INDEX.

Notice of Appeal.

(Filed August 17, 1935.)

106/355.

In Chancery of New Jersey

Between

WALTER C. HEMINGWAY and
RUTH H. HEMINGWAY,
Complainants,

and

ERIC T. BALL,
Defendant.

On Bill, &c.
Notice of Appeal.

The complainants, Walter C. Hemingway and Ruth H. Hemingway, hereby appeal from the final decree made by the Chancellor on the advice of Vice Chancellor Maja Leon Berry in the above entitled cause on July 24th, 1935, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, August 3rd, 1935.

JOHN MILTON,
Solicitor for and of Counsel
With Complainants.

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

JOHN MILTON,
Of Counsel With Complainants.

Affidavit of Service of Notice of Appeal.

(Filed August 17, 1935.)

106/355.

IN CHANCERY OF NEW JERSEY.

Between

WALTER C. HEMINGWAY and
RUTH H. HEMINGWAY,
Complainants,

and

ERIC T. BALL,
Defendant.

On Bill, &c.
Affidavit of Service.

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

EDWIN C. MULQUEEN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed in the office of John Milton, solicitor for complainants in the above entitled action.

2. On August 16th, 1935, at the request of Mr. Milton, I served George S. Harris, solicitor for defendant, with Notice of Appeal, dated August 3rd, 1935, by leaving a copy thereof with Miss Violet G. Cox, the person in charge of the office.

EDWIN C. MULQUEEN.

Sworn and subscribed to before me }
this 19th day of August, 1935. }

IRENE WALSH,
Notary Public of New Jersey.

Petition of Appeal.

(Filed Aug. 17, 1935.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between WALTER C. HEMINGWAY and RUTH H. HEMINGWAY, Complainants-Appellants, *and* ERIC T. BALL, Defendant-Respondent.	On appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Walter C. Hemingway and Ruth H. Hemingway, the appellants in the above entitled cause, respectfully shows that:

1. The petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, bearing date July 24th, 1935, in a certain cause in said Court of Chancery wherein the said Walter C. Hemingway and Ruth H. Hemingway were complainants and the said Eric T. Ball was defendant, in this respect, to wit, that the said decree adjudges that the complainants' bill of complaint be dismissed and that the complainants pay to defendant the costs of the motion to be taxed, together with a counsel fee to the solicitor of the defendant, George S.

Harris, in the sum of $200.00, and that the said defendant have ten days from the date of the said order within which to file his Reply to the complainants' Answer theretofore filed in the lower court.

And petitioner appeals from the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the Chancellor should not have dismissed the bill of complaint, but should have retained the cause until the final hearing, and in that the bill of complaint set forth an equitable cause of action which, if established upon the final hearing of the cause, would entitle the complainants to the relief prayed for, to wit, a permanent restraint against the prosecution of the action at law instituted by the said Eric T. Ball against the complainants, Walter C. Hemingway and Ruth H. Hemingway, in the Essex County Circuit Court; that the attack made upon the agreement pleaded in the complainants' bill of complaint, to wit, that it was void as contrary to public policy was a matter of defense, to be determined upon the final hearing of the cause, and the court erroneously dismissed the bill of complaint on motion, without taking the proofs or without affording the complainants an opportunity to show the situation of the parties at the time the agreement was made, or the circumstances surrounding the making of the agreement, all of which was material in a determination of the question as to whether or not the agreement was void as being contrary to public policy; and in that the court erroneously concluded that the agreement was void as contrary to public policy; and in that no costs or counsel fee should have been allowed to the defendant, because he should not have succeeded in his application.

Petitioners, therefore, pray that the said decree of the said Chancellor may be wholly reversed and set aside and for nothing holden, and that the petitioners may have such other relief in the premises as to this court shall seem proper.

JOHN MILTON,
Solicitor for and of Counsel
with Appellants.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

Complainants, WALTER C. HEMINGWAY and RUTH H. HEMINGWAY, his wife, residing in the Town of Montclair, County of Essex and State of New Jersey, respectfully show:

1. The complainant WALTER C. HEMINGWAY and the complainant RUTH H. HEMINGWAY are husband and wife, having been married on May 5th, 1933.

2. Complainant RUTH H. HEMINGWAY was formerly the wife of ERIC T. BALL, the defendant herein, from whom she was divorced pursuant to a certain judgment and decree duly entered in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the 28th day of April, 1933, in a certain cause in that Court depending wherein the said Ruth H. Ball was plaintiff and Eric T. Ball was defendant. The

said Eric T. Ball appeared and was represented by counsel in the said suit. A true copy of the said decree is annexed hereto and made part hereof, marked Schedule A.

3. Prior to the entry of the said decree of divorce, and while the relationship of husband and wife was subsisting between the said Eric T. Ball and Ruth H. Ball, and on or about March 3rd, 1933, the complainant Ruth H. Hemingway (then Ruth H. Ball) entered into an agreement with the defendant regarding the custody of the children of their marriage, together with the question of alimony, and wherein and whereby the said Ruth H. Hemingway (then Ruth H. Ball) renounced any and all claims upon the defendant or his property "now or in the future", and the said defendant on his part specifically renounced any claim that he might then have upon the said Ruth H. Ball "or her future husband". A copy of the said agreement is annexed hereto and made part hereof, marked Exhibit B.

4. Complainants allege that at the time of the making of the said agreement on March 3rd, 1933, the defendant knew of the intention of the complainants to marry when the complainant Ruth H. Hemingway (then Ruth H. Ball) succeeded in obtaining a decree of divorce from the defendant, and that the complainant Walter C. Hemingway was intended to be referred to by the words of the said agreement "her future husband".

5. The terms of the said agreement annexed hereto and made part hereof, marked Schedule B, were fully complied with by the parties thereto until on or about September, 1934.

6. Complainants charge that in violation of the express terms of the said agreement, and in fraud of the rights of the complainants, on or about October 10th, 1934, the defendant Eric T. Ball instituted an action in the Essex County Circuit Court in this State against the complainant Walter C. Hemingway to recover damages in the sum of $200,000.00 alleged to have been sustained as the result of the alleged wilful and malicious enticement by the complainant Walter C. Hemingway of the complainant Ruth H. Hemingway from the defendant. A copy of the summons and complaint in said action are annexed hereto and made part hereof, marked Schedule B. The alleged cause of action asserted in the said complaint by the said defendant was in existence at the time of the making of the said agreement, Schedule B annexed hereto, and was, as appears by the express language of the said agreement, intended to be released thereby.

7. Complainants are advised that since the said agreement (Schedule B annexed hereto) was entered into between the complainant Ruth H. Hemingway and the defendant Eric T. Ball while there was a relationship subsisting between them of husband and wife, the said agreement is unenforceable in a court of law, and that it is doubtful whether the release in favor of the complainant Walter C. Hemingway embodied in the said agreement (Schedule B) would constitute a valid defense in the said action at law as against the claim asserted by the defendant against the complainant Walter C. Hemingway, but that the rights arising thereunder in favor of the said complainant Walter C. Hemingway are equitable

rights which can be protected in this Honorable Court.

8. Complainants further charge that the defendant Eric T. Ball had full knowledge of the alleged course of conduct between the complainants which it is alleged gives rise to the cause of action asserted in the complaint in the action instituted by the defendant in the Essex County Circuit Court above referred to, and that, with full knowledge, he acquiesced in and consented to the same, both actively and passively, and is estopped by his conduct from now complaining thereof.

9. Complainants further charge that a trial of the action at law would cause the publication of certain scandalous matters and the reputation of complainants would be affected thereby, according as credence may be given to the statements and charges of the defendant herein, whereas on final hearing in this Court, the issues would be confined to the questions as to whether the defendant has released or waived the claim against the complainant Walter C. Hemingway which forms the basis of the complaint in the pending action at law, and whether he has been estopped by his conduct from prosecuting the said action of law.

10. Reliance will also be placed by complainants upon the provisions of an act of the Legislature of the State of New Jersey providing for declaratory judgments, Uniform Declaratory Judgments Act, under 2 Cumulative Supplements to Compiled Statutes of New Jersey, Section 163-351, page 238.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Eric T. Ball, who is the defendant in this suit, may answer this bill of complaint and each statement therein made.

2. That the defendant, his attorneys and agents be permanently restrained from prosecuting the action at law now pending in the Essex County Circuit Court, wherein the now defendant is plaintiff and the now complainant Walter C. Hemingway is defendant, and from instituting any other action or actions against the complainant Walter C. Hemingway upon any claim which was released by the said defendant under the terms of the said agreement Schedule B annexed hereto.

3. That a decree may be made construing and determining the validity of the said agreement Schedule B annexed hereto, and declaring the rights, status and legal relations of the complainants thereunder.

4. That a writ of subpoena may issue commanding the defendant to answer the bill of complaint herein, and to abide by such decree as this Court may make in the premises.

5. That complainants may have such other and further relief as may be proper.

JOHN MILTON,
Solicitor for and of Counsel
with Complainants.

Affidavit of Walter C. Hemingway.

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

WALTER C. HEMINGWAY, of full age, being duly sworn on his oath, according to law, deposes and says:

1. That he is one of the complainants in the within cause of action.

2. That the complainant Walter C. Hemingway and the complainant Ruth H. Hemingway are husband and wife, having been married on May 5th, 1933.

3. That on or about October 10th, 1934, the defendant Eric T. Ball instituted an action in the Essex County Circuit Court in this State against deponent to recover damages in the sum of $200,000, alleged to have been sustained as the result of the alleged wilful and malicious enticement by deponent of the complainant Ruth H. Hemingway from the defendant.

4. That complainant Walter C. Hemingway is advised that since the agreement (Schedule B annexed hereto) was entered into between complainant Ruth H. Hemingway and the defendant Eric T. Ball while there was a relationship subsisting between them of husband and wife, the said agreement is unenforceable in a court of law, and that it is doubtful whether the release in favor of deponent embodied in the said agreement would constitute a valid defense in the said action at law as against the claim asserted by the defendant against the deponent, but that the rights arising thereunder in favor of deponent are equitable rights which can be protected in this Honorable Court.

Affidavit of Walter C. Hemingway.

5. That defendant Eric T. Ball had full knowledge of the alleged course of conduct between the complainants which it is alleged gives rise to the cause of action asserted in the complaint in the action instituted by the defendant in the Essex County Circuit Court above referred to, and that, with full knowledge, he acquiesced in and consented to the same, both actively and passively, and is estopped by his conduct from now complaining thereof.

6. That a trial of the action at law would cause the publication of certain scandalous matters and the reputation of complainants would be affected thereby, according as credence may be given to the statements and charges of the defendant herein, whereas on final hearing in this Court, the issues would be confined to the questions as to whether the defendant has released or waived the claim against the deponent which forms the basis of the complaint in the pending action at law, and whether he has been estopped by his conduct from prosecuting the said action at law.

7. That reliance will also be placed by complainants upon the provisions of an act of the Legislature of the State of New Jersey providing for declaratory judgments, Uniform Declaratory Judgments Act, under 2 Cumulative Supplements to Compiled Statutes of New Jersey, Sections 163-351, page 238.

WALTER C. HEMINGWAY.

Subscribed and sworn to before me
this 14th day of December, A. D. 1934.

ANTHONY T. AUGELLI,
Master in Chancery of New Jersey.

Affidavit of Ruth C. Hemingway.

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

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

1. That she is one of the complainants in the within cause of action.

2. That the complainant Walter C. Hemingway and deponent are husband and wife, having been married on May 5th, 1933.

3. That deponent was formerly the wife of the defendant, Eric T. Ball, from whom she was divorced pursuant to a certain judgment and decree duly entered in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the 28th day of April, 1933, in a certain cause in that Court depending wherein the said Ruth H. Ball was plaintiff and Eric T. Ball was defendant. The said Eric T. Ball appeared and was represented by counsel in the said suit.

4. That prior to the entry of the said decree of divorce, and while the relationship of husband and wife was subsisting between the said Eric T. Ball and deponent, and on or about March 3rd, 1933, the deponent (then Ruth H. Ball) entered into an agreement with the defendant regarding the custody of their children of said marriage, together with the question of alimony, and wherein and whereby the said deponent (then Ruth H. Ball) renounced any and all claims upon the defendant or his property "now or in the future," and the said defendant on his part specifically renounced any claim that he might then have upon the said Ruth H. Ball "or her future husband."

5. That at the time of the making of the said agreement on March 3rd, 1933, the defendant knew of the intention of the complainants to marry when deponent succeeded in obtaining a decree of divorce from the defendant, and that the complainant Walter C. Hemingway was intended to be referred to by the words of the said agreement "her future husband."

6. That the terms of the said agreement were fully complied with by the parties thereto until on or about September, 1934.

7. That in violation of the express terms of the said agreement, and in fraud of the rights of complainants, on or about October 10th, 1934, the defendant Eric T. Ball instituted an action in the Essex County Circuit Court in this State against the complainant Walter C. Hemingway to recover damages in the sum of $200,000 alleged to have been sustained as the result of the alleged wilful and malicious enticement by the complainant Walter C. Hemingway of the deponent from the defendant. The alleged cause of action asserted in the said complaint by the defendant was in existence at the time of the making of the said agreement Schedule B annexed hereto, and was, as appears by the express language of the said agreement, intended to be released thereby.

8. That complainants are advised that since the said agreement was entered into between the deponent and defendant Eric T. Ball while there was a relationship subsisting between them of husband and wife, the said agreement is unenforceable in a court of law, and that it is doubtful whether the release in favor of complainant Walter C. Hemingway embodied in the said agreement

would constitute a valid defense to said action at law as against the claim asserted by the defendant against complainant Walter C. Hemingway, but that the rights arising thereunder in favor of the said complainant Walter C. Hemingway are equitable rights which can be protected in this Honorable Court.

9. That the defendant Eric T. Ball had full knowledge of the alleged course of conduct between the complainants which it is alleged gives rise to the cause of action asserted in the complaint in the action instituted by the defendant in the Essex County Circuit Court above referred to, and that, with full knowledge, he acquiesced in and consented to the same, both actively and passively, and is estopped by his conduct from now complaining thereof.

10. That a trial of the action at law would cause the publication of certain scandalous matters and the reputation of complainants would be affected thereby, according as credence may be given to the statements and charges of the defendant herein, whereas on final hearing in this Court, the issues would be confined to the questions as to whether the defendant has released or waived the claim against the complainant Walter C. Hemingway which forms the basis of the complaint in the pending action at law, and whether he has been estopped by his conduct from prosecuting the said action at law.

11. That reliance will also be placed upon the provisions of an act of the Legislature of the State of New Jersey providing for declaratory judgments, Uniform Declaratory Judgments Act, under 2 Cumulative Supplements to Compiled

Schedule A.

Statutes of New Jersey, Section 163-351, page 238.

RUTH C. HEMINGWAY.

Subscribed and sworn to before me this 14th day of December, 1934.

ANTHONY T. AUGELLI,
Master in Chancery of New Jersey.

Schedule A.

No. 43,139.
Dept. No. 2

IN THE

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

Filed 1933 Apr. 28 AM 10:19.

E. H. BEEMER, Clerk.
By R. WELTY, Deputy.

RUTH H. BALL,
Plaintiff,

vs.

ERIC T. BALL,
Defendant.

JUDGMENT AND DECREE.

This cause coming on regularly for trial this 28th day of April, 1933, before the Court, without

a jury, upon the issues made by the complaint and answer, plaintiff appearing by Messrs. Brown & Bedford, her attorneys, and defendant appearing by Messrs. Ayres, Gardiner & Pike, his attorneys, and it appearing to the satisfaction of the Court that the Court has jurisdiction of the subject matter of the action and of the parties, and witnesses having been sworn and testimony introduced in support of the allegations of the complaint, and the cause having been submitted to the Court for decision, and the Court having filed its written decision and Findings of Fact and Conclusions of Law, finding and deciding that plaintiff is entitled to the relief prayed for in her complaint.

NOW, THEREFORE, in consideration of the premises and the law, it is by the Court,

ORDERED, ADJUDGED AND DECREED that the plaintiff Ruth H. Ball, be and she is hereby granted an absolute divorce from the defendant, Eric T. Ball, and that the bonds of matrimony now and heretofore existing between plaintiff and defendant be, and the same hereby are, dissolved and each of the parties released from the obligations thereof and restored to the status of an unmarried person.

DONE IN OPEN COURT this 28th day of April, 1933.

B. F. CURLER,
District Judge.

Schedule A.

IN THE

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

No. 45,139. Dept. No. 2.

RUTH H. BALL,
Plaintiff,

vs.

ERIC T. BALL,
Defendant.

I, E. H. BEEMER, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the Judgment and Decree and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, but is still of force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 28th day of April, 1933.

E. H. BEEMER,
County Clerk.

(SEAL)

Schedule A.

I, B. F. CURLER, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. BEEMER, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine handwriting, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

WITNESS my hand this 28th day of April, A.D. 1933.

B. F. CURLER,
One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

Schedule B.

STATE OF NEVADA, }
COUNTY OF WASHOE, } ss.:

I, E. H. BEEMER, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable B. F. CURLER, whose name is subscribed to the preceding certificate, is one of the Presiding Judges to said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 28th day of April, 1933.

E. H. BEEMER,
County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

Schedule B.

March 3rd, 1933.
New Haven, Conn.

Dear Ruth,

The following is my understanding of the verbal agreement we have already made, in view of the fact that you have determined to obtain a divorce from me:

In the event of your divorce and remarriage, you are to have the custody of our son Robert Hutchinson during the school term, should he so desire. I am to have the custody of our older son Ernest Elijah, during the school year. Should

Ernest express the desire and insist on being with Robert, he may also be in your custody, and in the same way, if Robert shall desire and insist upon being with his brother Ernest, he may be in my custody.

While the boy or boys are in your custody you will arrange for their support and education, and I will do likewise while they are in my custody.

It is further understood that either of us may have access to the boys at any reasonable time. If either or both of the boys are with you during the school year, it is understood that they are to be with me from July 1st until September 1st, every year, until they reach maturity, excepting that during the summer of 1933 the boys may be with you during the month of July.

It is understood that neither boy is to be adopted by your future husband.

In making this agreement I renounce any claim that I may now have upon you or your future husband. And in accepting this agreement you in turn have renounced any and all claims upon me or my property, now or in the future. In the event of your divorce you will not ask for alimony.

Faithfully yours,

ERIC T. BALL.

RUTH H. BALL.

Schedule C.

The State of New Jersey, to Walter C. Hemingway:

(SEAL) YOU ARE SUMMONED to answer the annexed Complaint of ERIC BALL, in an action at law, in the Essex County Circuit Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WORALL F. MOUNTAIN, Esq., Essex County Circuit Court Judge, at Newark, this 10th day of October, Nineteen hundred and thirty-four.

JOHN H. SCOTT,
Clerk.

GEORGE S. HARRIS,
Attorney for Plaintiff.

Schedule C.

ESSEX COUNTY CIRCUIT COURT.

ERIC BALL, Plaintiff, *vs.* WALTER C. HEMINGWAY, Defendant.	Action At Law. Complaint.

Plaintiff residing in New Haven, Connecticut, says that:

1. Plaintiff and Ruth C. H. Ball, now Hemingway, were married July 27, 1917.

2. Plaintiff and said Ruth Ball, now Hemingway, lived together as husband and wife from said date of marriage to about March, 1933, and two children were born of said marriage.

3. Plaintiff was throughout said time, dutiful as the husband of said Ruth, and she in turn was fond of and faithful to plaintiff.

4. On or about the month of March, 1932, the defendant began a wilful and designed course of conduct to entice away said Ruth from plaintiff.

5. From said time up to and including the month of March, 1933, the defendant, Walter C. Hemingway, did by blandishments, amatory epistles, secret meetings, endearments, and entertainments, continue to seduce and entice said Ruth until, on or about said time, the said Ruth left the bed and board of plaintiff.

Schedule C.

6. The defendant, Walter C. Hemingway, by reason of his said arts, blandishments, amatory conduct, secret entertainments and endearments, has wilfully and maliciously alienated the affections of said Ruth for plaintiff, her lawful husband.

7. The defendant, Walter C. Hemingway, by reason of the foregoing, has wilfully and maliciously enticed said Ruth away from plaintiff, and robbed him of her conjugal society, and her consortium.

WHEREFORE, plaintiff demands as damages the sum of $200,000.00, together with costs of suit.

GEORGE S. HARRIS,
Attorney of Plaintiff.

Order to Show Cause.

(Filed December 17, 1934.)

IN CHANCERY OF NEW JERSEY.

Between

WALTER C. HEMINGWAY and
RUTH H. HEMINGWAY,
Complainants,

and

ERIC T. BALL,
Defendant.

On Bill, &c.

Order to show cause and restraining order.

This matter being opened to the Court by John Milton, solicitor for and of counsel with complainants, and the Court having read the bill of complaint in the above entitled cause and the affidavits thereunto annexed;

It is, on this 17th day of December, 1934,

ORDERED, that the defendant Eric T. Ball show cause before the Chancellor at the Chancery Chambers, #1060 Broad Street, in the City of Newark, New Jersey, on Wednesday the 2nd day of January, 1935, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said Eric T. Ball should not be enjoined and restrained from prosecuting the action at law now pending in the Essex County Circuit Court, wherein the now defendant is plaintiff and the now complainant Walter C. Hemingway is defendant, and from instituting any other action or actions against the complainant Walter C. Hemingway upon any claim which was released by the said defendant under the

terms of the certain agreement dated March 3rd, 1933; and why a decree should not be made herein construing and determining the validity of the said agreement of March 3rd, 1933, and declaring the rights, status and legal relations of the complainants thereunder;

AND it is further Ordered that in the meantime, and until the further order of this Court, the defendant Eric T. Ball, his attorneys and agents, be restrained from prosecuting the action at law now pending in the Essex County Circuit Court, wherein the now defendant is plaintiff and the now complainant Walter C. Hemingway is defendant, and from instituting any other action or actions against the complainant Walter C. Hemingway upon any claim which was released by said defendant under the terms of the certain agreement dated March 3rd, 1933, referred to in the bill of complaint herein.

AND it is further Ordered, that copies of said bill of complaint and the affidavits thereunto annexed and of this Order, certified to be true by the solicitor of complainants, be served upon said defendant within seven (7) days from the date hereof.

Respectfully advised:

ALFRED A. STEIN, V. C.

LUTHER A. CAMPBELL, C.

Service of a true copy of the within Order to Show Cause and Restraining Order, together with copy of Bill of Complaint and affidavits thereunto annexed, is hereby acknowledged on behalf of Eric T. Ball, the defendant herein, this 17th day of December, 1934.

----------,

Solicitor of Defendant, Eric T. Ball.

Notice of Motion to Strike Bill.

(Filed January 15, 1935.)

IN CHANCERY OF NEW JERSEY.

Between

WALTER C. HEMINGWAY and
RUTH H. HEMINGWAY,
Complainants,

and

ERIC T. BALL,
Defendant.

On Bill, &c.
Notice of Motion.

To JOHN MILTON, Esquire,
Solicitor of Complainants.

Sir:

PLEASE TAKE NOTICE that on the date to which the hearing on the Order to Show Cause issued in the above entitled matter by His Honor the Chancellor, Luther A. Campbell, as advised by Vice Chancellor Alfred A. Stein, on December 17, 1934, was continued; to wit, on January 15, 1935, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, in the Chancery Chambers, Newark, New Jersey, I shall move to strike the Bill of Complaint filed in the above entitled cause and to discharge the stay ordered by the said Court on the following grounds, to wit, because there is no equity in the said Bill of Complaint, in that:

(a) The alleged contract set forth in paragraph 3 of said Bill of Complaint is void both in law

and in equity and contrary to public policy, and this both in Connecticut, where the alleged contract was made, as well as in New Jersey.

(b) Because the allegations of paragraph 8 of said bill afford, if true, a complete and adequate defense at law.

(c) Because the allegations of paragraph 9 of said bill constitute no sufficient ground for invoking equitable jurisdiction.

(d) Because the complainants failed to allege in said bill performance or readiness to perform the alleged contract upon which they now seek relief.

(e) Because the complainant, Walter C. Hemingway, has no standing in the court of equity as a third party beneficiary of the said alleged contract, not being therein sufficiently identified, and if sufficiently identified, then barred from benefit therein because of public policy.

And I shall move to have the stay heretofore ordered by said Court on the said 17th day of December, 1934, discharged for all of the foregoing grounds, and upon the further ground that complainants come into the court of equity with unclean hands, it appearing upon the face of the Bill of Complaint and the affidavits thereto attached, that they committed a fraud on the courts of Connecticut.

GEORGE S. HARRIS,
Solicitor for Defendant.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between WALTER C. HEMINGWAY and RUTH H. HEMINGWAY, Complainants, *and* ERIC T. BALL, Defendant.	On Bill, &c. On order to show cause and on motion to strike. Opinion. 106/355.

MR. JOHN MILTON, for Complainants.

MR. GEORGE S. HARRIS, for Defendant.

SYLLABUS.

1. Contracts for the purpose of facilitating divorce are contrary to public policy and void.

2. The maxim that equity follows the law applies in proceedings involving questions of public policy and where the parties are *in pari delicto*, equity will leave them in the position in which they have placed themselves.

3. A plaintiff's acquiescence in the acts complained of constitute an adequate defense at law to a suit for alienation of affections.

BERRY, V. C.:

This matter is before the Court upon the return of an order to show cause why the defendant

should not be enjoined, *pendente lite,* from prosecuting an action at law in the Essex County Circuit Court against the complainant Walter C. Hemingway. On the return of the order to show cause, the defendant moved to strike the bill on the ground, among others, that the alleged contract set forth in the bill of complaint, and upon which complainants' right of action rests, is void both at law and in equity and contrary to public policy.

The facts appearing from the bill of complaint, and which for the purpose of the motion to strike are to be taken as true, are as follows: The complainant, Ruth H. Hemingway, was formerly the wife of the defendant, was divorced from him in Nevada on April 28th, 1933, and married her present husband May 5th, 1933. Prior to the institution of the divorce proceedings in Nevada and while the parties were living in Connecticut, Ruth H. Hemingway and Eric T. Ball entered into the agreement in question. This agreement, which is annexed to and made a part of the bill of complaint, is in the form of a letter written by Eric T. Ball to his then wife. It recites her determination to obtain a divorce, provides for the custody of the children in the event of Mrs. Ball's divorce and remarriage and concludes with this paragraph:

"In making this agreement I renounce any claim that I may now have upon you or your future husband. And in accepting this agreement you in turn have renounced any and all claims upon me and my property now or in the future. In the event of your divorce you will not ask for alimony."

On October 10, 1934, the defendant instituted an action against Walter C. Hemingway in the

Essex County Circuit Court for damages for the wilful and malicious enticement by Hemingway of the complainant Ruth H. Hemingway from the defendant.

Complainants allege that the institution of the action at law is a breach of the agreement above mentioned. The prayer for equitable relief is based upon an alleged inadequacy of any relief at law by reason of the fact that the agreement between Mrs. Hemingway and the defendant is invalid at law, the parties to the agreement being married at the time the agreement was executed, and can be no basis for any legal right in the complainant Walter C. Hemingway. The bill also alleges that the defendant consented to and acquiesced in the alleged course of conduct which the complaint at law alleged creates the cause of action and is therefore estopped by his conduct from complaining thereof.

It is the settled law of this state, and in this the parties are in substantial agreement, that contracts for the purpose of facilitating divorce are contrary to public policy and void. *Sheehan* v. *Sheehan,* 77 N. J. Eq. 411; *Dennison* v. *Dennison,* 98 N. J. Eq. 230, affirmed 99 Id. 883. The law is the same in Connecticut, in which state the parties were domiciled and the agreement made. *Maisch* v. *Maisch,* 87 Conn. 377, 87 Atl. 729. Complainants attempt to justify their bill upon the ground that the agreement in question was not one to facilitate the procuring of a divorce but was an agreement respecting support and maintenance. Non-collusive agreements respecting alimony settlements or respecting support and maintenance of the wife made either prior to or during the pendency of divorce proceedings are not necessarily void per se. *Dennison* v. *Dennison, supra.*

As was said in *Stokes* v. *Anderson,* 118 Ind. 533, 21 N. E. 311, "it may be that if an action for divorce is pending or if in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable *and confined strictly to the matter of alimony* it will be sustained." (Italics mine.)

Examining this agreement in the light of the allegations of the bill of complaint, the inevitable conclusion is that it was entered into with the idea of facilitating the procuring of a divorce and was conditioned upon divorce. The agreement renounces any claim the defendant has against his then wife or her future husband. This pre-supposes, and in fact the bill alleges, that at that time the defendant knew his wife was proposing to marry Walter C. Hemingway as soon as she could obtain a divorce. By agreeing to waive any claim which he might have against Hemingway, the defendant certainly made it appear to his wife that he would raise no obstacle to her proposed plan to secure a divorce. This is emphasized in the allegation of paragraph six of the Bill of Complaint, that the alleged cause of action in the suit at law against Hemingway was in existence at the time of the making of the agreement.

The agreement in question is of the kind the law abhors and merits the condemnation visited by Chief Justice Beasley upon the agreement which was involved in *Noice* v. *Brown,* 38 N. J. L. 228.

Complainants expend considerable effort in making a point of the (alleged) fact that on the date of the agreement in question Mr. and Mrs. Ball were not living together. This lends no

strength to their argument, for while the marriage exists, the marital duties and all legal sanctions pertaining thereto continue in existence. Whether or not the husband and wife are living together has no effect upon the legality or illegality of a contract entered into during the existence of the marital state. *Noice* v. *Brown, supra.*

A contract is void if when made it is contrary to morality or public policy. When the illegality of a contract is made to appear, the law will not extend its aid to either of the parties. The maxim that equity follows the law applies in proceedings involving questions of public policy, and where the parties are *in pari delicto,* equity will leave them in the position in which they have placed themselves. *Ellicott* v. *Chamberlin,* 38 N. J. Eq. 604 (E & A); *Selinger* v. *Selinger,* 115 N. J. Eq. 261 (Reversed, 117 *id.* 427, but solely on the facts).

It also may be noted that the bill alleges that the defendant, the plaintiff in the law action, consented to and acquiesced in the conduct complained of. Assuming, as we must, that that allegation is true, no ground for equitable jurisdiction is stated because in an action by the husband for the alienation of his wife's affections, his consent to the acts contributes to the injury, is a bar to recovery and is a defense which may be pleaded at law. *Milewsky* v. *Kurtz,* 77 N. J. L. 132.

I shall advise a decree discharging the order to show cause and dismissing the bill.

June 26, 1935.

Order Dismissing Bill.

(Filed July 24, 1935.)

(106/355)

IN CHANCERY OF NEW JERSEY.

Between

WALTER C. HEMINGWAY, and
RUTH H. HEMINGWAY,
Complainants,

and

ERIC T. BALL,
Defendant.

On Bill, &c.
Order Dismissing Bill.

This matter coming on to be heard in the presence of Thomas McNulty, Esq., of the office of John Milton, Esq., Solicitor of the complainants, Walter C. Hemingway and Ruth H. Hemingway, and of George S. Harris, Solicitor of the defendant, Eric T. Ball, and the Court having heard the arguments of the said solicitors, and having considered the same, and being of the opinion that the Bill of Complaint filed herein discloses no cause of action, and it appearing that due notice of said defendant's motion to dismiss the said Bill of Complaint for the cause aforesaid has been given to said complainants;

IT IS thereupon on this 24th day of July Nineteen Hundred and Thirty-five, ORDERED, ADJUDGED and DECREED, that the complainants' said Bill of Complaint be and the same is hereby dismissed, and

Order Dismissing Bill.

IT IS FURTHER ORDERED that the said complainants pay to the defendant the costs of this motion to be taxed, together with the counsel fee to the solicitor of the defendant, George S. Harris, in the sum of Two Hundred Dollars, ($200), and that the said defendant have ten (10) days from the day and date of this Order within which to file his Reply to the complainants' Answer heretofore filed in the law court.

Respectfully advised

MAJA LEON BERRY
V. C.

I consent to the form of the foregoing Order.

JOHN MILTON
Solicitor for Complainants

GEORGE S. HARRIS
Solicitor for Defendant

A True Copy.
GEORGE S. HARRIS.

New Jersey Court of Errors and Appeals

Between

WALTER C. HEMINGWAY and
RUTH H. HEMINGWAY,
Complainants-Appellants,

and

ERIC T. BALL,
Defendant-Respondent.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF COMPLAINANTS-APPELLANTS.

Preliminary Statement.

This is an appeal from a final decree of the Court of Chancery dated July 24th, 1935 (p. 33), dismissing the bill of complaint upon defendant's motion to strike (p. 26).

The bill sought to restrain prosecution of an action at law for damages for alleged alienation of affections in violation of the terms of an agreement entered into by the plaintiff with his then wife, who is now the wife of the complainant. The Court below held generally that the agreement in question was void as contrary to public policy and that, therefore, the bill set forth no cause for equitable relief.

Statement of Facts.

The complainants, Walter C. Hemingway and Ruth H. Hemingway, are husband and wife. Ruth H. Hemingway (formerly Ruth H. Ball) was the

wife of the defendant, Eric T. Ball, with whom she was domiciled in the State of Connecticut, and obtained a divorce from him in the courts of Nevada, *April 28th, 1933,* and shortly thereafter and on *May 5th, 1933,* married her present husband, Walter C. Hemingway, her co-complainant, with whom she is now living at Montclair, in this State. She had two children by her former husband, Ernest and Robert.

On *March 3, 1933,* she entered into the following agreement with her then husband (Ball):

"March 3rd, 1933.
New Haven, Conn.

"Dear Ruth,

"The following is my understanding of the verbal agreement we have already made, in view of the fact that you have determined to obtain a divorce from me:

"In the event of your divorce and remarriage, you are to have the custody of our son Robert Hutchinson during the school term, should he so desire. I am to have the custody of our older son Ernest Elijah, during the school year. Should Ernest express the desire and insist on being with Robert, he may also be in your custody, and in the same way, if Robert shall desire and insist upon being with his brother Ernest, he may be in my custody.

"While the boy or boys are in your custody you will arrange for their support and education, and I will do likewise while they are in my custody.

"It is further understood that either of us may have access to the boys at any reasonable time. If either or both of the boys are with you during the school year, it is understood that they are to be with me from July 1st until September 1st, every year, until they reach maturity, excepting that during the summer of 1933 the boys may be with you during the month of July.

"It is understood that neither boy is to be adopted by your future husband.

"In making this agreement I renounce any claim that I may now have upon you or your future husband. And in accepting this agreement you in turn have renounced any and all claims upon me or my property, now or in the future. In the event of your divorce you will not ask for alimony.

"Faithfully yours,

"ERIC T. BALL.

"Ruth H. Ball."

On *October 10, 1934,* more than a year and a half after the making of the agreement, the defendant Ball began an action in the Essex County Circuit Court against the complainant, Walter C. Hemingway, for alleged alienation of affections, claiming as damages the sum of $200,000.00.

Walter C. Hemingway, the present husband of said Ruth H. Hemingway, was not a party to the agreement of March 3rd, above set out, but the provision "In making this agreement I renounce any claim that I may now have upon * * * your future husband" was included in the agreement for his benefit. That it was the intention of Ball's wife to marry Hemingway in the event she secured a divorce was known to Ball at the time the agreement was made and the bill frankly says so (p. 6). Moreover that fact is plain from the agreement and the subsequent events.

It will be observed that the agreement in question is dated March 3, 1933, and that the cause of action asserted in the law action is for an alleged course of conduct extending from March, 1932, to March, 1933 (Case, p. 22, ll. 30-40), and it is manifest that this "claim" was embraced within and renounced by the agreement referred to.

Ordinarily, the agreement could be set up as a defense in the action at law, but this agreement

was made between husband and wife, and agreements between husband and wife are void at law but are enforceable, under well established principles, in a court of equity.

Hemingway thereupon filed his bill (p. 5) in this cause, his wife joining with him as co-complainant, setting up:

(1) the marriage of complainants;

(2) female complainant's divorce from the defendant Ball; the fact that he appeared and was represented by counsel in the suit;

(3) the making of the agreement of March 3, 1933;

(4) the knowledge of the defendant of the intention of the complainants to marry and identifying the complainant Hemingway as her "future husband";

(5) compliance with the terms of the agreement;

(6) the breach of the terms of the agreement in fraud of the rights of the complainants by instituting the action at law for alleged alienation of affections;

(7) the fact that the agreement was unenforceable at law and the doubtfulness of the release of the complainant Hemingway as a valid defense in the action at law as against Ball's asserted claim, alleging that the rights of Hemingway thereunder were equitable rights enforceable in the Court of Chancery;

(8) alleging that the defendant Ball had full knowledge of the alleged course of conduct between the complainants which he alleged gave rise to the cause of action asserted in the law court and averring that with full knowledge he ac-

quiesced in and consented to the same, both actively and passively, and is estopped by his conduct from complaining thereof;

(9) that a trial of the action at law would cause the publication of certain scandalous matters and the reputation of complainants would be affected thereby, according as credence may be given to the statements and charges of the defendant, whereas on final hearing in the Court of Chancery the issues would be confined to the questions as to whether the defendant released or waived the claim against Hemingway or whether he was estopped by his conduct from prosecuting the action at law;

(10) reliance was also placed upon the provision of the Uniform Declaratory Judgments Act.

Annexed to the bill and made part thereof was a copy of an exemplified decree of divorce, copy of the agreement of March 3, 1933 and a copy of the summons and complaint in the law action. The bill prayed for a permanent restraint against the prosecution of the action at law, a declaratory judgment construing and determining the validity of the agreement declaring the rights, status and legal relations of the complainants thereunder and for general relief.

The bill was verified by the complainants and upon its filing an order to show cause issued containing a restraint. Upon the return of the order to show cause the defendant Ball offered no proof but moved to strike the bill of complaint and the Court made the order appealed from dismissing the bill of complaint.

The ground of the motion was that there was no equity in the bill of complaint in that;

(a) the alleged contract was void at law and in equity as contrary to public policy, both in Con-

necticut, where the agreement was made, as well as in New Jersey;

(b) that the allegations of paragraph 8 of the bill (that the defendant acquiesced in the course of conduct of which he complained in his action at law) afforded a complete and adequate defense at law;

(c) because the allegations of paragraph 9 of the bill (that a trial at law would cause the publication of certain scandalous matters and the reputation of the complainants would be injured thereby, whether the statements and charges of the defendant were true or false) constituted no sufficient ground for invoking equitable jurisdiction;

(d) because the complainants failed to allege performance or willingness to perform;

(e) because complainant, Walter C. Hemingway, has no standing in the court of equity as a third party beneficiary, not being sufficiently identified, and if sufficiently identified then barred from benefit because of public policy, and moving to vacate the stay granted on the filing of the bill upon all of the foregoing grounds and upon the further ground that complainants come into the court of equity with unclean hands, it appearing upon the face of the bill and the affidavits that they committed a fraud upon the Courts of Connecticut.

The Vice-Chancellor was of the opinion that the conclusion was "inevitable" that the agreement in question was "entered into with the idea of facilitating the procuring of a divorce and was conditioned upon divorce"; that by waiving any claim Ball might have against Hemingway, he "certainly made it appear to his wife that he would raise no obstacle to her proposed plan to

secure a divorce''; that the agreement was illegal because contrary to public policy, and that since the parties are in *pari delicto,* equity will leave them in the position in which they have placed themselves; and further, that so far as the question of estoppel was concerned it would afford a complete defense to the action at law and presented no ground for equitable jurisdiction (S. C., pp. 28-32).

The grounds of appeal (pp. 3-5) are that it was error to dismiss the bill of complaint and that it should have been retained until final hearing; that the bill sets forth an equitable cause of action, which, if established upon the final hearing of the cause, would entitle complainants to the relief prayed for, namely, a permanent restraint against the prosecution of the action at law; that the attack made upon the agreement pleaded in the bill, namely, that it was void as contrary to public policy, was a matter of defense not available on the motion to strike out, but to be determined upon the final hearing of the cause; that the Court erroneously dismissed the bill on motion without taking proofs or without affording complainants an opportunity to show the situation of the parties at the time the agreement was made, or the circumstances surrounding the making of the agreement, all of which are material in a determination of the question whether or not the agreement was void as being contrary to public policy; and that the Court erroneously concluded that the agreement was void as contrary to public policy.

For convenience of treatment, these grounds of appeal will be argued under the following heads:

I. The bill of complaint sets forth an equitable cause of action and it was error to dismiss it on motion before answer filed and proofs taken.

II. The agreement pleaded in the bill did not contravene public policy, and it was error to dismiss the bill.

A. The agreement was not within that class of agreements to facilitate the procuring of a divorce.

B. The complainant, Hemingway, for whose benefit the agreement was made, was nevertheless entitled to the relief sought by him, because he was not a party to the agreement and was, therefore, not to be denied relief as in *pari delicto*.

POINT I.

The bill of complaint sets forth an equitable cause of action and it was error to dismiss it on motion before answer filed and proofs taken.

In a consideration of this appeal the fact that assumes paramount significance is that the Court dismissed the bill on defendant's motion before answer was filed and proofs taken. The Court disposed of the complainants' substantial rights in a summary manner and foreclosed them from offering proof showing the precise situation of the parties at the time the agreement was made and the circumstances that surrounded the making of the agreement, which proofs were competent and vital to the complainants in a consideration of the question of legality of the agreement. It is submitted that the objection that the agreement was violative of public policy was matter of defense which should have been pleaded and was not available to the defendant on a motion to strike. In the very nature of things this must be so, because the presumption of law

is always in favor of the validity of agreements, and this presumption can be rebutted only by clear and certain evidence. No evidence whatever was offered by the defendant in this case. The bill of complaint made an appeal to the conscience of the Chancellor. The alleged illegality of the contract was a proper matter of defense. It should not have been disposed of summarily on the motion. We think even in a court of law it would afford no basis for striking a complaint. The Court should have inquired into and given consideration to the substance of the transaction. The law regards the form of the transaction; equity ignores the form and looks to the substance.

The gravity and importance of the adjudication below, to the parties, is manifest; for, if the agreement were collusive, and entered into for the purpose of facilitating the procurement of a divorce, it is in effect a finding that the decree of divorce was procured through fraud or at least a cloud is cast upon that decree. The divorce was obtained more than a year and a half before the defendant started his action at law for alienation of affections. He appeared by counsel in the divorce suit and has never made any direct attack upon that decree. The order of the Court below dismissing the bill, and the opinion of the Court, impeach the validity of the marriage of complainants, and seriously affect their personal and property relations, in ways which are entirely obvious.

On the defendant's motion to strike the bill, as on a demurrer under the old practice, the allegations of the bill must be taken as true. The defendant's motion admitted the following material facts:

(1) On April 28, 1933, the female complainant secured a valid decree of divorce from him in the courts of Nevada in a suit in which he appeared

and was represented by counsel and filed an answer (Case, pp. 5, 15, 16), and that the defendant urged every defense that was available to him.

(2) The making of the agreement of March 3, 1933, and that at the time of its making the female complainant had a fixed cause of action for divorce, and that she had a vested determination to obtain a divorce from him.

(3) That he knew that she contemplated marrying the complainant Hemingway, her present husband, when she obtained her divorce.

(4) That he referred to the complainant Hemingway when he employed the words "your future husband" and intended to release any claim he may have asserted against Hemingway.

(5) That the decree of divorce has never been challenged by him, but that on the contrary after the remarriage of his wife he accepted the benefits of the agreement and acted on it for a year and a half after its making.

(6) That in violation of the terms of the agreement and in fraud of the rights of the complainants he comes into this jurisdiction and institutes an action against Hemingway for alleged alienation of affections.

(7) That the alleged cause of action was in existence at the time the agreement of March 3, 1933, was entered into and was intended to be released thereby.

(8) That defendant with full knowledge of the alleged course of conduct complained of by him in his action at law, acquiesced in and consented to the same, both actively and passively.

(9) That a trial of the action at law would cause the publication of certain scandalous matters, and

the reputation of complainants would be affected thereby to their injury, as credence may be given to his statements and charges.

Certainly in the absence of any attack upon it, the decree of the courts of the State of Nevada must be accepted and accorded full faith and credit by the courts of New Jersey, as required by the Constitution of the United States and the Federal legislation adopted thereunder to carry the constitutional mandate into effect.

The Theory of the Bill of Complaint.

Contracts between husband and wife are void and unenforceable at law. They are enforceable in equity *to the extent that they are fair and just. Fike* v. *Fike,* 3 N. J. Misc. 485, 486 (Vice-Chancellor Buchanan); affirmed *per curiam* (99 N. J. Eq. 424); *Lister* v. *Lister,* 86 N. J. Eq. 30 (at p. 48); *Hollingshead* v. *Hollingshead,* 91 N. J. Eq. 261 (at p. 278); *Demarest* v. *Terhune,* 62 N. J. Eq. 663 (at p. 667); Section 14 of the Married Woman's Act, 3 N. J. Compiled Statutes 3237; *Turner* v. *Davenport,* 61 N. J. Eq. 18, 20, affirmed 63 N. J. Eq. 228.

The agreement in question was made between husband and wife and was in part for the benefit of the complainant, Walter C. Hemingway.

That a person for whose benefit a contract is made, although he is not a party to the contract and the consideration does not move from him, may enforce it, has long been settled in this state. *Joslin* v. *New Jersey Car Spring Co.,* 36 N. J. L. 141, *Pruden* v. *Williams,* 26 N. J. Eq. 210, 212.

From a persuasion that the agreement of March 3, 1933, was void at law and, therefore, not available to Hemingway as a defense in the action for alienation of affections, the bill in this cause was filed. His wife was joined as a co-complainant

because it was essential that all of the parties be before the Court. If the defendant (plaintiff in the action at law) were permitted to maintain the action in flagrant disregard of his express renunciation of the claim and if that renunciation were unavailable in the action to the defendant, a fraud and an injustice would result.

Ever since the *Earl of Oxford's Case,* 1 Ch. Rep. 1, it has been the settled law that equity will interfere to restrain proceedings at law whenever, through fraud or other causes, one of the parties in an action at law obtains or is likely to obtain an unfair advantage over the other so as to make the legal proceedings an instrument of injustice. *Smithurst* v. *Edmunds,* 14 N. J. Eq. 408; *Metler* v. *Metler,* 18 N. J. Eq. 270; aff'd 19 N. J. Eq. 457; *Worrell* v. *Church,* 23 N. J. Eq. 96; *Hall* v. *Piddock,* 21 N. J. Eq. 311.

The suit is predicated upon another theory. The bill alleges (par. 10, Case, p. 14) that a trial of the action at law would cause the publication of certain scandalous matters and the reputation of complainants would be affected thereby, according as credence may be given to the statements and charges of the defendant, whereas on final hearing in the Court of Chancery the issues would be confined to the questions as to whether the defendant has released or waived the claim against the complainant Hemingway, and whether he has been estopped by his conduct from prosecuting the action at law.

This allegation, we submit, affords an additional equity to justify a court of equity in entertaining the suit. The case of *Boneisler* v. *Foster,* 154 N. Y. 229 (Court of Appeals), is directly in point. In that case the plaintiff's testator sought a decree restraining the defendant from prosecuting an action at law. The defendant had charged that the testator was the father of certain of her

children; that he had promised to marry her, etc. She threatened to sue him, then she executed an instrument whereby she released him from all claims and demands. Thereafter, despite the release, she instituted an action at law against him. Thereupon a further settlement was made between them and she agreed to discontinue the action and to release him from all claims. Two years later she brought another action. In sustaining the right of the defendant at law to an injunction the Court said, page 238:

> "The difference to the plaintiff between a trial of the action at law, in which all the scandalous matters would be made public and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issue would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial."

And the Court further said, page 239:

> "A specific performance of that agreement is indispensable to the security of the plaintiff against defendant's charges and revelations as to his past conduct, whether real or fabricated, which might affect his reputation and character in the community. This security he must be deemed to have obtained by his contract."

A further theory of the bill is that the defendant Ball knew of the alleged course of conduct of which he now complains and consented and acquiesced in it and is, therefore, estopped by his conduct from complaining thereof (par. 9, p. 14).

The learned Vice-Chancellor below was of the opinion that this was a defense which could be set up in the law action and if sustained would be a bar to the plaintiff's action, and in this he was undoubtedly correct, but we submit that the Vice-Chancellor entirely overlooked the additional equity upon which the complainants relied, and which was admitted by the motion to strike, that a trial of the action at law would result in the publication of certain scandalous matters which, whether true or false, would result in injury to the reputation of complainants, and that additional equity required the retention of the bill for final hearing.

The doctrine of estoppel is one of equitable origin but is now applied at law, as well. The jurisdiction to apply the doctrine is concurrent. In the absence of other equitable considerations, the relief at law is ordinarily complete and adequate. Equity, however, will not refuse to interpose when the remedy is more nearly complete and perfect in equity than at law. *N. Windholz & Son* v. *Burke,* 98 N. J. Eq. 471, 473. The difference between a trial at law and a hearing on the bill in this case is, as the New York Court of Appeals has said, "quite perceptible and substantial," and the bill should have been retained because the relief in equity would be "more nearly complete and perfect" than at law.

The equitable jurisdiction exercised in contentious matters by the Court of Chancery at the end of the eighteenth and beginning of the nineteenth century fell under three main heads: (1) The exclusive jurisdiction; (2) the concurrent jurisdiction; (3) the auxiliary jurisdiction.

Where the jurisdiction was concurrent, and an action was begun in a law court, equity did not withdraw it from the law court unless the court of equity was able to give a more perfect remedy or

the nature of the case admitted of its being better tried by the procedure of a court of equity than by that of a court of law.

South East Rail Co. v. *Martin* (1848), 2 Ph. 758;
South East Rail Co. v. *Brogden* (1850), 3 Macn. & G. 8;
Ochsenbein v. *Papelier* (1873), 8 Ch. 695;
Ashburner's Principles of Equity (2nd ed.), London 1933.

We submit that the nature of this case admits of its being better tried on the issue of estoppel than it could be in a court of law. In equity the proofs can be confined to the issue of estoppel and the injury to the complainants' reputation avoided and this, we submit, affords a substantial additional ground for equitable intervention.

In the case of *Miller* v. *Miller,* 284 Pa. 414, 131 Atl. Rep. 236 (1925) the Supreme Court of Pennsylvania reversed a summary judgment of the lower Court based upon the theory that the contract was one entered into for the sole purpose of securing a divorce, and was, therefore, contrary to public policy, which alleged illegality was claimed to be apparent on the face of the agreement. The plaintiff in that case, the divorced wife of defendant, had left the family home by reason of his misconduct. At the suggestion of his father an arrangement was entered into whereby certain shares of stock were deposited with a trustee, the income derived to be applied for the use of plaintiff. If the dividends from the stocks were less than $3,200.00 a year the husband was to make stipulated payments. *Prior to the making of the agreement plaintiff employed an attorney to apply for a divorce and shortly thereafter a libel was filed which was followed by the entry of a final decree and thereupon the stock was handed over*

to plaintiff. No dividends were declared and defendant paid the monthly amount agreed to until January, 1923. This suit was brought to recover the installments due from that time.

To the plaintiff's statement of claim an affidavit of defense was interposed, raising solely the question of law as to the right to recover upon the contract, averring that the illegality was apparent on its face. It was contended that the real consideration for the promise to pay was the obtaining of a divorce and, therefore, the contract was unenforceable as repugnant to public policy. This legal position was sustained by the Court below and judgment entered for the defendant. The plaintiff appealed. Justice SADLER, speaking for the Court, said at page 237 of Atlantic Reporter:

> "* * * all material facts averred in the statement shall, for present purposes, be taken as provable, and the benefit of reasonable inferences to be drawn therefrom must be given the plaintiff * * *.
>
> "The contract in dispute sets forth the purpose of the wife to immediately apply for an absolute divorce, and that the husband recognized his legal liability to her for support and maintenance. There follows the provision for the transfer of the stock, before mentioned, to one named, 'to be by him held in trust for the husband until such time as [his] said wife procures an absolute divorce from [him], within the next eight months, succeeding the date hereof, when and at which time he shall transfer and assign the same to [his] wife absolutely.' It is further stipulated that, if no divorce is obtained, the securities shall be returned to the settlor, and the agreement also sets forth the understanding as to the amount to be paid if the stock be given to the wife and dividends thereon remain unpaid. Plaintiff avers in the statement filed that this arrangement was made solely to obtain reasonable maintenance, and fixed a sum less than could have been secured from a court of

> competent jurisdiction, either in a proceeding for nonsupport, or as alimony. It is further claimed, the stipulation referring to a divorce was merely incidental, and was in no way dishonestly entered into for the purpose of facilitating the granting of a decree, or to assure that an application to the court would remain unopposed. In the opinion filed below, it is said that the writing alone must control, and, since there was no suggestion of fraud, accident, or mistake in its execution, parol evidence to explain the understanding of the parties was inadmissible. The plaintiff asserts there was no collusion to secure a divorce, and that the facts averred disclose the intention of the parties, negativing the existence of any such purpose, and therefore the contract cannot be properly construed to be one having for its end the performance of an act opposed to public policy, and, as a result, unenforceable."

The Court then points out that family settlements are always favored, and, when made to settle controversies between husband and wife, will be enforced if legally possible.

And the Court then observed that both parties conceded that if the contract had for its sole purpose the securing of divorce, the agreement would be held contrary to public policy, and therefore inoperative. Likewise, an arrangement tending to facilitate the granting of a decree is invalid, and where collusion appears, as shown by a promise not to defend, or to furnish evidence for the libelant, it cannot be sustained. But the Court said:

> "However, if the facts negative this idea, a settlement for support or alimony will be upheld, though a divorce was in the minds of the parties (citing cases), or the causes upon which the application is to be based are by stipulation limited" (citing authorities).

The Court further said, page 238:

> "In the present case, the wife had been compelled to separate by reason of the wrongdoing of the husband, and accepted the provision for her support as a result of the intervention of his father. Defendant bound himself to pay a less sum than could likely have been obtained in an action for nonsupport, or as alimony, in view of his wealth. The application for divorce was under advisement, prior to the date of the contract, and counsel had been consulted with the intention of instituting the necessary proceeding. If the facts averred in the statement are true, there was no collusion to secure the decree subsequently obtained on valid grounds. *The defendant did not in any way bind himself not to present a defense, or agree to furnish evidence or aid the libelant, if she determined to make application for the permanent dissolution of the marriage tie.*" (Italics ours.)

And further:

> "As was said in *Kuhn* v. *Buhl, supra,* at page 373, 96 A. 985 (quoting from 21 A. & E. Enc. (2d Ed.) 1099:
>
> > 'Where a written instrument is attacked upon the ground that the contract is offensive to law and violative of public policy, the whole transaction should be inquired into.'
>
> "Each case must be governed in some degree by its own circumstances. *Irvin* v. *Irvin, supra,* p. 545. The words used in a writing do not necessarily control. 13 C. J. 509. 'There can be no doubt that the court may look beyond the form into which the parties have cast their contract. * * * In determining the real character of a contract, courts will always look to its purpose' (6 R. C. L. 836), and will find this from a consideration of the written instrument in its entirety, keeping in mind the preliminary negotiations

> leading to its execution. 6 R. C. L. 837, 839; 13 C. J. 542. In considering the writing, where two interpretations are possible, or the words used may be deemed either as evidence of a valid or legal purpose, or the contrary, the former construction will be accepted. 13 C. J. 539. The mere fact that the evidence offered is in writing does not necessarily justify the court in conclusively determining its meaning. If unaffected by parol evidence, it is within the province of the court to interpret it, but where the question is not on the interpretation of the writing, but on its effect as evidence of a collateral fact, it is to be submitted to the jury. *Reynolds* v. *Richards,* 14 Pa. 205.
>
> "Plaintiff is entitled to be heard, and given leave to produce the proposed proof, negativing the suggestion that the contract was entered into in consideration of an agreement to secure a divorce or to facilitate the granting of one. If this can be satisfactorily done, a recovery may be had; otherwise the defendant must prevail in his contention."

The Court ordered the judgment below reversed.

We submit that the opinion of the Supreme Court of Pennsylvania in the foregoing case is an accurate and authoritative statement of the principles of law which should have governed and controlled the Court of Chancery on the defendant's motion to strike, and that the Court should have denied the motion and retained the bill until final hearing; that the claim that the agreement was void as contrary to public policy was a matter of defense, which the defendant should have pleaded, and that the Court below should have inquired into the entire situation on the final hearing of the cause. Under the following point we shall show that the agreement in question is clearly one not made to facilitate the procuring of a divorce.

POINT II.

The agreement pleaded in the bill did not contravene public policy, and it was error to dismiss the bill.

A.

The agreement was not within that class of agreements to facilitate the procuring of a divorce.

The agreement of March 3, 1933, will be read in vain for language from which either expressly or by implication, the husband consented that this wife should secure a divorce; or that he would not offer a defense to her suit; or that she should claim a divorce upon a non-existent ground; or that any fact was to be concealed from the court to which she applied for her divorce; or that the Court was to be in any way imposed upon. The decree of divorce recites that the defendant appeared and was represented by counsel in the suit and filed an answer, and the presumption must be that he offered whatever by way of defense he had to her suit, and that thereupon it was judicially determined that she was entitled to a divorce.

The agreement of March 3, 1933, placed no premium upon the wife's securing a divorce; on the contrary, its tendency was in the opposite direction. Its provisions, drafted by the husband, were such as to discourage her from prosecuting the course she had determined upon.

The language of the agreement, "In making this agreement I renounce any claim that I may now have upon you or your future husband", we submit, in no way justified the Court in summarily dismissing the bill in advance of a hearing on the ground that it rendered the agreement void and unenforceable as contrary to public policy.

We submit there is nothing illegal or contrary to public policy in the defendant's agreement to

release any claim he had against Hemingway whether this provision of the agreement be viewed either at the time of the making of the agreement or at the time when it was to take effect.

In *Noice* v. *Brown,* 38 N. J. L. 228, cited by the Court below and relied upon by the defendant, a married man entered into an agreement to marry when he should secure a divorce. He secured the divorce and breached the agreement. The promisee sued him for damages, setting up the agreement. It appeared affirmatively from the declaration that she knew at the time the agreement was made that he was a married man. Chief Justice Beasley brushed aside the contention of the plaintiff that the legality of the contract was to be determined as of the time set for its performance and held that the validity of the agreement was to be determined as of the time it was entered into. At that time it was clearly illegal. As we have said there was nothing illegal in the husband releasing any claim that he might have against Hemingway, either at the time the agreement was made or at the time when it was to take effect. In the instant case the time when this provision of the agreement was made and the time when it was to take effect coincide. The language is: "*In making this agreement* I *renounce* any claim I *may now have* upon you or your future husband." The motion to dismiss admits the charge of the bill that the defendant intended by the words "your future husband" the complainant Hemingway. The words are in the present tense and the release was effective upon the "making" of the agreement. It was not to be effective upon divorce; it clearly would not release any claim which arose after its "making".

It was the wife here who was determined to secure a divorce. It may have been desirable to her also to have the defendant release "her future husband" from any claim, but we are at a com-

plete loss to understand how the husband's agreement to release Hemingway can be possibly said to be an agreement to facilitate the "procuring" of a divorce. What did the agreement to release Hemingway have to do with the "procuring" of the divorce? Is there anything in the bill of complaint or in the situation to suggest that the wife would not have pursued her determination to secure a divorce whether or not the defendant agreed to release Hemingway of any claim? The learned Vice-Chancellor below said that by this provision the defendant "certainly made it appear to his wife that he would raise no obstacle to her proposed plan to secure a divorce." It must be plain from what has already been said that this conclusion is a *non-sequitur*. There is not a word anywhere in the agreement by which it is suggested, let alone made certainly to appear, that the defendant would raise no obstacle to his wife's securing a divorce, and the facts admitted by the defendant's motion to strike not only do not bear out but expressly negative the conclusion of the Court below. The decree of divorce recites that the defendant appeared and was represented by counsel and contested the wife's suit. This conduct of the defendant, following immediately after the making of the agreement, certainly makes it plain to us that it was not his notion to raise no obstacle to his wife's plan to secure a divorce. His attitude is further manifested by the very terms of the agreement drafted by him, most of which were obviously designed to place obstacles in the way of the wife in her plan to secure a divorce. The agreement provided that in the event of her divorce she was not to ask for alimony. In no sense can this provision be said to be promotive of the wife's securing a divorce, and while it might be said that under some circumstances such a provision might hold out an

inducement to the husband to refrain from resisting her application for a divorce the situation here repels any such inference. In fact it had no such effect.

The bill alleges that at the time the agreement was made the defendant knew of the intention of the complainants to marry when the female complainant secured a divorce. Of course he knew about it. That fact is plain from the agreement and the situation which followed. We see no illegality in the hopes, expectations and intentions of the complainants to marry, when they acquired a status where they were free to marry. True it is that if they made an agreement to marry while one was already married, the courts would not enforce it, but no such question is presented here.

The parties to the agreement being domiciled in Connecticut at the time of the making thereof and the agreement having been made in that state, the question of the legality of the agreement may properly be determined by the law of that jurisdiction. *Dennison* v. *Dennison*, 98 N. J. Eq. 230, 235; affirmed 99 N. J. Eq. 883.

The important cases in Connecticut on the subject are the following:

Goodwin v. *Goodwin*, 4 Day 343;
McCarthy v. *McCarthy*, 36 Conn. 177;
Seeley's Appeal, 56 Conn. 202; 14 A. 291;
Maisch v. *Maisch*, 87 Conn. 377; 87 A. 729;
Mills v. *Mills*, 119 Conn. 612, p. 5 (decided April, 1935).

In *Goodwin* v. *Goodwin, supra*, a case discussed by the late Vice-Chancellor Garrison in *Sheehan* v. *Sheehan*, 77 N. J. E. 411, at p. 415, it appeared that after the husband had committed adultery and contracted venereal disease, he and the wife

covenanted through a trustee that they would dissolve, as far as they could, the obligations of the marriage, that he would provide for her separate maintenance, and that she would be no further chargeable to him, and on his furnishing money and testimony she would pursue the proper means to obtain a divorce as soon as practicable, the suit, however, to be under the direction of the husband or his attorney.

A majority of the Court held this agreement contemplated a deception of the Court. The fact that the suit was to be under the absolute control of the husband and at his expense was to be concealed from the Court. Its discovery would have resulted in a dismissal of the petition. The true cause of divorce was to be concealed from the Court and a false one substituted in its place, and the Court thereby imposed upon. The majority held the agreement fraudulent and void as tending to mislead the Court and interfere with the administration of justice. Four of the judges dissented. In their view no fraud appeared in the facts; that, it being the duty of the husband to furnish his wife, who had no money, with the means to procure a divorce, and afterward to pay alimony, there was no fraud in his promising to do what he was under a legal duty to perform; that the object of placing the control of the divorce suit in his hands having been merely to prevent the fact of his having had venereal disease from becoming public, there was no imposition upon the tribunal in the omission of an incident which could not influence the result, the other proofs being ample. It was not denied by the dissenting judges that a suit for divorce gotten up solely by the defendant, under his own control and for his own benefit, would on this fact appearing be dismissed.

In *McCarthy* v. *McCarthy, supra,* the defendant had previously preferred a petition for divorce against his wife. In the course of the trial, upon the suggestion of the trial judge, negotiations took place between the counsel of both sides with a view to a compromise as a result of which an agreement was entered into that the wife should withdraw her opposition to the petition for divorce, that a guardian should be appointed for the children, and that certain real estate of the father should be conveyed to them. The premises were accordingly conveyed and upon representation made to the Court by counsel that the matter had been satisfactorily arranged, a decree of divorce was granted in favor of defendant. The defendant refused to surrender possession, whereupon the children brought this action in ejectment. The husband objected that the conveyance of the title to the premises in question to the plaintiff was made pursuant to and as part of a collusive and illegal agreement between defendant and his wife in relation to a divorce. The trial court found in favor of the children and the defendant moved for a new trial. The Court held that even on the assumption that the divorce was obtained by means of a collusive and illegal agreement, the title of the plaintiffs was good since they were not parties to a collusive agreement, and refused a new trial.

In *Seeley's Appeal, supra,* the wife was divorced from her husband upon her petition. During the pendency of the proceeding, they entered into a written agreement as follows:

> "Whereas, unhappy differences exist between myself, the undersigned, and my husband, Samuel A. Seeley; and whereas, I propose to apply for a bill of divorce from my said husband: Now, this agreement witnesseth that, in consideration of the sum of five

> hundred dollars to me in hand paid, the receipt whereof is hereby acknowledged and in further consideration of the sum of five hundred dollars to be paid at the time the divorce shall be granted, I, the undersigned, Sarah C. Seeley, hereby agree to make no claim for alimony upon said petition for divorce, and further agree that said sum of one thousand dollars shall be in full of all demands against said Samuel A. Seeley for alimony, and for any other cause or demand. Dated December 17, 1873. Sarah C. Seeley."

On the day of the decree of divorce and after the decree had been passed, she received $500.00 from her husband, and delivered to him a release from all claims of alimony. Thereafter he died, and she filed her petition in the Probate Court, praying that dower might be set out to her in his real estate. The Probate Court dismissed the petition; the Superior Court set aside the decree of the Probate Court; on appeal the Supreme Court of Errors affirmed the decree of the Superior Court.

The Court held, that Courts of the State of Connecticut will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other, and was further of opinion that the agreement in question tended to suppress evidence. The Court further held that in the interests of the wife as well as upon reasons of public policy the law refuses to enforce any contract imposed upon her during coverture by her husband barring her from obtaining dower or alimony. The doctrine of this case has been explained and distinguished in the two later cases in the Supreme Court of Errors presently to be discussed.

In *Maisch* v. *Maisch, supra,* plaintiff and her then husband, the defendant, while resident in

South Dakota, there entered into a contract reciting that plaintiff had commenced an action for divorce in a South Dakota court; that defendant had appeared and answered; that it was desirable to settle their property affairs and rights independently of the divorce proceedings, and to agree upon the amounts to be allowed plaintiff as attorney's fees, costs and alimony rather than to submit these matters to the Court for adjudication, leaving to the Court the question only of whether the plaintiff was entitled to an absolute divorce. The contract then provided for the payment of agreed allowances and all costs and of $20 a week, *in the event of a decree of divorce being granted,* during the defendant's life and until the death or marriage of the plaintiff.

After the execution of the contract, and on the same day, a decree of absolute divorce was granted to the plaintiff.

Plaintiff brought her action to recover damages for the defendant's neglect and refusal to make the payments required by the agreement.

A demurrer to the complaint, on the ground that the contract was against public policy and void was overruled.

The defendant then answered, denying that anything was due under the contract, and in a second defense set up that the contract was against public policy and void.

It was not pleaded by the defendant that the divorce proceedings were in fact collusive or fraudulent.

Judgment was for plaintiff, and defendant appealed. The Supreme Court of Errors affirmed the judgment for the plaintiff.

In his opinion for the Court, BEACH, J., stated that the principal question "*is whether the contract sued on is on its face, and without a showing*

that it was in fact intended or used for collusion or suppression of evidence, so contrary to the public policy of Connecticut that it cannot support the judgment."

The Court stated that all were in agreement that contracts for the purpose of facilitating divorce are contrary to public policy. Instances of such contracts were named as follows: Where the agreement is to assist each other in obtaining the divorce; where the agreement is for the non-appearance of one of the parties; where the agreement is to pay money in consideration of the promise of the wife to prosecute and sue for a divorce.

The Court stated that there was a difference of opinion among the courts of various jurisdictions, as to the validity of contracts made after divorce proceedings have been independently commenced or determined upon, and where the agreement is in fact an amicable arrangement as to the amount of alimony to be paid in the event of a divorce being granted. In some jurisdictions, contracts of this general character are held to be contrary to public policy.

Since the contract was made in South Dakota, the Court was guided by the status of the law in that jurisdiction. According to the law of South Dakota, the contract in suit appeared to be valid; the policy of that State is only to outlaw agreements which are collusive, if they are intended to alter, or promote, the dissolution of the relation of husband and wife.

If a party to an agreement is not asked to commit, or to appear to have committed, or to be represented in court as having committed, any act constituting a cause for divorce, or if the party is not asked to refrain from appearing in the contemplated action for divorce, or if it appears that

the party did not agree to refrain from making a defense, the agreement is not illegal.

The Court then considered the question of whether or not the enforcement of the agreement would be violative of the domestic policy, and concluded that the contract was enforceable in the courts of the State of Connecticut. The following passage from the opinion is of great significance:

> "No unyielding principle can be invoked, but each case must be determined as a matter of comparative justice. In the present case the contract has been fully performed by the plaintiff; in reliance on the defendant's express agreement, valid where made, she has omitted to demand alimony from the court and has now lost her opportunity of doing so; *there is no showing that the contract was actually made for the purpose of collusion or suppression of evidence, and no claim that the decree is for any reason invalid,* so that nothing remains unperformed except a financial obligation which the defendant seeks to evade. The public policy of Connecticut is not invoked to prevent the doing or continuance of any act forbidden by our law, but as a token of our disapproval of a past transaction in South Dakota between residents of that state which was unobjectionable under their law. *A disapproval, moreover, founded on a general objection to the making of such contracts and not upon any special objection to this particular transaction.*
>
> "We think it clear that the state of Connecticut is not deeply concerned as a matter of public policy in reprehending this contract. The right of each state to determine as a matter of public policy the conditions upon which the marital relations of its citizens may be dissolved is fully recognized; and it would seem that the same policy ought to control the validity of contracts made in view of pending divorce proceedings. It is not part of the public policy of Connecticut to be more careful than the state of Dakota itself in pro-

tecting the divorce courts of Dakota against collusion. We have assumed that the policy of the state of Connecticut is opposed to contracts between husband and wife made after divorce proceedings had been instituted and with a view of fixing by mutual agreement the amounts to be paid by the husband in lieu of alimony. It may be doubted perhaps whether the case of Seeley's Appeal, 56 Conn. 202, 14 Atl. 291, goes quite to this length, for that decision is complicated by the fact that the wife was at the time of the contract legally incapable of contracting with her husband. It is also pointed out in Seeley's Appeal that the contract in that case was objectionable because the court was left to rest a decree upon evidence which did not include all the facts in the case. This objection goes to the root of the matter. *Such contracts when made not to facilitate divorce, but solely for an amicable settlement of property affairs, and made in view of divorce proceedings already independently instituted or determined upon, are not necessarily contrary to public policy and void, unless concealed from the court.* If submitted to and approved by the court with full opportunity for scrutiny before the decree, they are unobjectionable; but, if concealed from the court, they are contrary to public policy and will not be enforced unless in extreme cases where the refusal to do so would assist in the perpetration of an intentional fraud.

> *"It does not appear whether the contract here in question was or was not concealed from the South Dakota court; but, as it was valid, there can be no presumption of any motive for concealing it. On the whole record, the contract is not so violative of the public policy of this state as to prevent a recovery."*

The above quotation, upon analysis, shows that the conclusions of the court were as follows:

1. Each case in which it is claimed that the agreement is void because contrary to public policy, is to be determined upon its own facts.

2. It is an important consideration that the contract was fully performed by plaintiff.

3. It is significant that on the defendant's express agreement, the wife omitted to demand alimony from the Court which granted her the decree of divorce, and had, therefore, lost her opportunity of doing so.

4. There must be a showing that the contract was actually made for the purpose of collusion, or suppression of evidence.

5. There must be a claim made that the decree of divorce was itself invalid.

6. What the Court was called upon to do was to disapprove of a past transaction in another state between residents of that state, where the transaction was unobjectionable under the law of the jurisdiction wherein the agreement was made.

7. The defense that the agreement was contrary to public policy, and therefore void, was a general objection to the making of such contracts, and not a statement of a special objection to the particular transaction.

8. The State of Connecticut is not deeply concerned as a matter of public policy in reprehending such a contract.

9. A contract when made not to facilitate divorce, but solely as an amicable settlement of property rights, and made in view of divorce proceedings already independently instituted or determined upon, is not necessarily contrary to public policy and void, unless concealed from the Court.

10. Even if the contract is concealed from the Court which grants the decree of divorce, it will still be enforced where the refusal to enforce the agreement will assist in the perpetration of an intentional fraud.

11. If it does not appear whether the contract in question was or was not concealed from the Court which granted the decree of divorce, there must be no presumption of any motive for concealing it.

In *Mills* v. *Mills,* 119 Conn. 612, decided by the Supreme Court of Errors as recently as April, 1935, the pertinent facts were these: Plaintiff married defendant in 1908 and lived with him as his wife until 1931. She brought the action in 1933 against defendant Winfield S. Mills and Madline Hulse Mills and asked for a declaratory judgment decreeing that the divorce obtained in Nevada by defendant Winfield S. Mills from the plaintiff in 1932, was a colorable one, and that it did not dissolve the marriage relation between plaintiff and defendant Winfield S. Mills, and that they are still husband and wife. The case was tried and judgment entered that the plaintiff was not entitled to the relief prayed for. She appealed, and the case was remanded with direction.

The Trial Court held that the Nevada divorce obtained by defendant from plaintiff was valid; that, if not valid, the plaintiff could not attack it by reason of collusion in obtaining it; that the plaintiff could not maintain the present action by reason of collusion between herself and her former husband in relation to the present action.

On appeal, the Supreme Court of Errors reversed the judgment of the Trial Court on each of the propositions above stated.

The facts, so far as pertinent in this connection, were these: In 1931, defendant Winfield S.

Mills told his wife, plaintiff, that he was going to take a trip and would be back in several weeks. Shortly before his departure he talked with her with reference to a divorce and made a property settlement with her, wherein he deeded to her a half interest in the house in which they were living. His wife knew, or at least suspected,—as the Court said,—that he was going away with the intention of securing a divorce.

The Court held that there was no proof of collusion between husband and wife as to the procurement of a divorce. The Court, per AVERY, J., said:

> "As employed in the law of divorce, collusion means an agreement between the parties to defraud or impose upon the court. This may be accomplished as well as by agreeing to make up a false case as by agreeing to withhold from the court evidence which, if disclosed, might affect the court in its disposition of the case. *Behrmann* v. *Behrmann,* 110 Conn. 443, 448, 148 A. 363; *Berman* v. *Bradford,* 127 Me. 201, 142 A. 751, 752; *Sheehan* v. *Sheehan,* 77 N. J. E. 411, 413, 77 A. 1063; *Seeley's Appeal,* 56 Conn. 202, 14 A. 291; *Keezer, Marriage & Divorce,* Sec. 420. The facts found bearing upon the question of collusion in the Nevada action are that the present plaintiff received a deed of property by way of settlement from her husband shortly before he left for Nevada. At that time she knew that he was leaving to obtain a divorce. She did not know of his relations with Miss Hulse nor is it found that she knew where he was going. She received notice of a divorce proceeding instituted at Reno, his attorney in that action having written to her inclosing a power of attorney for her to sign authorizing her appearance thereunder. On receipt of this letter, she consulted counsel at Greenwich. She did not execute the power of attorney or enter an appearance or take

> any steps to intervene in the Nevada action, although she had means sufficient to have enabled her to have gone there or to have employed counsel to represent her. A conveyance from husband to wife, when made not to facilitate divorce, but solely as an amicable settlement of property affairs made in view of divorce proceedings already independently instituted or determined upon, is not necessarily contrary to public policy and void unless concealed from the court. *Maisch* v. *Maisch,* 87 Conn. 377, 383, 87 A. 729; *McCarthy* v. *McCarthy,* 36 Conn. 177, 180. The plaintiff was not bound to follow her husband to Nevada and there defend against his suit. 'It can never be collusion for the defendant simply, and without any understanding with the plaintiff to abstain from making a defense.' 2 Bishop, *Marriage, Divorce & Separation,* Sec. 253. *There is nothing in the finding which indicates that the plaintiff refrained from making a defense in the Nevada suit because of any agreement with her husband or that she in any way agreed with him to impose upon the Nevada court.*"

This case is important because it is the latest expression of the Supreme Court of Errors of Connecticut on the question involved in this appeal. It is especially important for the following conclusions of the Court:

1. As employed in the law of divorce, the Court defines collusion as an agreement between the parties to defraud or impose upon the Court, either by making up a false case, or by agreeing to withhold from the Court evidence which, if disclosed, might affect the Court in its disposition of the case.

2. The knowledge, alone, of the wife, that the husband would obtain a divorce, and her agreeing to a settlement in the light of this knowledge, is not in itself evidence of collusion.

3. A conveyance from husband to wife when made not to facilitate divorce, but solely as an amicable settlement of property affairs made in view of divorce proceedings already independently instituted or determined upon, is not necessarily contrary to public policy and void, unless concealed from the Court.

4. The Court approved the doctrine of *Maisch* v. *Maisch.*

5. The Court approved the doctrine of *McCarthy* v. *McCarthy.*

6. In the absence of proof or a finding which indicates that the plaintiff refrained from making a defense in the Nevada suit because of an agreement with her husband, or that she in any way agreed with him to impose upon the Nevada court, there can be no conclusion that the agreement was collusive, and therefore void as being contrary to public policy.

We submit that these authorities make it clear that the agreement in question is not contrary to the public policy of the State of Connecticut, either as a collusive agreement or as an agreement to facilitate the procuring of a divorce.

Bishop in his work on *Marriage, Divorce and Separation,* Vol. 2, 1891, Sec. 253, p. 129 says:

> "*Facilitating Justice—Obstructing it with Falsity.*—It can never be collusion for the defendant simply, and without any understanding with the plaintiff, to abstain from making a defense. *But if there is a defense, for example, if both parties are guilty, so that either could bring forward the other's guilt in recrimination, it is collusion for one by arrangement with the other to institute the suit which the other lets go by default, for the purpose of obtaining a divorce not justified by the real facts. Yet an agreement*

between the parties, not involving an imposition upon the Court or a suppression of facts, to facilitate the proofs and smooth the asperities of the litigation, is, though liable to be looked into by the Court, not collusion or otherwise objectionable. It may be meritorious. To illustrate, Sec. 254. *Instances.* Where the respondent, not appearing, gave the solicitor of the petitioner a photograph to to aid in her identification, and for the like purpose was present in Court at the hearing, receiving £1 for her attendance, the divorce was granted. Said CRESWELL, J.:

> 'Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion, and therefore pronounce a decree.' ''

Then the learned author cites another case on which, after inquiry, the Court found the suit to be collusive.

In Sec. 699 of the same work preceding a discussion of the *Goodwin* case cited, *supra,* the learned text writer said:

> ''As explained in a preceding chapter, a mere smoothing of the asperities of a just litigation is not legally wrong, and it may be morally commendable.''

Dennison v. *Dennison,* 98 N. J. Eq. 230; aff'd *per curiam* 99 N. J. Eq. 883.

In that case the complainant filed a bill for specific performance of an agreement made for the payment of alimony and counsel fees entered into between the parties while they were still husband and wife, pending a suit by the wife against her husband for divorce in Pennsylvania, on the ground of adultery and extreme cruelty. While an order to show cause was pending why the de-

fendant should not be obliged to pay alimony and counsel fees to the complainant, the agreement was entered into between the parties, reciting the divorce action and the alimony proceedings. The defendant husband agreed to pay the complainant $25,000.00 in lieu of alimony and counsel fees —$5,000.00 down and $2,500.00 annually thereafter for a period of eight years. Immediately after the execution of this agreement the divorce libel was amended by striking out the charge of adultery as one of the grounds for divorce. While the agreement did not mention this fact, it appeared from the testimony in the cause that the abandonment of the charge of adultery in the divorce action was one of the considerations of the agreement, *and that another of the considerations was the agreement by the complainant not to institute proceedings against the corespondent named in the divorce libel for damages for alienation of the affections of complainant's husband.* A final decree of divorce was entered in favor of the complainant. *No defense to this proceeding was interposed by the defendant,* and the decree was based upon the ground of extreme cruelty.

The defendant defaulted in the payment of the installments and that led to the filing of the bill.

The defendant answered alleging the agreement to be void as against public policy of the State of Pennsylvania, and as being an agreement to facilitate the procurement of a divorce; that the agreement was contingent upon the complainant here obtaining a decree of divorce in the Pennsylvania proceeding, and that one of the considerations for the agreement was his engagement not to defend said suit for divorce. The Court found as a fact that the agreement was not collusive. As to the withdrawal of the charge of adultery, it is said at page 235:

> "* * * to my mind it does not. This is not the suppression of a defense. It is an abandonment of one cause of action, and might be considered as the suppression of scandal in the interest of morality. Such an agreement is perfectly proper under the Pennsylvania decisions. *Irvin* v. *Irvin, supra.*"

The Court further held that the agreement was not one for facilitating the procuring of the divorce and quoted with approval the language of *Maisch* v. *Maisch, supra,* and then continued, page 237:

> "But it is contended by counsel for defendant such agreements in New Jersey are absolutely void. When I say 'such agreements' I mean non-collusive agreements respecting alimony settlements or respecting support and maintenance of the wife made either prior to or during the pendency of the divorce proceedings. I am unable to entirely agree with counsel for defendant on this point. While it is quite true that such agreements are usually viewed with suspicion and are not favored by our courts, no New Jersey case has gone so far as to hold such agreements void *per se;* at least, I have been unable to find any such cases, nor has the diligence of counsel for defendant referred me to any."

Contrary to this holding the Court of Chancery in the instant case held that the agreement here in question was void *per se.*

The Court further pointed out in the cited case that agreements between husband and wife were subject to the supervisory jurisdiction of the Court of Chancery and were enforced when fair, equitable and just. The Court further points out that if the husband resists the enforcement of a contract with his wife, the burden of proving the unfairness of the agreement as a ground for its non-enforcement would be upon the husband and

that the equities to be considered in determining the fairness or unfairness of such a contract are the equities as applied to the wife.

And at page 239 the Court said:

> "The agreement here was made by the parties while they were still husband and wife, and the agreement has been fully performed by the wife and partially performed by the husband. The wife, as was said in *Maisch* v. *Maisch,* 'in reliance on the defendant's express agreement, valid where made * * * has omitted to demand alimony from the court and has now lost her opportunity to do so.'
>
> "As the complainant has fully performed her part of the agreement, it would be inequitable to permit the defendant to default thereon."

And after stating that the method of enforcing the contract is in accordance with the *lex fori,* the Court said (p. 240):

> "The defendant should not object to the application of this rule, since he has, of his own choice, made this the state of his residence, thereby voluntarily submitting himself to its laws, and has compelled the complainant to enter this state to enforce the contract. To accede to the contention of the defendant that by removing to this state he can thereby avoid the obligation of this contract would be, in effect, to offer New Jersey as a haven for all ex-husbands who wished to avoid the results of their alimony contracts and furnish for them a complete refuge from prosecution thereunder. Since in this state equity has exclusive jurisdiction over contracts between husband and wife, it seems idle to contend that because contracts between husband and wife are not prohibited in Pennsylvania, where this contract was made, equity ought not to assume jurisdiction for its enforcement here. This agreement having been made while

> the parties were still husband and wife, the subsequent entry of a divorce decree could not divest the complainant of her vested rights under the agreement. *Buttlar* v. *Buttlar, supra;* (71 N. J. Eq. 671), *Galusha* v. *Galusha,* 116 N. Y. 635.

It is equally true here that the husband should not be permitted to avoid the force and effect of the contract made by him in the State of Connecticut by instituting an action for alienation of affections in the courts of New Jersey.

In *Stokes* v. *Anderson,* 118 Ind. 533; 23 N. E. 331, relied upon by the defendant and cited by the Court below, the Supreme Court of Indiana in characterizing the agreement in that case said (p. 551):

> "This was a mere collusive agreement between husband and wife whereby the wife was to obtain a divorce from her husband. The agreement in effect was that Mrs. Stokes would ignore the cause of divorce which actually existed, as she claimed, and allege another upon which she did not in fact rely; that her husband would make no resistance to the action, but would aid in bringing about the desired result by agreeing to pay the costs and the fee of her attorney."

In the course of the Court's opinion this further statement was made which was not at all essential to the decision:

> "It may be that if an action for divorce is pending, or if, in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable and confined strictly to the matter of alimony, it will be sustained. But if it is broader in its terms, *and its tendency is to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy and is void.*"

The Court below quotes a part of this language, emphasizing the words "and confined strictly to the matter of alimony."

In the case of *Dennison* v. *Dennison, supra,* the agreement was not confined strictly to the matter of alimony, but embraced as well an agreement on the part of the complainant not to institute proceedings against the corespondent named in the divorce libel for damages for alienation of affections of the complainant's husband. Nevertheless the Court in that case enforced the agreement.

Instances of cases where the agreement was so framed as to have effect only on condition that a divorce should be granted are: *Birch* v. *Anthony,* 109 Ga. 349, 34 S. E. 561, 77 A. S. R. 379; *Muckenburg* v. *Haller,* 29 Ind. 139, Amer. Dec. 345.

In *Birch* v. *Anthony, supra,* the executor of the husband's estate sought to enjoin the wife from claiming from the estate the right to a year's support or her right to dower out of the estate of her deceased husband. The basis for the relief sought was the following contract made between the husband and wife:

> "Having positively determined to leave my husband, E. R. Anthony, and deny him all marital rights whatever, I hereby in consideration of Four Hundred ($400.00) Dollars this day paid me by him, I relinquish all claims of any kind whatever I have on him as wife.
>
> "Witness my hand and seal this day of 1894. (L. S.)
>
> "Legal
>
> "Providing this" (there) "is a divorce granted said Anthony by 1st of April, 1895.
>
> Signed "Mrs. F. B. Anthony
> David Milne
> Isabelle Milne."

The Milnes were witnesses.

We quote from the case:

> "It was contended by counsel for the plaintiff in error that the $400. mentioned in the contract was paid, upon the separation between Anthony and his wife, as permanent alimony, and that she was therefore not entitled to a year's support or to dower, as, under our law, in a case of voluntary separation, the husband may voluntarily, by deed, make an adequate provision for the support and maintenance of his wife, and thus bar her right to permanent alimony and any further interest in his estate in her right as wife. This contention might possibly be sound, but for a part of the contract which, in our opinion, renders the whole of it illegal and void. Whatever else may have been contemplated by the parties to this contract, it manifestly appears that it was their intention to promote a dissolution of the marriage relation existing between them. By reference to the contract it will be seen that it was apparently complete and ready to be signed when the condition was added providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. This provision renders the whole contract illegal as it is well settled that a contract intended to promote a dissolution of marriage is contrary to the policy of the law, illegal and void."

In *Muckenburg* v. *Haller, supra,* the complaint alleged while the plaintiff and defendant were husband and wife, lawfully married and co-habiting, he, at her request, erected upon a lot in Indianapolis owned in fee by her and her two children by a former marriage, a dwelling house worth $700., upon an agreement between them that he should take the rents and profits until reimbursed for his expenditure; that he never received any such rents; that afterwards, and on February

14th, 1863, they were divorced; that before the divorce, it was agreed between them as a compromise that he should relinquish his rights to the rents and profits, and that she should pay him $200.00 with interest one day after a divorce should be granted between them, and she thereupon executed her written contract to that effect, and that she fails and refuses to pay. There was a demurrer to the complaint which the law court overruled, and the wife appealed.

FRAZER, C. J., speaking for the Supreme Court of Indiana said (p. 140):

> "The specific contract for the payment of $200.00 was contrary to the policy of the law. It was so framed as to have effect only on condition that a divorce should be granted. Its direct tendency was to interest the present plaintiff in procuring a divorce, or in foregoing resistance to an effort by his wife directed to that end. The marriage relation is not to be tampered with, and the courts, by contract of parties, converted into mere registers of their agreements for separations from the bonds of matrimony. The law favors marriage, and cannot therefore sanction contracts intended to promote its dissolution by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract or to award damages for its breach, has successfully been made."

Instances of champertous agreements with regard to procuring a divorce are: *Barngrover* v. *Pettigrew,* 128 Iowa 533, 104 N. W. 904, and *Donaldson* v. *Eaton,* 136 Iowa 650, 114 N. W. 19.

In *Johnson* v. *Johnson,* 90 S. W. 964, 122 Ken. 13, 121 A. S. R. 449, the wife gave the husband a note in consideration of his agreement not to defend an action by her against him for divorce.

The court held the agreement contrary to public policy.

Cases of this character are clearly not in point on the issue presented here.

In *Kohler* v. *Kohler,* 316 Ill. 33, 146 N. E. Rep. 476, a bill was filed for the cancellation of an agreement which recited that differences having arisen between husband and wife, they had separated with intent to live apart for the remainder of their lives. The husband paid a sum of money to the wife and conveyed the homestead to her, and she on her part released all interest in his property, of every kind and character. The agreement further provided that in case an action for divorce should be instituted by or for either of the parties, the wife was not to ask for alimony or counsel fees. Shortly after the making of the agreement the husband committed suicide. The wife sought to have the agreement set aside so that she could obtain a larger share of his estate. She contended the agreement was entered into for the purpose of stimulating or inducing one of the parties to secure a divorce, and amounts to collusion between the parties to secure a decree of divorce, and that it was, therefore, contrary to public policy. The court held the agreement valid.

Allen v. *Allen,* 150 S. Rep. 237 (Aug. 1933). In this case the Supreme Court of Florida in a *per curiam* opinion held:

> "Agreements to facilitate or promote divorce have reference to such agreements as those withdrawing opposition to the divorce or not to contest it or to conceal the true cause thereof by alleging another. They have no reference to *bona fide* agreements relating to alimony or the adjustment of property rights between husband and wife, though in contemplation of divorce, if they are not directly conducive to the procurement of it."

In *Ham* v. *Twombly,* 181 Mass. 170, cited with approval in *Sheehan* v. *Sheehan, supra,* the Court said:

> "If a wife in good faith undertakes to procure a divorce to which she legally is entitled upon the ground of adultery already committed by her husband, and to prevent unnecessary publicity or scandal, her husband agrees with her as to the amount of alimony and the expenses to be incurred for witness, this does not make a divorce so obtained collusive or fraudulent."

In the light of all of these authorities we think that the court below should have at least inquired into the situation on a final hearing of the cause.

B.

The complainant Hemingway, for whose benefit the agreement was made, was entitled to the relief sought by him, because he was not a party to the agreement, and was, therefore, not to be denied relief as in *pari delicto.*

In *McCarthy* v. *McCarthy,* 36 Conn. 177 (cited *supra*), the court held that even if the divorce was to be regarded as obtained by means of a collusive and illegal agreement, nevertheless, the title of the children to the real estate would not be affected by it, since they were not parties to the collusive agreement.

In *Phalen* v. *Clark,* 19 Conn. 421, 50 Am. Dec. 253. A., the assignee of a lottery granted by the state of Rhode Island, and the proprietor of all the tickets in such lottery not sold at the time of drawing, instrusted C., residing at Hartford, in Connecticut, who then was, and for a long time had been, the agent of A. for the sale of tickets in such lottery, with a large number of tickets, to sell or return, which were held by C., as the agent of A., at the time of the drawing of the

lottery. One of the tickets so held by C. drew a prize of $30,000. By a fraudulent combination with D., C. obtained information of that fact in advance of the mail, and, in his return of sales to A. included such prize ticket as sold to D. before the drawing. C. and D. afterwards caused this ticket to be presented to A. for payment of the prize, representing D. as the bona fide owner thereof; and A., being ignorant of the fraud, thereupon paid the prize. On a bill in chancery, brought by A. against C. and D. to recover back the money so paid, it was held that the fraudulent combination between C. and D. and the consequent injury to A. were entirely independent of any act in which A. had participated, prohibited by the laws of this state, and, consequently, that A. was not precluded from a recovery on the ground of his being in *pari delicto.*

We submit, therefore, that as the complainant Hemingway was not a party to the transaction he cannot properly be barred from relief on the ground that he was in *pari delicto,* and that in no event should the bill have been dismissed as to him before hearing.

Conclusion.

In conclusion, we submit, that the decree below is erroneous; that the bill should not have been dismissed upon motion but should have been retained, pending a final hearing of the cause, so that the court would receive evidence as to the situation of the parties at the time the agreement was made, the circumstances that surrounded its making and should have inquired into the legality of the contract; that the agreement in question does not contravene the public policy of the State of Connecticut or of this state, and that the de-

fendant in the face of his express agreement to release the complainant Hemingway of all claims he then had against him should not be permitted to welch upon his agreement and to use the courts of the State of New Jersey to maintain an oppressive, vexatious and harassing suit in bad faith against the complainant Hemingway. Our present public policy as recently declared by legislative enactments is opposed to actions for alienation of affections and kindred actions. We submit that it is much more offensive to the public policy of this state to permit this defendant to use its courts for the purpose of maintaining such an action after expressly renouncing his claim, and we respectfully urge that the decree of the Court of Chancery be reversed and set aside and that the cause be remanded for further proceedings.

Respectfully submitted,

JOHN MILTON,
Solicitor for and of counsel with
Complainants-Appellants.

New Jersey Court of Errors and Appeals

Between WALTER C. HEMINGWAY and RUTH H. HEMINGWAY, *Complainants-Appellants,* *and* ERIC T. BALL, *Defendant-Respondent.*	*On Appeal from the Court of Chancery.*

BRIEF OF DEFENDANT-RESPONDENT.

Statement of Facts.

This appeal is taken from the final decree of the Court of Chancery dated July 24, 1935 (S. C., p. 33), dismissing the bill of complaint (S. C., p. 5), upon defendant's motion to strike (S. C., p. 26).

For the purposes of this appeal, as well as for the purposes of the determination in the Court below, the facts appearing upon the face of the bill of complaint must be taken to be true. Those facts are as follows:

Ruth H. Hemingway, one of the complainants, was formerly the wife of the defendant Ball. On March 3, 1933, the defendant, knowing of the intention of the complainants to marry when and if Ruth Hemingway succeeded in obtaining a divorce from the defendant, entered into an agreement with his then wife, while they were residents of Connecticut. This agreement, in the form of a letter written by Ball to his then wife, is annexed to and made part of the bill of complaint, and one of the prayers of the bill

is that a decree may be made construing and determining the validity of said agreement. This agreement (S. C., p. 19) sets forth the determination of his wife to obtain a divorce, provides for the custody of the children in the event of Mrs. Ball's divorce and remarriage and concludes in the following language:

> "In making this agreement I renounce any claim that I may now have upon you or your future husband. And in accepting this agreement you in turn have renounced any and all claims upon me or my property, now or in the future. In the event of your divorce you will not ask for alimony."

Subsequent thereto Ruth then Ball was divorced from the defendant in Nevada on April 28, 1933 (less than eight weeks after the agreement), and married Hemingway, her present husband, five days later.

On October 10, 1934, the defendant Ball instituted an action against the complainant Hemingway in the Essex County Circuit Court for damages for the wilful and malicious enticement by Hemingway of the complainant Ruth H. Hemingway from the defendant.

The complainants thereafter on December 17, 1934, filed a verified bill upon which an order to show cause was made why Ball should not be enjoined from prosecution of the action at law, which order was accompanied by a temporary stay of the proceedings instituted by Ball against Hemingway.

Prior to the return of the order the defendant Ball served notice upon complainants that upon the return day he would move to strike the bill and discharge the stay for reasons urged in the notice (S. C., p. 26).

After argument and filing of memorandum, an order dismissing the bill, advised by Vice-Chancellor Berry, was filed July 24, 1935 (S. C., p. 33), following an opinion dated June 26, 1935 (S. C., p. 28), from which order the complainants appeal.

The grounds of appeal (pp. 3-5), grouped in accordance with the complainants' memorandum (p. 7), are as follows:

1. The bill of complaint sets forth an equitable cause of action and it was error to dismiss it on motion before answer filed and proofs taken.

2. The agreement pleaded in the bill did not contravene public policy, and it was error to dismiss the bill.

(a) The agreement was not within that class of agreements to facilitate the procuring of a divorce.

(b) The complainant, Hemingway, for whose benefit the agreement was made, was nevertheless entitled to the relief sought by him, because he was not a party to the agreement and was, therefore, not to be denied relief as in *pari delicto*.

ARGUMENT.

Answering Point II of the complainants, the defendant says that:

I.

The alleged contract set forth in paragraph 3 of the bill is void both in law and equity, both in Connecticut where made, and in New Jersey where its enforcement is sought.

The alleged contract is in the form of a letter appended to the bill, and made part of it, written

by Eric Ball to his wife, at New Haven, Conn., on March 3, 1933. The pertinent parts of the letter, for the purposes of this argument, are:

> *Paragraph 1.* "Dear Ruth: The following is my understanding of the verbal agreement that we have already made, in view of the fact that you have determined to obtain a divorce from me."
>
> *Paragraph 2.* "In the event of your divorce and remarriage, you are, etc."
>
> *Paragraph 6.* "In making this agreement I renounce any claim that I may now have upon you or *your future husband.* And in accepting this agreement you in turn have renounced any and all claims upon me and my property now or in the future. In the event of your divorce you will not ask for alimony.
>
> Faithfully yours, Eric T. Ball"

Paragraphs 3 and 4 of the bill allege that when this letter was written, the relationship of husband and wife subsisted between Eric Ball and Ruth Ball and that they had in mind Walter C. Hemingway in the words "her future husband." We must therefore, for the purposes of this motion, take those facts to be true, to wit, that no separation had taken place, that no divorce proceedings had been begun, as in fact they had not. In this view of the situation, therefore, we have clearly under the decisions of Connecticut and New Jersey, a contract made upon condition of divorce, a collusive contract and a contract promotive of divorce. If the words "her future husband" mean anything, they mean that two conditions must exist before the alleged beneficiary can come into existence:

1. That she shall divorce her husband with whom she is then living, and

2. That she shall remarry Hemingway. Furthermore, if the words of the letter mean anything when Ball says, "I renounce any claim that I may now have upon you," they mean that he will not defend in any divorce action she may bring because that is the only claim he could have upon her; which makes the alleged contract clearly collusive.

The appellants cite the five Connecticut cases pertinent to the issue cited by the defendant in his memorandum to the Vice-Chancellor. It is necessary briefly to advert to these cases. The Vice-Chancellor in his opinion after an examination of these cases, after having stated that it is the settled law in this State * * * that contracts for the purpose of facilitating divorce are contrary to public policy and void, squarely stated:

> "The law is the same in Connecticut in which State the parties were domiciled and the agreement made."

citing *Maisch* v. *Maisch,* 87 Conn. 377, 87 A. 729.

In the case of *Goodwin* vs. *Goodwin,* 4 Day 343, cited with approval in the New Jersey case of *Sheehan* vs. *Sheehan,* 77 N. J. E. 411, which involved an agreement between husband and wife providing for the dissolution of the marriage obligation and, as a consideration for her separate maintenance and a release of her further obligations to him whereupon she should pursue the proper means for obtaining a divorce, the Court held the agreement void as against public policy and said in the opinion that:

> "A contract between husband and wife promotive of divorce is illegal and void."

The case of *McCarthy* v. *McCarthy,* 36 Conn. 177, is not in point. The petition for divorce was

already filed and it was during the course of the trial, at the suggestion of the Court, that counsel for petitioner and defendant drew an agreement of negotiation between the parties providing for the withdrawal of the suit, the appointment of a guardian for the children and the transfer of certain real estate by the petitioner to them. Subsequently it was represented to the Court by the counsel that the matter had been satisfactorily arranged and a decree was granted in favor of the defendant who thereafter refused to surrender possession of the premises, and the children as a result brought an action in ejectment. The Court in this case properly held that even on the assumption that the divorce was obtained by a collusive and illegal agreement, the title of the plaintiffs was good.

The *Appeal of Seeley,* 56 Conn. 202, 14 A. 292, is a case of importance and subsequently followed in the Maisch case. Seeley's appeal was a case in which divorce proceedings were pending between husband and wife. While so pending they entered into an agreement whereby she agreed to accept One Thousand Dollars in full demand for alimony. Whereupon she received Five Hundred Dollars from her husband upon the granting of the decree of divorce. He died. She sought to secure her dower rights in the estate and her petition was granted. The high Court, in sustaining the superior Court, declared this contract absolutely void and said:

> "Inasmuch as the state rests upon the family, and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense: that it will not permit the dissolution

thereof by the other parties thereto. Its consent, in the form of a decree of its court passed after hearing in due process of law, is a prerequisite to a divorce. The law requires husband and wife, in their relation to each other, to perform certain duties, and refrain from committing certain wrongs. Taking note of human infirmity, and of certain failure of some to do, or to refrain from doing, as it requires, it makes possible a method of release from the marriage contract upon proof that the purpose must entirely fail of accomplishment. Every decree of divorce must rest upon proof of such facts as have been by the legislature declared to be sufficient to uphold it; not at all upon considerations as to rights of property; not at all upon the wishes or agreement of the parties. Courts will not enforce any contract which is the price of consent by one party to the marriage relation to a procurement of a divorce by the other. The court is entitled to know in every case whether the particular marriage tie in question is or is not of sufficient strength to bear the strain to which the law has subjected it. Upon the record, in the case before us, a petition by the wife for divorce was pending. In consideration of a sum of money partly paid in hand, and partly to be paid when her petition should be granted, she agreed with her husband to refrain from exercising her legal right to ask the court to decree alimony to her. Presumably each party saw in that agreement an individual advantage,—to him, in that he possibly paid her less thereby than the judgment of the court upon hearing would compel—to her, in that he refrained therefor from answering the allegations of her petition by proof, and thus possibly permitted a divorce which he could have prevented."

After stating that the statute provides for dower for a woman divorced without alimony if she is the innocent party, the Court goes on as follows:

> "Therefore she is within the protection of the statute, and entitled to dower. To the argument that this result is contrary to the intention of both herself and her husband as expressed by their agreement, and that she was an equal participant in the wrong by which she now profits, we answer that the conclusion rests not at all upon any regard for her; wholly upon principles promotive of the public welfare. That she gains is an unavoidable incident * * *. *The law will not permit itself to be made the instrument for enforcing agreements which it prohibits,* by this device of division of payments. There is no error in the decree appealed from."

The foregoing remains unqualifiedly the law of Connecticut. The case of *Maisch* v. *Maisch,* 87 Conn. 377, 87 A. 729, which was cited with approval in Vice-Chancellor Berry's decision in the case of *Dennison* v. *Dennison,* 98 N. J. E. 230, affirmed 99 N. J. E. 883, cited Seeley's Appeal, and the Court again said:

> "It is everywhere agreed that contracts for the purpose of facilitating divorce are contrary to public policy, as where the agreement is to assist each other in obtaining the divorce."

The Maisch case, however, was similar to the Dennison case decided by Vice-Chancellor Berry and affirmed by the Court of Errors and Appeals. The parties were residents of South Dakota where an agreement for payment of money in lieu of alimony was made, which agreement the wife sought, in Connecticut, to have specific-

ally performed. The Connecticut Court in that case came to the same conclusion that our Court did in the Dennison case, to wit, that since the divorce was already pending when the agreement was made, and since the obligation was upon the husband to maintain his wife, and since she had foregone her right of alimony, and since the contract would have been sustained in South Dakota, that portion of the agreement, to wit, to pay alimony for the support of the wife, was not so contrary to public policy as to prohibit its enforcement in Connecticut.

The analogy between the Maisch case and Dennison case is complete. In the Dennison case a bill was filed for specific performance of an agreement for payment of alimony and counsel fees entered into by the husband and wife while residents of Pennsylvania, pending a suit by the wife for divorce. In fact an order to show cause had been made against the defendant husband in the divorce action, why he should not pay alimony, and it was at this stage of the proceedings that he agreed to give $25,000 to his wife, together with counsel fees, in lieu of alimony. Toward this amount he had paid $7,500 and then refused to pay further, whereupon, he having come to this State, she sought the protection of our court of equity. The Vice-Chancellor, the same Vice-Chancellor who rendered the opinion in the instant case, clearly indicated that in the agreement set forth above, there was nothing collusive and that the testimony on the part of the defendant that a part of the consideration was that he should not sue the correspondent and that he should not defend, was specifically discredited and the decision was squarely rested upon the same line of reasoning that the Court used in Connecticut in the case of *Maisch*

v. *Maisch.* In the instant case there were no divorce proceedings pending at the time the agreement was made and upon the face of the letter itself are the condemnatory covenants which the Court did not find present in the Dennison case, to wit, that Ball would not defend and that he would not make a claim against the man designated in the letter as "your future husband," who was bringing about the separation.

There remains to consider the Connecticut case of *Mills* v. *Mills,* 119 Conn. 612, 179 A. 5, which supports with explicity the contention of the appellee and agrees with the line of cases including *Maisch* v. *Maisch,* 87 Conn. 377, and *McCarthy* v. *McCarthy,* 36 Conn. 177, and *Dennison* v. *Dennison,* 98 N. J. E. 230; affirmed 99 N. J. E. 883, that a mere agreement for property settlement between husband and wife, does not constitute collusion.

We submit that the decisions of Connecticut are consonant with the decisions of New Jersey where the law is unmistakably fixed.

One of the latest cases is *Selinger* v. *Selinger,* 115 N. J. E. 261, 170 A. 853. In that case A. the father of the complainant, when complainant was then married to one Hagen and undivorced, conveyed to the defendant some property of his. The complainant, now the wife of the defendant, seeks to have a trust impressed upon the property. The defendant says that the conveyance was made in consideration of his marriage to the complainant.

The Court said:

> "His assertion that there was a conveyance to him based upon a consideration of marriage would, under ordinary circumstances, be a good consideration; but in the

instant case it was not. The conveyance was made to the defendant when it was impossible for him to marry the complainant because of her then existing marriage to Hagen. She was not divorced from Hagen until almost eleven months after the execution and recording of the deed. Under the circumstances, such an agreement as defendant contends existed between him and complainant's father was clearly void and in contravention of public policy. It is the kind of agreement the law abhors, and the vice of it was condemned in no uncertain language by Chief Justice Beasley in *Noice* v. *Brown,* 38 N. J. L. 228, 20 Am. Dec. 388, when he said: 'The defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her * * * after such divorce * * * obtained. I cannot see the faintest semblance of legality in the promise * * * A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, required the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion.' While I do not consider the illegality of the consideration for the conveyance as having any bearing upon, or the determining factor of, the issue between the complainant and the defendant—and it cannot be so regarded—*yet,* it may not be amiss to give a moment's attention to the legal effect of the

> transaction between the defendant and the complainant's father. If the alleged agreement had not been executed, but were merely executory, it could not be enforced because of its illegality. When the illegality of a contract is made to appear, the law will not extend its aid to either of the parties. It does not sit as an arbiter of differences arising out of an illegal contract. The maxim that equity follows the law holds good in proceedings involving questions of public policy; and where the parties are in pari delicto equity will leave them in the position in which they have placed themselves."

The instant case, which we are considering gets right in the teeth of *Noice* v. *Brown*, (*supra*), cited in the Selinger case. Suppose the covenant of the letter, which we are considering and which they allege was made for the benefit of the future husband, were positive instead of negative; suppose in other words, the agreement had been that Ball would pay Hemingway $5,000 as soon as he married Ruth Ball his then wife. Can it be doubted that every court in the country would immediately declare such an agreement void, and that being so, the negative character of his promise, if he made one, is equally void.

Sheehan v. *Sheehan*, 77 N. J. E. 411, 77 A. 1063, reiterates the proposition that agreements to facilitate divorce are void and that agreements conditioned upon divorce are void. If it can be said with any degree of truth that this agreement did not facilitate the divorce of the complainant, Ruth H. Hemingway, it certainly cannot be said that the portion of the agreement, which the complainants seek to rely upon, was not conditioned upon divorce.

As early as *Miller* v. *Miller*, 1 E. 301, we have the clear pronouncements of the Court, as follows:

> "Contracts framed to take effect upon condition of divorce, are illegal."

An examination of all the authorities in the country discloses nothing running counter to this proposition. *Muckenburg* v. *Haller*, 29 Ind. 139; *Speck* v. *Dansman*, 7 Mo. A. 165; *Knox* v. *Perkins*, (N. H.), 163 A. 497; *Halstead* v. *Halstead*, 74 N. J. E. 596, 70 A. 928.

Answering Point I of the Brief of Complainants-Appellants:

II.

The bill of complaint sets forth no equitable cause of action, and the decree of the Court of Chancery, in dismissing the bill, on motion of defendant-respondent, is in all respects proper and valid.

We have seen already that, if there is equity in the bill, it must primarily rest upon the validity of the agreement already discussed and disposed of under Point I.

Relied upon, also, by the complainants below was the charge contained in paragraph 8 of the Bill of Complaint that the defendant, Ball, had full knowledge of the course of conduct between complainants which allegedly gives rise to his cause of action and consented to it. This contention presents no ground for equitable relief, as noted by the Vice-Chancellor in his opinion, because such a defense is perfectly adequate at law. Again assuming, as we must for the purposes of this appeal, that the allegation that the defendant, Ball, consented to and acquiesced

in the course of conduct complained of, no ground for equitable jurisdiction is stated because in the law action, his consent and acquiescence is a bar to his recovery. *Milewsky* v. *Kurtz,* 77 N. J. L. 132. There is nothing in the cases cited by complainants-appellants on this point to qualify this conclusion in any way.

What is left? The complainants-apppellants urge two further points which stripped of unnecessary verbiage are:

1. That the mere fact that a trial of the action at law would or might cause the publication of certain scandalous matters and the reputation of the complainants would be affected thereby, is sufficient to confer jurisdiction upon the Court of Chancery, and

2. That the bill should not have been dismissed on motion but should have been held for final hearing, because attendant circumstances should have been inquired into.

Taking up first the contention under (1), we find the complainants-appellants citing no New Jersey authority, but they cite (erroneously) *Boneisler* v. *Foster,* 154 N. Y. 229. The case intended to be referred to is the case of *Bomeisler* v. *Forster,* (*id.*). In that case, the agreement relied upon to bar the law action was a perfectly valid one. There is no denying that equity has the right to stay a law action, where there is a valid release, and where the mere fact of the release would settle the entire issue. In such a case, the Court would have inherent jurisdiction to stay the action at law, and would cogently be persuaded to exercise its jurisdiction because the scandal would be avoided. The equity jurisdiction in that case was rested *squarely upon the right of specific performance of the valid agreement.* In the instant case,

there is no agreement which the Court of Equity —or any other Court—will recognize as valid, and hence nothing upon which to rest the right of specific performance.

It is absurd to say that the mere fact that the reputation of complainants might be injured in an action at law is sufficient to warrant equity's taking jurisdiction.

No case can be found supporting such a proposition. The Bomeisler case stands for the sound proposition that where there is a valid agreement which would preclude a law action involving scandalous matters, the Court of Chancery will grant specific performance (a purely equitable remedy), because in such a case, the equitable remedy is more adequate. Such a decision presupposes a valid agreement, which is lacking in the instant case.

The second point raised under Point I of the brief of complainants-appellants, was that the bill should not have been dismissed for lack of equity, on motion, but should have been retained for final hearing, because the Court should have inquired into the circumstances attendant upon the making of the agreement.

This proposition is unsound, and unsupported by any case, so far as a careful examination has disclosed. The complainants-appellants cite in support of this proposition:

(a) *Miller* v. *Miller,* 284 Pa. 414, 131 A. 236, and cited therein are
  (x) *Kuhn* v. *Buhl,* 251 Pa. 348, 96 A. 977.
  (y) *Irvin* v. *Irvin,* 169 Pa. 529, 32 A. 445.

There remains to be considered then the single Pennsylvania case of *Miller* v. *Miller, supra,* on this point. This was a suit at law brought to

recover installments due under a contract entered into after separation between the parties, and when divorce proceedings were under advisement. The wife had been compelled to leave her husband because of the ill-treatment accorded her. The agreement for maintenance was made through the intervention of the father for her support. The amount agreed upon was less than the husband would have been compelled to pay in an action for non-support. These facts all appeared in an affidavit of defense. Notwithstanding which, summary judgment was entered. The upper Court, in reversing the judgment properly said if these facts are true, there is no collusion. The Court further specifically found *that the defendant did not bind himself not to present a defense or agree to furnish evidence of aid the libelant, if she secured a divorce.* The contract itself was barren of agreements on these points.

The evidence in this case was necessary to clarify the interpretation of the contract, and the decision so held. It cited finally the proposition *that in considering the writing where two interpretations are possible, or the words may be deemed either as evidence of a valid or legal purpose or the contrary,* the circumstances may be inquired into, and should be, not to alter or vary the agreement but to explain it. That, in substance, is the holding in the case of *Miller* v. *Miller.* But that is not the instant case, and the principles are inapplicable.

It is not suggested that the words used in the agreement in the instant case are capable of two interpretations—or at least it is not suggested what possible testimony would or could be offered to make it valid. In the Miller case the

Court below was confronted with specific affidavit of defense on all these points. The words of the Vice-Chancellor in his opinion (S. C., p. 31),

> "Examining this agreement in the light of the allegations of the bill of complaint, the *inevitable* conclusion is that it was entered into with the idea of facilitating the procuring of a divorce and *was conditioned upon* divorce,"

are, we submit, a fair and accurate statement of the only conclusion to be reached, when it is remembered that the complainants allege that at the time the agreement was made the relationship of husband and wife still subsisted, that Ball knew she intended to divorce him, and that upon securing that divorce, she proposed to marry Hemingway, and that Hemingway was in their minds as "the future husband", named in the agreement as the third party beneficiary.

It is significant that the brief of complainants-appellants is devoid of New Jersey cases on the point. The law is well settled in New Jersey that the bill must stand or fall at the hearing on the motion to strike for lack of equity without the help of interpolations suggested by complainants' counsel (*Mutual Life Ass'n.* v. *Bradbury,* 53 N. J. E. 643, 33 A. 960). It is well settled that no extraneous matter by affidvait or otherwise can be introduced to alter the allegations of the bill, and that it will properly be dismissed where it is plainly defective. *Com. etc. Tr. Co.* v. *N. J. Lime Co.,* 86 N. J. E. 450, 100 A. 52. It is well settled *that when a defect is present on the face of the bill* which otherwise would be available as a defense to the defendant, it is proper to strike the bill.

Steelman v. *Wheaton,* 72 N. J. E. 626, 66 A. 195;

Allen v. *Demarest,* 41 N. J. E. 162, 2 A. 655;

Story Eq. Pl., secs. 500-501.

Finally the complainants urge that the complainant, Hemingway, for whose benefit the agreement was made, was entitled to the relief sought by him because he was not a party to the agreement and was therefore not to be denied relief as in *pari delicto.* The complainants cite no New Jersey cases. They cite the case of *McCarthy* v. *McCarthy,* 36 Conn. 177, but the pronouncement of the Court, which they quote, was dictum because the Court specifically held that the agreement was not collusive and illegal.

The case of *Phalen* v. *Clark,* 19 Conn. 421, cited by them, is certainly not in point because the third party was not a third party beneficiary in the sense that Hemingway is in this case and he had parted with a valuable consideration in good faith.

This action is brought by the co-complainants, Ruth H. Hemingway and Walter C. Hemingway, for whose benefit it is alleged the contract was made. It is difficult to see how the parties are not in *pari delicto* when the person asking relief is a party to the contract, which contract is void. It is also difficult to see how, upon any legal theory, a party can benefit as a third party beneficiary from a contract declared void. To entitle one to maintain an action on a promise made and entered for his benefit it is, of course, necessary that there shall first be a valid contract. *People's Bank and Trust Co.* v. *Weidinger,* 73 N. J. L. 433, 64 A. 179, *Davis* v. *Dunn,* 121 Mo. A. 490, 97 S. W. 226, *Electric Appliance Co.* v. *United States Fidelity Co.,* 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. Furthermore, independent

of the question of guilt on the part of Hemingway, the New Jersey cases indicate clearly that when the illegality of the contract is made to appear, the law will not extend its aid to either of the parties. The maxim that equity follows the law applies in proceedings involving questions of public policy. The case of *Selinger* v. *Selinger*, 115 N. J. E. 261, is distinctly in point. It must not be forgotten in this connection that Ruth Hemingway, who alleges she made the agreement, is a co-complainant. Diligent search has failed to disclose a single case where a third party beneficiary named and identified in a contract, which is void, has been permitted to recover.

CONCLUSION.

It appears, therefore, that all of the cases cited by the complainants-appellants, are in substantial agreement that while a mere agreement for maintenance is valid, any agreement provocative of divorce, or conditioned upon divorce, or to take effect upon the event of divorce, are universally held void. It appears that upon the face of the bill the facts alleged taken to be true show inevitably such an agreement. It further appears that if equity is unable to take jurisdiction to enforce the specific performance of this void agreement, there is nothing left in the bill giving cause for equitable jurisdiction. We respectfully submit, therefore, that the decree of the Court of Chancery be in all things affirmed.

Respectfully snbmitted,

GEORGE S. HARRIS,
Solicitor for and of Counsel
with Defendant-Respondent.