Index

In Chancery of New Jersey.

(Filed, Jan. 11, 1917.)

Between KITTIE LOUISA SMITH, *Petitioner,* *and* WILLIAM JOHN SMITH, *Defendant.*	*On Petition for Divorce.* *On Application for Alimony and Counsel Fee after Final Decree.*

Notice of Appeal

William John Smith, the defendant in the above entitled cause, hereby appeals from the order made in this Court by Honorable Eugene Stevenson, one of the Vice-Chancellors in said cause on the twenty-fourth day of October, nineteen hundred and sixteen, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, January 10, 1917.

WILLIAM J. ST. LAWRENCE,
Solicitor of Defendant.

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

HENRY MARELLI,
Of Counsel with the Defendant.

New Jersey Court of Errors and Appeals.

(Filed, Jan. 11, 1917.)

Between

KITTIE LOUISA SMITH,
Petitioner-Respondent,

and

WILLIAM JOHN SMITH,
Defendant-Appellant.

On Appeal.

Petition

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of William John Smith, the appellant in the above stated cause respectfully shows:

That your petitioner finds himself aggrieved by an order and decree made in the above cause by his Honor, Edwin Robert Walker, Chancellor, bearing date the twenty-fourth day of October, nineteen hundred and sixteen, in this respect, to wit, that Kittie Louisa Smith, the said respondent, did begin an action for divorce in this Court, against said William John Smith, the appellant, resulting in the granting of a decree nisi of divorce to said Kittie Louisa Smith, on the sixth day of December, nineteen hundred and fifteen, and a final decree of divorce on the seventh

day of June, nineteen hundred and sixteen; that no alimony was prayed for in the petition in said cause and no reservation for alimony was made in either of said decrees; that subsequent to the granting of said final decree and on or about the second day of October, nineteen hundred and sixteen, application was made by said respondent, in said cause for alimony resulting in the order and decree herein appealed from, which said order and decree adjudges that the defendant, William John Smith, pay to the petitioner, Kittie Louisa Smith, the sum of twenty-five dollars a month for her support and maintenance and costs to be taxed; and your petitioner appeals from the whole of said order and decree upon the grounds that the Court of Chancery did not have jurisdiction to make such order, because no application for alimony was made in the petition for divorce by said petitioner and no reservation for alimony was made in either of said decrees, and that the petitioner is not entitled to any relief or to any affirmative decree whatever in this cause and that the same is erroneous; that the Court of Chancery should have by its order and decree dismissed petitioner's said application for alimony.

Your petitioner therefore prays that the said order and decree may be wholly reversed, set aside and for nothing holden, and that you, petitioner, may have such further relief in the premises as shall be equitable and just.

WILLIAM J. ST. LAWRENCE,
Solicitor for Appellant.

HENRY MARELLI,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

(Filed, February 2, 1917.)

Between

KITTIE LOUISA SMITH,
Petitioner-Respondent,

and

WILLIAM JOHN SMITH,
Defendant-Appellant.

On Petition for Alimony.

On Appeal.

Answer to Petition of Appeal

The respondent admits it to be true that a certain order was on October twenty-fourth, nineteen hundred and sixteen, made and entered in the Court of Chancery as in the petition of appeal is stated, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that said order is agreeable to law and equity and she prays that the same may be affirmed with costs to be adjudged to this respondent.

ADDISON ELY, JR.,
Of Counsel with Respondent.

IN CHANCERY OF NEW JERSEY.

(Filed, October 9, 1916.)

Between KITTIE LOUISA SMITH, *Petitioner,* *and* WILLIAM JOHN SMITH, *Defendant.*	*On Petition for Alimony.*

Notice

To WILLIAM J. SMITH, defendant:

TAKE NOTICE: That on Monday, October 2d, 1916, at ten o'clock in the forenoon, or as soon thereafter as I can be heard, I shall apply to the Chancellor at Chancery Chambers in Jersey City for an order requiring you to pay to the above named petitioner, Kittie Louisa Smith, or to her order during her natural life or until the further order of this Court to the contrary, a suitable allowance for her support and maintenance, and for an order directing that the final decree entered in said cause on the seventh day of June, 1916, be amended to contain suitable provisions for the enforcement of said order.

Said application will be made upon the Master's Report filed herein together with the petition and affidavits, copies of which are annexed hereto and served herewith upon you.

Dated September 18, 1916.

ADDISON ELY, JR.,
Solicitor of Petitioner.

IN CHANCERY OF NEW JERSEY.

(Filed, October 9, 1916.)

Between KITTIE LOUISA SMITH, *Petitioner,* *and* WILLIAM JOHN SMITH, *Defendant.*	*On Petition for Alimony.*

Petition

TO HIS HONOR, EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

The petition of Kittie Louisa Smith, the above named petitioner in this cause respectfully shows that:

1. On June 7, 1916, final decree of divorce from the bonds of matrimony for the cause of adultery upon the part of the above named defendant was entered in the above entitled suit.

2. On May 10, 1915, defendant was ordered to pay alimony at the rate of Twenty-one Dollars per month on the first day of every calendar month, which payment was made until the entry of said final decree.

3. Petitioner was unable on the said alimony so received by her to properly support herself, and now that said alimony has been discontinued she is unable to support herself and has been compelled to depend upon the generosity of her father for her existence, and has incurred bills for medical attendance, rooming, etc., and now finds herself unable longer to call upon her father because of his inability to further contribute to her support.

4. Petitioner prays that a suitable allowance for permanent alimony may be made to her for the period of her natural life and that the final decree of divorce

entered herein may be amended so as to include suitable provision for the payment of the same.

And your petitioner will ever pray, etc.

ADDISON ELY, JR.,
Solicitor and Counsel with Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } *ss.*

Kittie Louisa Smith, the above named petitioner, being duly sworn according to law, upon her oath deposes and says that:

1. She is the petitioner in and has read the foregoing petition.

2. She knows the contents thereof and the same are true.

3. She says that the above named defendant has been employed for many years by the Erie Railroad Company as a locomotive engineer; that by reason of his ability and carefulness he has obtained a record entitling him to many privileges and advantages and the consequent high rate of pay incident thereto; that she is informed and verily believes to be true that his income as such engineer averages more than Two Hundred Dollars per month.

Sworn to and subscribed before me this 19th day of September, 1916. } KITTIE LOUISA SMITH

LEWIS C. ALLEN,
Commissioner of Deeds,
New Jersey.

[SEAL]

IN CHANCERY OF NEW JERSEY.

(Filed, October 9, 1916.)

Between KITTIE LOUISA SMITH, *Petitioner,* *and* WILLIAM JOHN SMITH, *Defendant.*	*On Petition, etc.*

Answer

TO HIS HONOR, EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

The above named defendant in answer to the petition of the petitioner respectfully shows:

1. That defendant admits that a final decree of divorce was made, in the above cause, on the seventh day of June, A. D., nineteen hundred and sixteen.

2. That defendant admits, that, by an order of this Court, made on the tenth day of May, A. D., nineteen hundred and fifteen, he was ordered to pay the petitioner, alimony pendente lite, at the rate of twenty-one dollars a month, on the first day of each month and of each succeeding calendar month thereafter until the termination of said suit, together with a Counsel fee of fifty dollars to her solicitor.

3. That defendant obeyed said order, in all respects, and the alimony was regularly paid as directed to the petitioner or her solicitor, and the Counsel fee was paid to the solicitor, and the taxed bill of costs was paid to the Solicitor before the final decree was granted.

4. That defendant further shows that petitioner accepted the same without any objection, and that she received the final decree of divorce as a final disposition to her case, but this defendant avers the fact to be, that the petitioner by her extravagance has be-

come greatly in debt, and owes her Counsel large sums of money, and does not make this application in good faith, but for the purpose of paying Counsel fees.

5. That defendant further shows that the said petitioner took her decree nisi, and then after six months took her final decree, and during all that time, no application was made about alimony.

6. That defendant further shows that the said alimony pendente lite received by the said petitioner was amply sufficient to provide for her maintenance and support, together with the income derived from her ability as dressmaker and for the services rendered by her for her father as a housekeeper.

7. That defendant further shows and charges that when the petitioner left the home of the defendant, she had previously contracted many debts and she had greatly involved the defendant in debt, to such an extent, that he has, since her departure, been struggling to pay said debts, viz:

M. E. B. Tallman, House Surgeon..	$ 55.39
Interborough Coal Company	20.49
Norman Gardenier, Clothing, etc. ..	873.72
Ludwig Bowman & Co.	105.00
Norman S. Garrison, M.D.	18.75
Making a total of	$1,073.33

This defendant further shows that he has paid between seven and eight hundred dollars of the above claims.

8. That defendant further shows that the payment of these debts contracted by the said petitioner, while she lived with the defendant, and since, and for which she had received money to pay the same, has greatly impoverished this defendant.

9. That defendant further shows that, on different occasions, this defendant gave the petitioner various sums of money to pay the bills so contracted by her, and that she never paid the same, or applied any of the money to the purposes for which it was intended, and never explained to the defendant what she did with it.

10. That defendant further shows that, on one occasion, he gave the petitioner money to pay the rent of their home, and was afterwards astonished to find out that there was sixty-four dollars rent due for three months' rent and which this defendant was obliged to pay, although the petitioner had previously received the money, that she had repeatedly contracted debts without the permission of the defendant, that defendant contributed enough money to provide all household necessities, clothing and all other expenses, that she was a woman ignorant of the value of money and spent the same fruitlessly with her friends in giving them dinners, entertainments, trolley parties, moving pictures, and during all this time she had neglected her home.

11. That defendant further shows besides all the money he contributed to the household expenses, the petitioner received ten dollars a week from his two brothers who boarded and lodged with defendant.

12. That defendant further shows that the extravagance of the petitioner was such, that, although she was receiving money from the defendant, and from his two brothers regularly as boarders, he was obliged to give a chattel mortgage for seventy-five dollars on his piano to pay her debts, and she bought Christmas presents with it, and at other times he was obliged to get loans from loan associations to pay her debts, and save litigation.

13. That defendant admits that he is an engineer, and that he is, at times, employed by the Erie Railroad Company, but most of the time substituting, and that he has no regular or steady employment, and that he most strenuously denies the allegation that he is receiving two hundred dollars a month, or anything like that sum, but avers the fact that his compensation varies, and does not amount to more than from seventy-five dollars to one hundred dollars a month, and depends solely upon how often the said Company may need his services as a substituting engineer.

14. That defendant further shows that the petitioner is a woman of large, strong and powerful physique, enjoying good health, and is now thirty-

seven years old, and is well enabled to earn her own living and provide for all her wants.

15. That defendant further shows, that since the granting of the final decree of divorce, on the seventh day of June, A. D., nineteen hundred and sixteen, he has married again, and is now living with his second wife in the City of Passaic.

16. That defendant further shows that the said petitioner should be barred from interfering with the final decree of divorce, because said application is only made for the purpose of annoying the defendant, and to pay her extravagances, and he maintains that the opening of the final decree in this cause, would be a great hardship upon him, the said defendant having married again, and assumed the expense of a new establishment, supposing that the final decree in this case, was final.

That defendant therefore prays that the application for the relief sought will be denied and dismissed by this Honorable Court.

And your petitioner will ever pray, etc.

W. J. St. Lawrence,
Solicitor for Defendant.

William J. Smith,
Defendant.

State of New Jersey, } *ss.*
County of Passaic, }

William J. Smith, of full age being duly sworn on his oath saith that he is the defendant in the above cause, that a decree of divorce was granted in said cause, that he has been paying the alimony by order of this Court, that he has paid the Counsel fee and the taxed bill of costs, that petitioner accepted said alimony without any objection; that she received a final decree of divorce on the seventh day of June, A. D., nineteen hundred and sixteen; that petitioner involved the defendant in great debt; that no appli-

cation was made from the tenth day of May, A. D., nineteen hundred and fifteen to the seventh day of June, A. D., nineteen hundred and sixteen, the date of the said final decree; that petitioner was always supplied with plenty of money and enjoyed the comforts of a good home; that she is amply well to support herself by her trade as a dressmaker, and for services rendered as housekeeper for her father and that all other facts, matters and things set forth, in the foregoing petition, so far as they relate to the acts of this defendant, and so far as they relate to the acts of others, are true.

Subscribed and sworn to this 30th day of September, A. D., 1916, before me. } WILLIAM JOHN SMITH

ABRAM I. BLUESTEIN,
Attorney at Law of New Jersey.

[SEAL]

IN CHANCERY OF NEW JERSEY.

(Filed, October 30, 1916.)

Between KITTIE L. SMITH, *Petitioner,* *and* WILLIAM J. SMITH, *Defendant.*	*On Petition for Alimony.*

Order

This matter coming on regularly to be heard upon petition and affidavit of the petitioner, and the answering affidavits of the defendant, in the presence of Addison Ely, Jr., solicitor of petitioner, and William J. St. Lawrence, solicitor of the defendant, and the Court having heard the argument of counsel and duly considered the matter, and having determined therefrom that the petitioner is entitled to alimony from the date of this application.

It is, on this twenty-fourth day of October, 1916, ordered that the said defendant, William J. Smith, to pay to Kittie L. Smith, the above named petitioner, or to her solicitor, the sum of Twenty-five Dollars per month on the second day of each calendar month from the second day of October, 1916, until the further order of this Court, together with the costs of this application to be taxed. The first payment, namely for October, however, to be made at any time within ten days from date hereof.

Respectfully advised,

EUGENE STEVENSON,
Vice-Chancellor.

E. R. WALKER,
Chancellor.

A true copy
ROBERT H. MCADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between KITTIE L. SMITH, *Petitioner,* *and* WILLIAM J. SMITH, *Defendant.*	*On Petition for Divorce.*

Decree Nisi

This cause coming on to be heard in the presence of Addison Ely, Jr., solicitor for and of counsel with the petitioner, no one appearing for the defendant, Whereupon, and upon reading the pleadings and proofs in this cause, and the report of Edward J. Luce, one of the Special Masters of this Court, to whom, by a previous order of the Court made in this cause, it was referred to take the depositions and other proofs offered by the said petitioner in support of the allegations of the petition, and to report the same, together with his opinion thereon; from all of which it now appears, to the satisfaction of the Chancellor, that the petitioner and the defendant were joined in the bonds of matrimony on or about the twenty-first day of August, A. D., one thousand nine hundred and one, and that the defendant has been guilty of the adultery charged against him in the said petition, and that at the time the cause of action for divorce therefor arose the petitioner and defendant were bona fide residents of this State, and the said petitioner has continued so to be down to the time of the commencement of this action, and it further appearing that jurisdiction herein has been acquired by personal service of process upon the defendant within this State;

It is thereupon, on this 6th day of December, A. D., nineteen hundred and fifteen, by his Honor, Edwin

Robert Walker, 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 hereby order, adjudge and decree that the said petitioner, Kittie L. Smith, and the said defendant, William J. Smith, be divorced from the bond of matrimony for the cause aforesaid, and the said parties, and each of them, be freed and discharged from the obligations thereof, unless sufficient cause be shown to the Court why this decree should not be made absolute, within six months from the date hereof.

And it is further ordered, adjudged and decreed that the said defendant do pay to the said petitioner her costs of this suit, incurred and to be incurred, to be taxed, and that the said petitioner do have execution therefor, according to the practice of this Court.

And it is further ordered, adjudged and decreed that permission for the petitioner to resume her maiden name be reserved.

Respectfully advised,

C. S. Biddle, *A.M.* E. R. Walker, *C.*

IN CHANCERY OF NEW JERSEY.

Between KITTIE L. SMITH, *Petitioner,* *and* WILLIAM J. SMITH, *Defendant.*	*On Petition for Divorce.*

Final Decree

The Court having in this cause by a decree nisi, bearing date and entered on the sixth day of December, A. D., nineteen hundred and fifteen, ordered, adjudged and decreed that the petitioner, Kittie L. Smith, and the defendant, William J. Smith, be divorced from the bonds of matrimony for the cause of adultery, unless sufficient cause be shown to the Court why said decree should not be made absolute within six months from the date thereof; and application being now made to the Court by the petitioner for an order that 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;

It is thereupon, on this seventh day of June, A. D., nineteen hundred and sixteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and that 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 hereby order, adjudge and decree that the said decree nisi be made and become absolute and that the said petitioner, Kittie L. Smith, and the said defendant, William J. Smith, 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 ac-

cordingly, and the said parties and each of them are and is hereby freed and discharged from the obligations thereof.

And it is further ordered, adjudged and decreed that the petitioner be permitted to resume her maiden name.

E. R. WALKER,
Chancellor.

New Jersey Court of Errors and Appeals.

KITTIE LOUISA SMITH,
Petitioner-Respondent,

vs.

WILLIAM JOHN SMITH,
Defendant-Appellant.

On Petition for Alimony.
On Appeal.

Brief for Defendant-Appellant

WILLIAM J. ST. LAWRENCE, *Solicitor.*
HENRY MARELLI, *Of Counsel.*

ABSTRACT OF CASE.

This is an appeal from an order of the Court of Chancery, dated October 24, 1916, granting alimony to the petitioner-respondent upon her application for

the same made subsequent to the entry of a final decree for divorce in an undefended suit brought by her. In the suit for divorce, the defendant was personally served with process (See Decree Nisi, Case, Page 14). The final decree therein was entered on June 7, 1916, (See Final Decree, Case, Page 16). That decree (as well as the decree nisi) neither provided for alimony, nor reserved the right to make future application for it. By its terms, "the marriage between the said petitioner and the said defendant" was "dissolved," "and the said parties, and each of them," were thereby "freed and discharged from the obligations thereof." After the entry of that decree, the defendant re-married; and was living with his second wife when the petitioner-respondent made her said application for alimony (See paragraph 15 of Answer, Case, Page 11), out of which came the order brought into this court by this appeal.

SPECIFICATIONS OF GROUNDS OF APPEAL.

I.

The Court was without jurisdiction to make the order in question for the reason that the final decree for divorce (as well as the decree nisi) neither provided for alimony nor reserved the right to make future application for the same.

II.

By the terms of the final decree for divorce taken by the petitioner-respondent, she conclusively waived all right to alimony, and is effectually estopped from claiming same.

ARGUMENT.

I.

WE CONTEND THAT THE COURT WAS WITHOUT JURISDICTION TO MAKE THE ORDER IN QUESTION FOR THE REASON THAT THE FINAL DECREE FOR DIVORCE (AS WELL AS THE DECREE NISI) NEITHER PROVIDED FOR ALIMONY NOR RESERVED THE RIGHT TO MAKE FUTURE APPLICATION FOR THE SAME.

It is a general rule, declared with practical unanimity by the text writers, that alimony will not be allowed on a separate proceeding after a decree a vinculo. 1 Am. & Eng. Enc. of Law, 479; Schouler, Husb. & W., No. 459; Bishop, Mar. & Div. No. 376, et seq.; 14 Cyc, 769.

This rule has found, substantially, recognition in this State. In *Lynde vs. Lynde,* 54 N. J. Eq., 473, 476, 477 (affirmed by the Court of Errors in 55 N. J. Eq., 591), the Court declared:

"By the unwritten law, alimony is not a matter of independent claim or right. It is incidental to a bill for divorce or other relief between husband and wife. . . . It is plainly the legislative contemplation that the subject of alimony is to be dealt with as an adjunct of the divorce suit, and I cannot but deem it, at least, a question of grave doubt whether, when the final decree in such a case fails to treat of the question of alimony in any way, and more particularly when in a case like the present, where alimony is specially asked, it so fails, it will not be taken to have determined all matters involved in the suit and to have ruled adversely to the question of alimony, *which it has not affirmatively responded to by allowance or reservation.*"

There are three recognized exceptions to the general rule: (1) Where the right of future application for alimony is reserved by the decree of divorce (Ruling Case Law, Vol. 1, Sec. 84); (2) where the reservation so to apply has been inadvertently omitted from the final decree dissolving the marriage, and application is subsequently made to amend the decree (*Lynde vs. Lynde, supra*); and (3) where a statute is held to bestow upon the court the power to entertain an application for alimony after the entry of the decree of divorce (*Sharpe vs. Sharpe,* 24 N. H., 564).

The question, therefore, arises as to whether Sec. 25 of "An Act providing for divorces and for decrees of nullity of marriage, and for alimony and the maintenance of children (Revision of 1907)," Compiled Statutes, Vol. 2, page 2035, confers the power to entertain an application for alimony after a decree of absolute divorce containing no provision in respect thereto. The section of the act referred to is a reenactment of Sec. 19 of "An Act providing for divorces and for decrees of nullity of marriage and for alimony and the maintenance of children (Revision of 1902)," Pamphlet Laws of 1902, page 507.

Both sections read as follows:

"Pending a suit for divorce or nullity, or after decree of divorce, it shall be lawful for the Court of Chancery to 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 be rendered fit, reasonable and just."

Section 19 of the Revision of 1902 was obviously the result of an attempt to collect and condense in a single brief paragraph matters contained theretofore

in Sec. 19 and Sec. 22, at seq., of the Revision of 1874 (Gen. Stat., Vol. 2, 1267).

Sec. 19 (Page 1269) of the Revision of 1874, read:

"That when a divorce shall be decreed it shall and may be lawful for the Court of Chancery to take such order touching the alimony and maintenance of the wife, and also touching the care and maintenance of the children, or any of them, by the said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just," etc.

Sec. 22 of that act provided for the control of custody of minor children pendente lite; Sec. 23 dealt with the same subject after decree of divorce; and Sec. 23 to 29, inclusive, with the like subject under certain diverse circumstances therein named.

The circumstance of the condensation of these several sections in Sec. 19 of the Revision of 1902 (re-enacted as Sec. 25 of the Revision of 1907) may properly be borne in mind in construing the latter section.

"In determining the meaning of a statute, the court will keep in mind the circumstances surrounding the enactment and the objects sought to be obtained by the statute." *Hoyne vs. Davisch,* 106 N. E. 341; *Werner vs. King,* 107 N. E. 837.

It is also true that a thing which is within the letter of a statute, is not within it, unless within the intention of the makers. Lewis' Sutherland Statutory Constructions, Vol. 2, Sec. 379; *Associates of the Jersey Company vs. Davison,* 29 N. J. L., 415, 424.

As the law in this State stood prior to 1902, a valid decree for divorce barred subsequent application for alimony, except where a reservation for alimony was embodied in the decree. That rule grew, in one way

or another, out of the very finality of a final decree. According to one view, it rested upon the ground that the marriage relation thereby ceased to exist, and there remained, therefore, no basis for an allowance of alimony. According to another view, it was rested upon the doctrine of res adjudicata; the question of alimony might have been litigated in the suit for divorce, and the judgment pronounced in that suit became final, not only as to the marital status but as to alimony as well. Whichever view was adopted, the final decree was deemed, just as it purported to be, *final,* and as settling definitely the relations and obligations of the parties. Unless it declared otherwise, it fixed forever their rights and liabilities. In *Beck vs. Beck,* 43 N. J. Eq., a decree for alimony at a certain rate per week, upon an order for permanent separation from bed and board, was reversed by the Court of Errors for the sole reason that it should have provided that either party might, at any time, apply to the court making the decree for a change in the allowance, and the security for its payment.

It is not to be lightly presumed from any general words employed in a section which seeks to combine and unify several sections of an older act, that the Legislature meant to introduce a revolutionary change in law long settled. If any such radical departure from the old law was in the legislative contemplation, the lawmakers could readily have expressed it in unmistakable terms; and could have declared that an order for alimony may be made after a final decree, *irrespective of the circumstance that that decree provided for it or reserved it, or not.*

We submit that some such direct and pointed phrase would have been employed, if the legislature had intended that the wife's right to support by virtue of

the marriage was thereafter not to be terminated, as theretofore, by an absolute divorce; and that the form of decree dissolving the marriage in unvarying use, which declared "the said parties, and *each* of them, are and is hereby freed and discharged from the *obligations* thereof" should not thereafter have that effect at all.

The section in question is loosely and faultily drawn. Read literally, it wholly fails to declare, as did Sec. 19 of the Revision of 1874, that *"when"* (that is, *at the same time that*) "a divorce shall be decreed, it shall and may be lawful for the Court of Chancery to take such order touching the alimony" of the wife "as from the circumstances of the parties," etc., shall be just. It only declares that *"pending* a suit for divorce," etc., "or *after decree* of divorce," it shall be lawful" . . . "to make such order touching the alimony of the wife" . . . "as the circumstances of the parties" shall make just. The authority to provide for permanent alimony simultaneously with the taking of a final decree is not given by this statute; if not given there, it does not exist; there can be no permanent alimony independently of statute. But every day the courts read such authority into this statute; they enlarge it by construction; they supply the words "upon" or "at the time of" or other term equivalent to the "when" in the Revision of 1874. If the section may be *enlarged* by construction, by construction it may be *limited* as well; and that general expression, by which temporary alimony and permanent alimony and the custody and support of children are all illadvisedly grouped together, may be restrained so far as it applies to permanent alimony "after decree" to those instances in which alimony has been dealt with, either affirmatively or by specific reservation, in such decree.

If it be objected to this construction that the Legislature is thereby made to appear to have needlessly provided for what the terms of the decree had reserved of themselves, the answer is that it has certainly needlessly provided for temporary alimony (alimony, "pending a suit for divorce," which can be none other than temporary alimony, the merits of the divorce suit not being adjudged). No previous statute (except the Revision of 1902, from which the section in question is copied) dealt at all with temporary alimony; there was no occasion for dealing with it by statute, because the court entertained applications for it under its general and inherent jurisdiction in connection with suits for divorce. The fact seems to be that in the ambitious design to consolidate in a single paragraph the authority to make orders relating to minor children at any time during or subsequent to a suit for divorce with the distinct subject of alimony for the wife, the draftsman fell into confusion and employed terms at once, as we have seen, too narrow and too broad. We submit, therefore, that the section in question was not intended to alter the ancient law, and confers no power to grant alimony after a final decree entirely silent upon the subject of alimony.

II.

WE CONTEND THAT BY THE TERMS OF THE FINAL DECREE FOR DIVORCE TAKEN BY THE PETITIONER-RESPONDENT, SHE CONCLUSIVELY WAIVED ALL RIGHT TO ALIMONY, AND IS EFFECTUALLY ESTOPPED FROM CLAIMING SAME.

The final decree taken by the petitioner concludes with these words:

"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.*"

These words are unambiguous. They declare that the marriage relation has ceased, and that all duties and liabilities dependent upon that relation, no longer exist.

On the faith of those words, the defendant remarried, and contracted fresh obligations which, alike in law and in morals, he is bound to observe. It may well be that, if the final decree instead of declaring that all his obligations toward his former wife were at an end, had reserved to her the right to make application thereafter for alimony, the defendant would not have undertaken the burden of new duties.

If by the use of any language, a wife may renounce the right to contribution toward her maintenance on the part of her divorced husband, the words of this decree are strikingly apt for that purpose. Nothing can be plainer and more direct in language than that "the said parties, and each of them, are and hereby is freed and discharged from the obligations" resulting from the marriage relation.

It is familiar law that a statutory right or privilege may be waived, except where such waiver contravenes some public policy which prevents it. 40 Cyc, 254.

Either the petitioner waived her right to permanent alimony, or she is estopped to insist upon such alimony to the prejudice of her divorced husband, who has been misled by the decree which she has taken.

In 16 Cyc, page 805, under caption "Waiver" and footnote thereto, the law is laid down as follows:

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain *rights*, remedies or objections which he is entitled to assert, he will be estopped to insist upon such *rights*, remedies or objections *to the prejudice of the one misled.*"

"It seems to me that one difference between waiver and estoppel is that in the former the result was voluntary, while in the latter, the conduct of the party may have been voluntary, but with intention not to lose any existing rights, *yet, if such conduct misled, then estoppel arises.* One is the voluntary surrendering of a right, and the other is the inhibition to assert it from mischief that it has caused. In strictness, the term "waiver" is used to designate the act, or the consequences of the act, of one side only, while the term "estoppel" is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts."

In the case at bar, the petitioner has not alleged that the form of her decree resulted from oversight or inadvertence. For aught that appears, it is precisely the decree that she wished to take. There is no claim of mistake.

It seems highly inequitable that a party should cause the Court of Chancery to pronounce a decree, distinctly "freeing and discharging" the defendant from all obligations arising out of the marriage relation thereby destroyed, and when on the faith of that judgment the defendant has married another woman and acquired, perhaps, a family by her, whom the law obliges him to support, the divorced wife should be permitted to harass him, in the face of the assurances of her decree, by a belated claim for alimony.

CONCLUSION.

To sustain the order appealed from will be to perpetuate the illogical position in which the court below is placed by this Petitioner. By the final decree of June 7, 1916, the court below freed and discharged both parties of every obligation growing out of their marriage. By the order of October 24, 1916, without re-opening or modifying that final decree, the same court declared, in effect, that it did not mean what it said by its final decree, and undertook to enforce upon the defendant an "obligation" from which, four months before, it solemnly declared that it had "freed and discharged" him.

The order, we think, should be set aside.

Respectfully submitted,

WILLIAM J. ST. LAWRENCE,
Solicitor for Defendant-Appellant.

HENRY MARELLI,
Of Counsel.


NPCO
PATERSON, N.J.

New Jersey Court of Errors and Appeals

Between

KITTIE LOUISA SMITH,
Petitioner-Respondent

and

WILLIAM JOHN SMITH,
Defendant-Appellant

Brief of Petitioner-Respondent

ADDISON ELY, JR.,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

KITTIE LOUISA SMITH,
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and

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Brief for
Petitioner-
Respondent

The Case of Lynde vs. Lynde on which the appellant relies, was decided at the May term of the Court of Chancery 1896, 9 Dickinson, page 473. There have been several statutes and decisions since that rob the case of any value, if any, it might have had for the appellant. At the time of the decision, Section 19 of the Divorce Act was in force, see G. S. Page 1269, Paragraph 19. Since then the Divorce Act of 1902 changed Section 19. See Session Laws 1902, Page 502, Chapter 157, Section 19.

The Divorce Act of 1907, re-enacted the same Section 19, as Section 25, Session Laws of 1907, Page 474, Chapter 216, also found in Compiled Statutes, Page 2035. The law now is that;

> "Pending a suit for divorce or nullity or *after decree of divorce,* it shall be lawful for the Court of Chancery to make such order touching the alimony of the wife, etc., as the circumstances of the parties, and the nature of the case shall be rendered fit, reasonable and just. Orders so made may be revised and altered by the court from time to time as circumstances may require."

This Section seems to be broad enough in every respect to sustain the order made by Vice Chancellor Stevenson, which has been appealed from.

In McKensey vs. McKensey, 20 Dickinson, Page 633, decided at the October term 1903, of the Court of Chancery, Vice-Chancellor Stevenson held under public laws of 1902, page 507, Section 19, "It shall be lawful for the Court of Chancery to make orders for alimony. Alimony may be awarded to a wife after a decree for divorce. Also a divorce suit is practically kept open by our new Statute after final decree and after enrollment of the decree for applications for orders for alimony and maintenance, even though these matters have not been originally brought into suit by the petition or bill or by the final decree."

In Swallow vs. Swallow, 84 Equity, Page 111, decided in the Court of Chancery, 1915, Vice-Chancellor Backes allowed permanent alimony at the rate of $5 a week to date from the application, although such relief was neither prayed for in the petition nor in any way presented to the Court. The Court held that in such a case alimony should begin from the date of filing petition asking for alimony.

These Statutes and decisions seem to answer appellant. I respectfully ask that the order be affirmed.

Respectfully submitted,

ADDISON ELY, JR.,

Of Counsel with Respondent.