting their interests under the circumstances of the case.

"In administering relief, the fundamental theory on which equity acts is that of restoration of the parties to the status quo, and, as a general rule, the court will award no further relief than to place the parties in the same position as that occupied by them at

the time when the instruments canceled were executed. Where the parties cannot be put in *status quo*, the court should make such adjustments in awarding relief as the facts and circumstances of the case warrant." 12 C. J. S. 1077, par. 77, and cases there cited.

In the case of *Greer v. Frost* (Arizona), 20 P. 2d 301, a contract for the sale of community property was unenforceable because not signed by the vendor's wife. The Court said on page 303:

"The question was then open for the trial court to determine in the present case whether or not the contract of sale was unenforceable and it did determine on sufficient evidence that it was not for the reasons aforesaid. If such were the fact, certainly it would be highly inequitable to allow plaintiff to retain possession of the premises as security for the payment of a deed, the consideration of which had failed completely. Upon the findings of the trial court, equity would require that each party be restored as far as possible to the *status quo ante*. This could be done only by returning to each the title and possession of the property which he formerly had and the judgment of the court did this."

In *Glass, et als. v. Craig, et als.*, 83 Fla. 408, 91 S. O. 332, the Court held:

"In administering the remedy of cancellation, the fundamental theory on which equity acts is that of restoration. The parties should be left as nearly as possible in the

position they occupied before the trade which is rescinded.”

In *Hayes v. Thornbrough* (Oklahoma), 69 P. 2d 664, the Court held:

“It is a recognized rule in equity that one will not be permitted to cancel his contract or conveyance and retain any benefits he may derive from it by a conditional decree. A court of equity may restore the parties to *status quo* whenever possible. It is within the power of a court of equity to require that the person invoking equity shall do equity as a condition of relief and the court may impose terms which may be just and equitable to restore the parties to the *statu quo*.”

It should be borne in mind that the Petitioner is the moving party in this case and the equitable maxim, “he who seeks equity must do equity,” is applicable.

“In a wife’s action in the nature of a creditor’s bill to enforce collection of a judgment for alimony, a court of equity has power before enforcing the judgment to make a conditional decree requiring the wife to make restitution of property obtained in lieu of alimony theretofore agreed upon, or, if restitution be not made, to enjoin the collection of the judgment for alimony on the husband’s cross-petition, it being inequitable to permit the wife to enforce the judgment and at the same time retain the property obtained under the agreement.” *McEntire v. McEntire*, 140 N. E. 328, 107 Ohio St. 510.

The above principles are recognized in New Jersey in an opinion by Vice-Chancellor Henry C. Pitney in *Lurch v. Holder*, 27 A. 81 (not officially reported).

The proposition that Petitioner-Respondent's failure to abide by and perform the agreement of February 21, 1938, is a complete failure of consideration justifying cancellation, is sustained by the case of *Seven Mile Beach Co. v. Dolley, et als.*, 71 N. J. Eq. (E. & A.) 735.

Release is valid and effectual.

The authority of the Chancery Court in divorce litigation to make orders for permanent alimony, is derived solely from Revised Statutes, 1937, 2:50-37:

“Pending a suit for divorce or nullity, brought in this State or elsewhere, or after decree of divorce, whether obtained in this State or elsewhere, the Court of Chancery may make such order touching the alimony of the wife, and also touching the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, and upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with the order, may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits

of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just, or enforce the performance of the said orders by such other lawful ways and means as is usual, and according to the source and practice of the Court of Chancery; orders so made may be revised and altered by the court from time to time as circumstances may require. As amended L. 1938, c. 235, p. 538, § 1." (*Cohen v. Cohen*, 121 N. J. Eq. 299), and is not mandatory but permissive. (*Levy v. Levy*, 9 A. 2d 779, 17 N. J. Misc. 324).

There is nothing in the Statute which prohibits a wife who is *sui juris* from releasing and relinquishing the benefits she is entitled to by virtue of this Statute.

The parties are no longer man and wife. The marriage relation has been completely severed and there is no reason why her release to her former husband should not be equally as effective as a release by her to a stranger.

The Defendant-Appellant respectfully contends that his Counterclaim against the Third Party, Marion Irene Evans, sets forth a cause of action against her and should not have been stricken and that the Second Answer in Lieu of Plea should not have been stricken.

HOPKINS, VORBURGER & DICKSON,
Solicitors of Defendant-Appellant.

HERMAN G. VORBURGER,
Of Counsel.

New Jersey Court of Errors and Appeals

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

On Petition
for Divorce.

On Appeal
from
Chancery.

**SUPPLEMENTAL BRIEF OF
DEFENDANT-APPELLANT.**

The Opinion of Advisory Master Stanton in this matter was received by us after May 15th, the opening of the term, so that we had no opportunity to comment on the same in our original Brief.

Release.

Like the Advisory Master, we have found no cases in the New Jersey Reports dealing with the effect of a General Release after a Final Decree for divorce has been granted and when the parties are no longer man and wife.

The mere fact that alimony is a personal and not a contractual right does not preclude a wife from releasing or relinquishing it in the absence of statutory prohibition. A man may have a per-

sonal right to an office or position which he cannot assign, but he may, nevertheless, release and relinquish it.

In considering whether a release would be against "public policy," we respectfully request the Court to consider whether expressions of public policy with respect to alimony and agreements thereto, having their origin many years ago and based on conditions as they then existed, are applicable to present day conditions—particularly to the present economic status of women.

It should be borne in mind that years ago there were few occupations open to women, little opportunities for them to earn a livelihood, and when a divorce was granted, some provision had of necessity to be made for the support of the wife.

At the present time, women are engaged in almost every trade and profession; in many of which they excel the male. In many cases their earning capacity exceeds that of their husbands, and marriages in which both husband and wife continue to work after marriage, are more and more prevalent.

"As the habits, opinions, and wants of a people vary with the times, so public policy may change with them." 13 C. J. 427, par. 363, and cases cited.

This Court, in the case of *Parmly v. Parmly*, 125 E. 545, set forth the public policy with respect to permanent alimony as follows:

"The continuing duty of support thus imposed is grounded in a public policy designed to make for permanence in the marriage relation, as well as to accord a measure of

protection to the innocent wife. The legislature has deemed it to be contrary to the public interest to permit the guilty husband, whose willful misconduct has brought about a dissolution of the marriage, to also cast off the duty of support arising from the marriage status."

After the Final Decree has been entered and the parties are no longer man and wife, declaring a General Release to be against public policy does nothing toward making the marriage relationship permanent. It has already been terminated. The punishment of wrong doers is primarily a matter for the legislature which has ample power to define the crime, and enact the penalty for it. The occasions when the divorce is caused solely because of the wrong doings of the husband are rare. It generally occurs as a result of the culmination of actions on both sides; many of them of a minor or petty nature.

In many cases, the ability of a divorced wife to release her claim for alimony may be of inestimable benefit to her. She may be able to secure for herself a lump sum payment which is not contingent on the continuance of her husband's life or her own life. She may avoid the trouble, expense and uncertainty of collecting periodical alimony payments. She may avoid fluctuations in the amount of alimony caused by a change in her husband's financial status.

In light of women's present improved economic status and ability to support themselves, there is no longer any reason for affording them the same protection the Court gives to an infant, lunatic or other person incapable of taking care of himself.

Counterclaim.

In his Opinion, the Advisory Master concludes that the conveyance made in February, 1944, is a completed gift to the daughter who was the natural subject of the Defendant's bounty.

We respectfully contend that there is nothing in the pleadings which would warrant the finding of a gift. The pleadings conclusively show that the conveyance was only made in performance of the alimony agreement. It was one of the considerations received by the wife for entering into the same. The daughter paid no consideration therefor and is a mere volunteer and nominee of the mother. In the absence of the agreement, the conveyance would not have been made to her.

Paragraph 3 of the alimony agreement (S. C., 13, line 40 and p. 14), provides for the making of the conveyance to the daughter. The conveyance is part and parcel of the alimony agreement.

The affidavit annexed to the Answer to Petition to modify *Decree Nisi* (S. C., 45, line 13), clearly negatives any gift, and sets forth that the conveyance was made to the daughter, "So that the Defendant could comply with the terms and conditions of said Agreement and the Decrees of this Court."

The daughter still has the title to the property for which she paid nothing, and as there are no intervening equities, there is no reason why she should not return it. The father caused the conveyance to be made to the daughter in performance of his contract, therefore, he is the proper party to initiate proceedings for its reconveyance. All other persons interested in the matter have been made parties to the Counterclaim.

The Advisory Master, in his Opinion, states, "Petitioner concedes that Defendant has met all of his obligations under the agreement with one exception, namely, to pay the taxes and upkeep of the Sommer Avenue home after its transfer to the daughter. Defendant contends that the agreement does not require him to do so."

The Defendant's contention is correctly set forth. Nevertheless, because of the ambiguous language of the agreement, the Defendant has caused the taxes and upkeep of the Sommer Avenue property to be paid after such transfer, so that there might be no possible question with respect to complete performance on his part. He intends to cause these payments to be continued until his obligation to pay the same is judicially determined.

The pleadings do not raise this question specifically and no testimony has been taken to determine whether the Defendant has, in fact, made the payments or not. The Counterclaim alleges complete performance of all of the terms and conditions of the agreement by the Defendant.

Respectfully submitted,

HOPKINS, VORBURGER & DICKSON,
Solicitors of Defendant-Appellant.

HERMAN G. VORBURGER,
Of Counsel.

The Advisory Master, in his Opinion, states: "Petitioner concedes that Debsdant has met all of his obligations under the agreement with one exception, namely, to pay the taxes and upkeep of the Summer Avenue home after its transfer to the daughter."

The Debsdant's contention is correctly set forth. Nevertheless, because of the ambiguity of the agreement, the Debsdant has reached the taxes and upkeep of the Summer Avenue property to be paid after such transfer, so that there might be no possible question with respect to complete performance on his part. He intends to make these payments to be continued until his obligation to pay the same is judicially determined.

The Debsdant does not raise this question specifically and no testimony has been taken to determine whether the Debsdant has in fact made the payments or not. The Court should allow complete performance of all of the terms and conditions of the agreement by the Debsdant.

Respectfully submitted,

THOMAS J. VANNOCK

Solicitor of Debsdant-Appellee

HARVEY D. VANNOCK

OF COUNSEL

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**New Jersey Court of Errors
and Appeals**

Between:

MARION HELEN O'HARA,
Petitioner-Respondent,

and

GEORGE KENNETH O'HARA,
Defendant-Appellant,

and

MARION IRENE EVANS,
*Third Party Defendant-
Respondent, et als.*

On Petition
for Divorce.

On Appeal
from Chancery.

BRIEF OF PETITIONER-RESPONDENT.

The issue on this appeal is very simple. The learned Advisory Master, after due consideration of the facts and briefs of the respective parties, struck out the Second Answer in Lieu of Plea, which set up as a bar to the petitioner-respondent's application for an increase in alimony, a general release which she had executed in conformity with an agreement for support which had been approved by the Court. The Advisory Master also struck out a counterclaim as to Marion Irene O'Hara, a daughter of the parties hereto, on the ground that the same set forth no cause of action against her. The ground of the counterclaim against her was that she be decreed to reconvey premises 49 Sommer Avenue, Maplewood, New Jersey, which had been conveyed to her by her grandmother, after she attained the age of 21 years. This conveyance was made pursuant to the alimony settlement approved by the court as aforementioned. However, the grand-

mother, in whom title was vested, and who made the conveyance, was not the counterclaimant, nor did she in said counterclaim seek such relief. The counterclaim was filed by the father as against the daughter, seeking such relief.

The petitioner-respondent and defendant-appellant were married on December 10th, 1918, and have one child, Marion Irene Evans, now 22 years of age. A petition for divorce was filed against appellant, in the Court of Chancery, on February 28th, 1939, charging desertion. On April 20th, 1938, a *decree nisi* was entered in said suit (Docket 126/219). The said *decree nisi* approves a settlement agreement between the parties, made February 21st, 1938. A copy of this agreement is set forth in the State of Case, pages 10-19. The *decree nisi* became final on July 21st, 1938.

On June 6th, 1944, petitioner-respondent filed a petition to modify the *decree nisi* (S. C., pp. 1-23). It is therein recited, as by reference thereto will more fully appear, that said child, Marion Irene Evans, was then over 21 years of age, and had received a deed for premises 49 Sommer Avenue, Maplewood, New Jersey, and petitioner was then living with her daughter in said premises; that the lump sum settlement of \$7,000 had been expended for doctor bills and other expenses; that petitioner had only \$150 remaining therefrom; had no money or other assets except an automobile valued at about \$100 and certain personal property; that she had been receiving \$55 a week for maintenance which was wholly inadequate and much less than should be paid by appellant by reason of his affluence, wealth, income and capital assets.

Further that at the time of the making of the agreement, petitioner was not compelled to pay

income tax on the support received, but which is now due by virtue of a change in the law, that defendant had received a substantial sum by reason of the death of his father, etc.

Further that under the terms of the agreement it was intended that as long as petitioner and her said daughter lived at the premises aforesaid, which had been conveyed to the daughter, that defendant was obliged to pay taxes and upkeep of said home; that if the petitioner lived elsewhere, the defendant was bound to pay her \$100 a month for rental of another home.

It was prayed that by reason of the financial condition of the appellant he pay an additional amount for income tax purposes; that he pay \$75 a week for support; that he pay her \$100 a month for rent.

The appellant then filed an answer to said petition to modify and a counterclaim. In the answer he set up three Answers in Lieu of Plea, the Second of which was stricken by the Court as aforementioned. The striking of this Second Answer in Lieu of Plea is one of the grounds of the appeal. The counterclaim was against petitioner, her daughter Marion Irene Evans, and others (S. C., pp. 30-47), and the same prayed that the daughter, Marion Irene Evans and her husband be enjoined from conveying the property aforementioned, which had been conveyed by Julia A. O'Hara, mother of appellant to said daughter, and that said daughter and her husband be directed to reconvey to the said Julia A. O'Hara, this although Julia A. O'Hara was not the counterclaimant, but merely a defendant thereto, and had not prayed for such relief.

We respectfully submit that the learned Advisory Master was correct in striking the counter-

claim as against said daughter, and also the Second Answer in Lieu of Plea, which set up a general release as a bar to a modification of alimony.

The petition was for an increase of alimony under the *decree nisi*. It must be obvious at the outset, as a general rule, that no agreement by the parties can oust the jurisdiction of the Court with respect to the awarding of alimony. This even if a general release is executed by the wife.

In *Applegate v. Applegate*, 135 N. J. Eq. 39, 38 A 2d. 119, the Court of Errors and Appeals said (4/13/44):

“Our decisions hold uniformly that alimony is a subject specially committed to the Court of Chancery and arising from the present or past status of the parties as husband and wife. The jurisdiction not only exists while that relation persists, but by the express language of the Divorce Act (Comp. Stat., p. 2035, Sec. 25, N. J. S. A. 2:50-37) *continues after a decree of divorce*; and it necessarily includes the power, in cases where the wife is entitled to alimony, to regulate the amount of such alimony *from time to time*, to supervise agreements between the parties in that regard, to enforce them if deemed just, and to decline to recognize them otherwise.”
(*Italics ours.*)

The court in its opinion in the above case reviews in some detail a number of decisions applicable to the point in question.

We might add that the general release in this matter involved, is very indefinite, reciting first that in consideration of one dollar and other good and valuable consideration, that Marion Helen

O'Hara releases George Kenneth O'Hara, of all claims, then follows this qualifying clause:

“this release is limited so as to cover the requirements of paragraph 13 of the agreement entered into between the parties hereto dated February 21, 1938, and is to be so construed as to cover the requirements in that paragraph and *nothing more*; and also there is excepted therefrom all the obligations of the decrees made in the divorce action of the said Marion Helen O'Hara against said George Kenneth O'Hara in the Court of Chancery of N. J. bearing Liber 126/219 of said court.”

This release was merely a step in the settlement, contemplated and provided for at the time of the making of the agreement, but the same fails to divest the power of the Court of Chancery to make orders for support from time to time as the circumstances of the parties require.

It is our opinion, that even if the wife should execute a general release, that nevertheless under the decisions of this State which are reviewed in *Applegate v. Applegate, supra*, the wife as successful suitor is entitled to such an award as will secure to her the same social standing, comforts and luxuries she would have enjoyed, but for the divorce, of an award, which together with the income from her separate property, if any, will maintain her in the station and condition of life to which she was accustomed before the dissolution of the marriage, and is in keeping with her husband's pecuniary faculties to provide therefor.

In *Hires v. Hires*, 91 N. J. Eq., affirmed 92 N. J. Eq. 451, it was held in effect that the injured wife could not bargain away Chancery's jurisdiction

to provide for and regulate the *quantum* of alimony from time to time, in accordance with her necessities.

In *Herr on Divorce*, Section 372, pages 474-475, this learned authority states that under the statute orders with respect to the wife's support may be changed from time to time as circumstances require, and as may be equitable and just.

Again in *Baumgarten v. Baumgarten*, 107 N. J. Eq. at page 277, the court said:

“Our statute exhibits an intention that alimony shall be continuously dealt with by the court according to the varying circumstances of the party; that the husband's ability to pay and the justice of the wife's enjoyment of her right are subject to the change of circumstances which the Court cannot anticipate and hence complete justice requires that the Court's power to act shall be kept open so long as it shall be needed to direct just variation.”

With respect to the effect of a release, 27 *Corpus Juris Secundum*, Section 234, page 951, states:

“Thus an agreement by which the wife attempts to release or settle for an agreed consideration all claims upon the husband for alimony, or purports to fix the amount to be paid by the husband as alimony or in lieu of alimony, does not control the Court.”

The general release could only affect the property rights of the parties, but has no effect on the right of the Court of Chancery to make orders for the support and maintenance of a successful party to a divorce action.

The striking out of the Second Answer in Lieu of Plea, setting forth the general release, is not dispositive of the entire case, because the suit will proceed to final hearing upon the other defenses set forth in said answer.

The appellant contends in his brief that there is nothing to prohibit the respondent from releasing him, that at the time the general release was made the parties were not husband and wife. However, this release was made pursuant to an agreement signed by them, while they were still married. He says her release to appellant should be as equally effective as a release to a stranger. With this we cannot agree, because the husband has a legal obligation to support and maintain a wife who has divorced him, whereas no such obligation exists on the part of a stranger. We submit that the decisions of our court as enumerated in *Applegate v. Applegate, supra*, hold that the parties cannot bargain away the court's right to make such orders for support, from time to time, as the circumstances require.

In *Irwin v. Irwin*, 98 N. J. Eq. 457, it is stated:

“Consistently with that view our Court of Errors and Appeals in *Lynde v. Lynde*, 64 N. J. E. 736, has defined a wife's claim for an allowance of alimony as a purely personal right, and not, in any sense, a property right, as a right in its nature not susceptible of assignment by the wife to another, nor capable of enjoyment by her in anticipation. From this conception of alimony as the just expression of a matrimonial duty, it seems clear that what the court cannot admeasure as a finality the husband cannot limit by the purchase of immunity from future liability,

should conditions arise in which justice impels a reassertion of the rights of the wife.”

Again reverting to the question of the appellant's counterclaim against the daughter, as before mentioned, we contend that this has nothing to do with the respondent's application for increased alimony.

The cases cited by the appellant with respect to the counterclaim are not applicable to the present situation, to wit, where the matter deals with the question of support for the wife. In addition thereto, the agreement (S. C., p. 13, bottom and p. 14) provides:

“When the said Marion Irene O'Hara is twenty-one years of age, the said property is to be deeded to her, free and clear and thereafter she is to be the absolute owner thereof to do with the same as she pleases.”

In view of the facts and law above cited, we respectfully submit that the order of the court below, striking out the Second Answer in Lieu of Plea, and striking out the appellant's counterclaim against his daughter, should be affirmed, with costs.

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