RECENT CASES

CONFLICT OF LAWS — ASSIGNMENT FOR BENEFIT OF CREDITORS — LOSS OF LIEN.—Plaintiffs, residents of Pennsylvania, recovered judgments in New Jersey against defendant. Subsequently defendant made an assignment for the benefit of creditors under the laws of Pennsylvania, passing title to realty in New Jersey. Plaintiffs' failure to withdraw the claims they had filed with the assignee operated to discharge their liens under Pennsylvania law, but not under New Jersey law. The assignee was unable to sell the New Jersey land and he reconveyed to defendant. Defendant obtained a rule to show cause why the judgments should not be discharged. *Held,* Pennsylvania law governed, and the liens were discharged. *Shoemaker v. Wiley; National Bank of Oxford v. Wiley* (two cases), 125 N.J.L. 10, 13 Atl. 2d 212 (S. Ct. 1940).

Assignments for the benefit of creditors may be divided into two classes: voluntary and involuntary.[1] The first results from the willful, spontaneous act of the debtor in conveying his property;[2] the second from the force and operation of the law.[3] In both cases a transfer of some or all of the debtor's property is made to an assignee in trust to apply the same on the proceeds thereof to the claims of creditors and to return the surplus, if any, to the debtor.[4] It is necessary to distinguish between the two because of their divergent legal effects. If the assignment is voluntary, the transfer will be recognized everywhere, and if it purport to convey land or chattels situate in another state, that state will recognize the assignment.[5] This follows as a direct consequence of the rules that every owner of property has the power to convey title to his property wherever it may be, and that every debtor

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1. MINOR, CONFLICT OF LAWS (1901) 309.
2. Bartlett v. Teah, 1 F. 768 (C. C. Ark. 1880); BURRILL, ASSIGNMENTS (6th ed.), Sec. 2; 5 C. J. 1035.
3. Young v. Clapp, 147 Ill. 176, 35 N.E. 425, 37 Am. St. Rep. 545, 23 L.R.A. 47 (1893).
4. Bartlett v. Teah, *supra* note 2; BURRILL, *op. cit.*, Sec. 2; 6 C. J. S. 1220.
5. Green v. Van Buskirk, 74 U.S. 139, 19 L. Ed. 109 (1869); Judd v. J. W. Forsinger Co., 117 N.J.L. 35, 186 Atl. 525 (S. Ct. 1936); Frazier v. Fredericks, 24 N.J.L. 162 (S. Ct. 1853).

owning property has, as an incident of ownership, an inherent common law right to make a voluntary assignment of such property for the benefit of his creditors.[6]

If, however, the assignment is an involuntary transfer—compelled by the law by an agent of the court—it will have no extraterritorial effect.[7] That is, if the assignment purport to convey land in a state other than that where the conveyance is made, the state where the property is located will refuse to recognize the passage of title. The reason for this is that no state may project its decrees beyond its boundaries.[8]

While the rule is clear-cut, a puzzling question arises where the assignment, though initiated by the voluntary act of the insolvent, is made under the protection of a state statute. Several courts, when considering statutes which permitted a debtor to compel his creditors to execute discharges of their claims as a condition of sharing in the distribution, have held assignments executed under such laws as involuntary conveyances.[9] Defendant in the instant case took advantage of a statute[10] which was, in effect, similar to the abovementioned.

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6. Cole v. Cunningham, 133 U.S. 107, 10 S. Ct. 269, 33 L. Ed. 538 (1890); In re Bridge, 230 F. 184 (W. D. Wash. 1916); Bernstein v. Raff, 250 N.Y.S. 694, 140 Misc. 353 (1931).

7. Oakey v. Bennett, 52 U.S. 33, 13 L. Ed. 593 (1850); Hutcheson v. Peshine, 16 N.J.Eq. 167 (Ch. 1863); Hanford v. Paine, 32 Vt. 442, 78 Am. Dec. 586 (1860). But *cf.* Moore v. Bonnell, 31 N.J.L. 90 (S. Ct. 1864), where the distinction is repudiated in dictum. For an approval of this doctrine as enunciated in Moore v. Bonnell, *cf.* Hackett, *Future Status of Foreign Assignments*, 13 HARV. L. REV. 484 (1900).

8. MINOR, *op. cit.* 322, 15 C. J. S. 833.

9. Security Trust Co. v. Dodd, 173 U.S. 624, 19 S. Ct. 545, 43 L. Ed. 835 (1899). "It was in legal effect tacking a bankrupt law to the assignment law; and inasmuch as the distribution of the estate depends not upon the will of the assignor but upon the positive requirement of the law-making power, we can see no escape from the conclusion that in so far it becomes statutory and not voluntary." Seignitz v. Garden City Trust Co., 107 Wis. 171, 83 N.W. 327, 50 L.R.A. 327 (1900). And see REST., CONFLICT OF LAWS (1934) Sec. 264.

10. "Nothing in this act shall be taken or understood as discharging an insolvent from liability to such of his creditors as do not choose to exhibit their claim, or who, before the schedule of distribution is made or filed, withdrew their claims; but with respect to creditors who exhibit their claims before a voluntary assignee, or an auditor appointed in such case, and do not withdraw

The first step in determining whether the Pennsylvania or the New Jersey law should govern is ascertaining whether the foreign assignment was voluntary or involuntary, for if it be the latter, the result is obvious. It is submitted the assignment was voluntary. While several jurisdictions, as mentioned, have held the statute converts the act of an individual into an act of the state, it would seem as though this were the minority view.[11] Since the determining factor is whether the individual or the state is conveying, the mere taking advantage of a favorable state statute should not, *ipso facto,* convert the act of defendant to an involuntary transfer. In addition the Pennsylvania law expressly prohibits the benefits of the statute where the insolvent was forced into the hands of a receiver by the action of his creditors.[12] Since this latter is unanimously held an involuntary transfer,[13] it is evident that the Pennsylvania legislature meant the act to apply only where the transfer is voluntary. It also seems that the assignment was voluntary in view of Pennsylvania decisions, and that the statute is merely declaratory of the common law of that state. In *Kendall v. McClure Coke Co.,*[14] adjudicated four years before the act in question was passed, it was held that a creditor is estopped to proceed against lands in another state included in an assignment for the benefit of creditors on the ground that the assignment is invalid under the laws of such state, where he participated in the assignment by filing his claim. Citations within the case indicate the same estoppel applies to domestic lands.[15]

If now the assignment is held to be a voluntary transfer, it is neces-

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them as aforesaid, they shall be wholly debarred from maintaining afterwards, by suit, action, execution, or otherwise, any claim existing at the time of the assignment, whether due or not. * * * But the benefits of this section shall not apply in favor of any insolvent who was forced into the hands of a receiver by the action of his creditors." Act of 1901, June 4, P. L. 404, Sec. 33; PA. STAT. (PURDON 1936) tit. 39, sec. 100.

11. *Cf.* 5 C. J. 1038.

12. *Supra,* note 9.

13. Barth v. Backus, 140 N.Y. 230, 35 N.E. 425, 37 Am. St. Rep. 545, 23 L.R.A. 47 (1893); Weiden v. Maddox, 66 Tex. 372, 1 S.W. 168, 59 Am. Rep. 617 (1886).

14. 182 Pa. St. 1, 37 Atl. 823 (1897).

15. Burke's Estate, 1 Pars. Eq. Cas. 470 (Pa.); Guiterman v. Landis, 1 Wkly. Notes of Cases 622 (Pa.).

sary to determine what law shall govern. If the assignment conveyed chattels located in New Jersey, there could be no doubt that the assignment would be controlled by Pennsylvania law, for personal property has no locality, and is transferable according to the law of the state where the owner is domiciled.[16] The present case, however, deals with land. It is a fundamental doctrine of real property law that all rights relating to land are governed by the law of the state where the land is situated.[17] By statute[18] in New Jersey, plaintiffs' judgments became liens on defendant's New Jersey land as soon as the judgments were entered on the records of the court. While the lien of judgment does not constitute an estate or property in the land, it gives a right to levy on such land to the exclusion of adverse interests subsequent to the judgment,[19] and is undeniably a right relating to the land. As such New Jersey law must govern, for the law of the situs controls all acquisition, disposition, and devolution of land.[20]

It is to be noted that the issue here presented is not whether the foreign assignment is valid in New Jersey, but whether the discharge of the judgment liens is governed by Pennsylvania or New Jersey law. Although defendant by filing under the law of his state, in effect incorporated the provisions of the statute in his assignment, New Jersey

16. Graham v. First Nat. Bank of Norfolk, 84 N.Y. 393, 38 Am. Rep. 528 (1881); Snetzer v. Gregg, 129 Ark. 542, 196 S.W. 925, L.R.A. 1917 F. 999 (1917); Bentley v. Whittemore, 19 N.J.Eq. 462, 97 Am. Dec. 671 (E. & A. 1868); Frazier v. Fredericks, 24 N.J.L. 162 (S. Ct. 1853). However, even though the assignment of chattels is valid at the domicile of the assignor, the overwhelming majority of states discriminate in favor of domestic creditors. *Cf.* Sunderland, *Foreign Voluntary Assignments*, 2 MICH. L. REV. 112, 180 (1903); 87 U. OF P. L. REV. 328 (1939). For a discussion of the constitutional questions involved, see Bentley, *An Assignment in Insolvency*, 7 HARV. L. REV. 281 (1893).

17. Sunderland v. U. S., 266 U.S. 226, 45 S. Ct. 64, 69 L. Ed. 259 (1924); Liberty Oil Co. v. Condon Nat. Bk., 291 F. 293 (C.C.A. 8th 1923); DICEY & KEITH, CONFLICT OF LAWS (5th ed. 1932) 583, REST., CONFLICT OF LAWS, Sec. 215 *et seq.*

18. N.J.R.S. 1937 2:27-252; N.J.S.A. 2:27-252.

19. Pierce v. Brown, 7 Wall. (U.S.) 205, 19 L. Ed. 134 (1869); Massingill v. Downs, 7 How. (U.S.) 760, 12 L. Ed 903; Huff v. Sweetser, 8 Cal. A. 689, 97 P. 705 (1908).

20. *Supra*, note 17.

will, in the absence of claims of domestic creditors, recognize the transfer.[21] Several states insist that a foreign assignment must conform to the laws of the state where the property is located.[22] The better and majority opinion is that state laws pertaining to assignments for the benefit of creditors relate only to domestic assignments and do not have effect on transfers made beyond its borders.[23] Since plaintiffs are not domestic creditors, New Jersey will not raise a shield for their protection but will hold the assignment made in Pennsylvania to be valid. The real question at issue here concerns the discharge of the liens. Since the creation, transfer, foreclosure, discharge, and redemption of liens on lands are determined by the law of the state where the land is,[24] plaintiffs should not be governed by Pennsylvania law.

It is true a lienor may lose his lien by such representations to purchasers as to induce the belief that he has abandoned his claim, so as to make it inequitable that he should thereafter set up his lien in prejudice of their rights.[25] New Jersey, however, does not raise an estoppel against the lien holder in such a situation presented by the instant case.[26] Moreover, the assignee for the benefit of creditors is not a purchaser. He stands as trustee for the creditors and can receive only what the defendant can give—an encumbered title.[27]

21. Moore v. Bonnell, *supra*, note 7. Bentley v. Whittemore, 19 N.J.Eq. 462, 97 Am. Dec. 671 (E. & A. 1868).

22. Shickler v. Tinkham, 35 Ga. 176 (1866); Loring v. Pairo, 10 Iowa 282, 77 Am. Dec. 108 (1860); King v. Johnson, 5 Harr. (Del.) 31 (1848). And see 2 MICH. L. REV. 180 (1903).

23. Bentley v. Whittemore, *supra*, note 21; Varnum v. Camp, 13 N.J.L 326, 25 Am. Dec. 476 (S. Ct. 1833); Thurston v. Rosenfield, 42 Mo. 474 (1868); 2 MICH. L. REV. 180, 184 (1903).

24. REST., CONFLICT OF LAWS (1934), Secs. 230, 230a.

25. Williams v. Champion, 39 N.J.Eq. 350 (Ch. 1885), *aff'd* 40 N.J.Eq. 342 (E. & A. 1885); Borden v. Hutchinson, 49 Atl. 1088 (N.J. Ch. 1901).

26. West Hudson County Trust Co. v. Wichner, 121 N.J.Eq. 157, 187 Atl. 579 (Ch. 1936); Howell v. Teel, 29 N.J.Eq. 490 (Ch. 1878); Moses v. Thomas, 26 N.J L. 124 (S. Ct. 1856). This seems the majority view. See 55 A.L.R. 993 (1928).

27. Warner v. Citizens Bank of Anacortes, 19 F. 2d 947 (D.C. Wash. 1927), *aff'd* 25 F. 2d 21 (C.C.A. 9th 1928); rehearing den. 26 F. 2d 465 (1928); Clark v. Smith, 1 N.J Eq. 121 (Ch. 1830); Bell v. Fleming's Exr's, 12 N.J.Eq. 490 (E. & A. 1859).

CONTRACTS—INFANTS—ESTOPPEL.—Plaintiff had a savings account in defendant bank. On January 11, 1938, she signed a statement that she was born March 21, 1918, although she was actually born one year later. On May 22, 1939, and September 30, 1939, she was co-maker on two personal notes from defendant bank. At the time these loans were made she had again misrepresented her age. Subsequently on December 8, 1939, the plaintiff was refused her savings account balance by defendant because the loans had not been paid. Plaintiff by her next friend brings this action to recover the amount of her savings account. *Held,* that plaintiff is estopped to plead her infancy to disaffirm her contract. *Horwitz v. Hudson County National Bank,* 125 N.J.L. 3, 13 A. 2d 495 (S. Ct. 1940).

The view is generally accepted that where an infant has misrepresented his age and thereby induced another person to contract with him, he is not precluded in an action at law from asserting his privileges as an infant.[1] Thus he is not estopped from pleading his infancy and can disaffirm any contract, except one for necessaries.[2] This right to repudiate is based upon the incapacity of the infant to contract and the law thereby protects him from his unwise and indiscreet acts in ordinary transactions and business relationships.[3] Consequently while the infant's fraud may have induced the contract, it would defeat the policy of the law to give these acts contractual force by the doctrine of estoppel.[4] The rule holding an infant liable on a contract for necessaries is based upon the doctrine that the law implies the promise to pay from the necessity of the infant's situation.[5] In effect this is giving the acts of the minor

1. Beam v. McBrayer, 132 S.C. 72, 128 S.E. 34 (1925); Sawyer Boot and Shoe Co. v. Braveman, 126 Me. 70, 136 Atl. 290 (1927); Tobin v. Spann, 85 Ark. 556, 109 S.W. 534, 16 L.R.A. (N.S.) 672 (1908).

2. A minor is bound and cannot disaffirm his contract for necessaries such as food, clothing, lodging, medical attendance, and instruction suitable and requisite for the proper training and development of his mind. Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L.R.A. 859, 23 Am. St. Rep. 780 (1891).

3. Sternlieb v. Normandie National Securities Corp., 263 N.Y. 245, 188 N.E. 726, 90 A.L.R. 1437 (1934).

4. Conrad v. Lane, 26 Minn. 389, 4 N.W. 695 (1880); Beam v. McBrayer, *supra,* note 1; Green v. Green, 69 N.Y. 553, 25 Am. Rep. 233 (1877).

5. Trainer v. Trumbell, 141 Mass. 527, 6 N.E. 761 (1886).

contractual force and yet seems consistent with the purpose of the general rule since the supply of necessities to an infant, contrary to the general theory that an infant's acts are unwise and indiscreet, obviously is for the good and welfare of the minor. Therefore in consonance with the great weight of authority plaintiff should not have been estopped in this action since the proceedings were in a court of law.[6]

On the other hand, an infant who seeks equitable relief is generally held to be estopped to avoid a transaction in which he has misrepresented his age, unless he can restore any consideration received by him.[7] A few decisions hold to the contrary on grounds similar to those expounded by law courts, that a fraudulent representation of capacity cannot be an equivalent for actual capacity,[8] and the injured party may yet find relief in a tort action for fraud.[9] There is however a contrariety of opinion whether an action will lie in deceit for misrepresentation in inducing a contract.[10] The real question in such a case is whether the matter infected with fraud arises *ex contractu* or *ex delicto*. But the overwhelming weight of authority in the United States, contrary to the

6. In the case of LaRosa v. Nichols, 92 N.J.L. 375, 105 Atl. 201, 6 A.L.R. 412 (S. Ct. 1918), the leading New Jersey case on estoppel, the court held that an estoppel could be enforced in a law court as it is in equity. The court adopted this statement from the case of Central R. Co. v. MacCartney, 68 N.J.L. 165, 52 Atl. 575 (S. Ct. 1902). But such an adoption would seem unwarranted since the MacCartney case involved adult parties and the court could apply the doctrine of estoppel since adults have the capacity to contract. But the LaRosa case involved an infant for whom a court cannot imply contractual capacity since he is conclusively presumed incapable of entering into a contract

7. Ostrander v. Quinn, 84 Miss. 230, 36 S. 257 (1904) (holding that the plaintiff would be estopped especially where the fruit of the fraud had not been handed back); County Board of Education v. Hensley, 147 Ky. 444, 144 S.W. 63, 42 L.R.A. (N.S.) 644 (1912).

8. Sims v. Everhardt, 102 U.S. 300, 26 L. Ed. 87 (1880). This was a case in equity where the court held that an estoppel *in pais* was never applicable to infants. *Contra*, BIGELOW, ESTOPPEL, 6th ed. 627, and 1 WILLISTON, CONTRACTS, No. 245. Myers v. Hurley Motor Co., 273 U.S. 18, 47 Sup. Ct. Rep. 277 (1927) which represents the majority view, follows the Sims case in permitting an infant to recover for payments on an automobile, but at the same time allows the other party affirmative relief in setting off for the use of depreciation of the automobile

9. 11 HARV. LAW REV. 199 (1897).

10. See note 57 L.R.A. 673.

English rule, holds that an infant is liable in deceit for misrepresentation on the grounds that since the misstatement of age is not considered the consideration in the contract, it is a tort with no basis in any contract relation and hence arises *ex delicto*.[11] Consequently in such a case the minority view in adhering to the principles of contracts has not deprived the injured adult from seeking relief in deceit. It thereby falls in line with a strict interpretation of the law, and does not work any hardship upon the other party.

The courts of equity generally allow an estoppel *in pais* where there is a fair and reasonable contract, a benefit to the infant, a misrepresentation of age upon which the other party has been induced to act, and a justification for the other party's acting.[12] But the misrepresentation will not estop the infant unless it was made with the intent to deceive.[13] In the principal case it is not revealed whether the infant received any benefits from her position as co-maker on the personal notes. However it has been held that although an infant misrepresented his age, he was not estopped where he received no benefits by becoming a mere surety as accommodation maker of a note.[14] In fact some cases have gone so far as to hold that so injurious is such a transaction to the infant, that the contract is held void.[15] Finally it is not revealed whether the adult party was justified in having believed the infant to have been of majority since in addition to the misrepresentation the infant must have appeared and acted of age.

It is therefore submitted that the plaintiff should not have been estopped to have pleaded her infancy in this action.

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11. Tuck v. Payne, 17 S.W. 2d 8 (1929); Lowery v. Cate, 108 Tenn. 54, 68 S.W. 1068, 57 L.R.A. 673, 91 Am. St. Rep. 744 (1901) (holding that where an infant negligently performs his contract the tort arises *ex contractu*, and similarly where the misrepresentation is in regard to the subject matter of the contract as a warranty of goods. In such cases the infant is not liable in tort).

12. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924).

13. Folds v. Allardt, 35 Minn. 448, 29 N.W. 201 (1886). Here the adult party delivered goods to an infant believing him of age because of his participation in a partnership. The court held the infant not estopped.

14. Grauman M. and C. Co. v. Krienitz, 142 Wis. 556, 126 N.W. 50 (1910).

15. Chandler v. McKinney, 6 Mich. 217, 74 Am. Dec. 686 (1859).

CONTRACTS — SUBSCRIPTIONS — CONSIDERATION. — Plaintiff, a non-profit corporation organized for the purpose of "conserving game birds in America, establish hatcheries, refuges, and to teach vermin control," received the following subscription from the defendant: "In consideration of gifts of others to 'More Game Birds of America, Inc.' I subscribe and agree to pay The Foundation the total sum of $5,000.00 payable in yearly installments of $500.00 each, as and when called for." Other considerations mentioned in the contract were the obtaining of subscriptions from other individuals, the mutual promises of other subscribers. Defendant paid $2,200 and refused to pay the balance. P brought an action at law for balance due. *Held* for the plaintiff. Public policy forms a basis on which consideration may be spelled out in order to impose liability on such subscriptions. *More Game Birds of America, Inc. v. Boettger,* 125 N.J.L. 97, 14 A. 2nd 778.

A subscription to a charitable enterprise requires a legal consideration to support it like any ordinary contract.[1]

A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him.[2]

In a case presenting a parallel situation a group of subscribers promised to pay a certain amount for the support of public worship on condition that the trustee should manage the funds in a particular manner, and apply income thereof to the support of the Congregational minister, and to the payment of the taxes of the parish which might be assessed on subscribers. This was held to be a valid consideration to bind the subscribers as the acceptance by the trustee was to perform the conditions.[3]

Another case similar to the previous one is one in which the defendant and others of an ecclesiastical society associated together to raise a fund for support of a minister, the interest of the subscriptions to be devoted to the purpose of perpetuating blessings of the gospel to the defendant

1. N. J. Orthopaedic Hospital & Dispensary v. Wright, 95 N.J.L. 462, 113 Atl. 145 (E. & A. 1921).

2. Nebraska Wesleyan Univ. v. Estate of Homer Griswold, 113 Neb. 256, 202 N.W. 609 (1925).

3. Trustees of Parsonage Fund in Fryeburg v. Ripley, 6 Me. 442 (1830).

and other members of the society. This was held valid consideration.[4]

There are numerous other cases similar to these which have been held valid through public policy, estoppel, and consideration of others which may or may not be legal reasons. In these cases the subscriber desires work of a certain kind to be done. When he picks religious preaching, he desires to have that definite preaching. It is worth something to him to have that done. When the subscriber picks a corporation formed for the purpose of building up the hatcheries, refuges, and teaching vermin control, he desires to have these things accomplished. They are worth something to him to have done. When he asks the corporation to accept his money, he desires to have these things done for that money. The corporation upon accepting that money agrees to use that money for the purpose either expressed by the subscriber or implied by the fact that he chooses that particular corporation.

"A subscription for a charitable purpose will be considered gratuitous and as merely a continuing offer to make a gift which may be withdrawn, and is unenforceable until accepted and acted upon by the promisee in such a manner as to establish mutuality of obligation as between the promisor and promisee. Where the promisee has, before withdrawal, accepted the subscription, and has expressly or by clear implication agreed to apply the promised contribution to the purpose for which it was subscribed, and has thereby assumed the discharge of an obligation which may be enforced in law or in equity, the element of valuable consideration to support the promisor's agreement is supplied by the enforceable covenant of the promisee; there is promise for promise; and therefrom springs a valid and enforceable contract."[5] This quotation treats the subscription as any other contractual dealing. It is an offer until accepted and when it is accepted it becomes a valid binding contract. The subscriber has bargained for and received that which the corporation has been formed to accomplish. Certainly a person could enter into a valid contract in hiring some one to set up hatcheries in his own yard. One could hire B to set up $50 worth of hatcheries on his property and when B agreed, it is doubtful if any one would question the validity of the contract. It does not matter that the purpose is not

4. Somers v. Miner, 9 Conn. 458 (1832).

5. Furman University v. Waller, 124 S.C. 68, 117 S.E. 356 (1923).

expressly stated; it can be done by implication.

When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement; that there was a promise on one side, and on the other a return promise made by implication; and that a bilateral agreement may exist though one of the mutual promises be a promise implied in fact.[6]

The consideration for the agreement is found in the obligation imposed upon, and assumed by the trustee of this academy to see to, and make the application of this money as directed by the subscribers to this fund so as to enable this institution to prosecute its duties of public instruction for which it was incorporated, thus rendering this assumed liability and promise, the consideration of the promise of the other.[7]

The principal on which promises of the character of those embraced in the present case are held to be valid is the reciprocal undertaking on the part of the promisor to pay and the promisee to perform something of value to the promisor.[8] It certainly is not unreasonable to take implications from the subscribers subscribing to a particular kind of charity that he meant to have a certain amount more done in that field. One can imply that it is worth something to the subscriber to have work done in that field and that reason he pays money to the charity is that he wants the work done by the organization formed for that purpose. The organization is more specialized in this kind of work. He will get more for his money. This can be distinguished from gifts of money to persons in that the receivers in these subscriptions cases are formed for a specific purpose. The person who considers a certain kind of work as valuable can give money to a corporation formed for that purpose and thus avoid the time and trouble of hiring some one on his own to do the work. Why should the idea that A gives money to a corporation formed for the purpose of building bird hatcheries and teaching vermin control be challenged as lacking a valid legal consideration? There is no reason to consider these cases and hold them valid by the favored theory of public policy if you can find a real consideration.

6. Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927).

7. Troy Academy v. Nelson, 24 Vermont 194 (1852).

8. Barnett v. Franklin College, 10 Ind. App. 103, 37 N.E. 427 (1894).

PROCESS — IMMUNITY FROM SERVICE — WITNESSES—The defendant A, a resident of New Jersey at time of the accident, asked his companion B to assume responsibility of the injury. The plaintiff, relying on A's and B's statements that B was the driver, commenced an action in tort against B just before two years after the cause of action arose. Within that two years A removed to New York, and believing that an action, at that time, against him was barred, he came into New Jersey and testified in behalf of B, stating he was the driver. While so attending he was served with process by the plaintiff and suit was commenced against him. *Held*: Immunity from service will not be granted where the witness did not act in good faith, but in furtherance of a fraudulent and collusive scheme. *Baskerville v. Kofsky*, 18 N.J.Misc. 325, 13 Atl. 2d 562 (Com. Pl. 1940).

Immunity from civil arrest and service of summons while voluntarily going to, attending and returning from a trial is granted a party and witness participating in such trial. Such exemption from service of a *capias* has long been recognized by the common law of England,[1] and the courts of New Jersey and of the United States have applied it equally to the service of summons as to service of *capias*.[2] Its invocation is deemed essential to the proper administration of justice. The courts in striving to secure a just determination of the case, founded

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1. Anonymous, 88 Eng. Rep. 906 [c. 1725]; Walpole v. Alexander, 99 Eng. Rep. 520 [1782]; *Ex parte* Cobbett, 119 Eng. Rep. 1502 [1857]; Meekens v. Smith, 126 Eng. Rep. 363 [1791]; Selby v. Hills, 131 Eng. Rep. 364 [1832].

2. Rogers v. Bullock, 3 N.J.L. 109 (S. Ct. 1809). Immunity from arrest granted only where witness came without being subpoened. R.S. 1937, 2:97-18; Jones v. Krauss, 31 N.J.Eq. 211 (Ch. 1879), extend privilege to witness under subpoena. Following cases show there is no distinction between summons and *capias* and give general principle. Halsey v. Stewart, 4 N.J.L. 426 (S. Ct. 1817); Dungan ads. Miller, 37 N.J.L. 182 (S. Ct. 1874); Massey v. Colville, 45 N.J.L. 119, 46 Am. Rep. 754 (S. Ct. 1883); Mulhearn v. Press Publishing Co., 53 N.J.L. 153, 21 Atl. 186, 11 L.R.A. 101 (S. Ct. 1890); Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (S. Ct. 1920); Herman v. Arndt, 116 N.J.L. 150, 182 Atl. 830 (E. & A. 1935); Riewold v. Riewold, 121 N.J.Eq. 134, 188 Atl. 72 (Ch. 1936); Allen v. Plowman, 14 N.J.Misc. 251, 183 Atl. 899 (Dist. Ct. 1936); Morgan v. Morgan, 122 N.J.Eq. 2, 192 Atl. 508 (E. & A. 1937). Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10,739, 18 Fed. Cas. 1137 (C. C. E. D. Pa. 1849), approved in Stewart v. Ramsey, 242 U.S. 128, 61 L. Ed. 192 (1916).

upon the facts as they actually occurred, have improvised this method to encourage witnesses, who could not otherwise be brought under the jurisdiction of the court,[3] to testify as to such facts. There has been varied statements whether this privilege is for the benefit of the court or for the benefit of the witness,[4] but the necessary effect is that the witness would not come voluntarily within the jurisdiction of the court, unless he was given such privilege while in attendance at court, and "eundo et reteundo," and thus the court would be deprived of material evidence.

As this doctrine is an exception to the general rule that a court has jurisdiction over those persons physically present, the freedom is a privilege granted by the court, who, in its discretion, may refuse to invoke this rule in certain circumstances. But such discretion is prescribed by limits laid down in a series of cases[5] and should not be disregarded so that the protection intended by the general policy of the state would be nullified.[6]

One of the situations in which such exemption has been denied is where the service of process upon the witness or party was directed toward administrating of further relief in the original cause, insofar as the cause for which process was served was related to the first case

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3. Massey v. Colville, *supra;* Kutschinski v. Kutschinski, 112 N.J.Eq 341, 164 Atl. 560 (E. & A. 1932) Allen v. Plowman, *supra* note 2; Morgan v. Morgan, *supra* note 2, for express language to effect that absolute immunity is granted to non-resident witnesses, while only a very limited privilege for residents. This induces the question whether one who may be served with process under R. S. 1937, 39:7-(1 to 8) though a non-resident by service upon the State Commissioner of Motor Vehicles, where the accident occurred on the highways of New Jersey, is not thereby brought under the consequences of a resident and absolute privilege denied. This question is moot here, since statute applies to non-resident drivers when the accident occurred, while defendant, here, was a resident of New Jersey at that time.

4. Halsey v. Stewart, *supra* note 2, for benefit of court as well as for parties. Jones v. Krauss, *supra* note 2, for benefit of court. May v. Shumway, 16 Gray. 86, 77 Am. Dec. 401 (Mass 1860) for benefit of parties and witnesses; Morgan v. Morgan, *supra* note 2.

5. See 19 A.L.R. 828 (1921).

6. Jones v. Krauss, *supra* note 2.

in such a manner as to be "a part and continuation of the earlier one."[7] There the denial is justified. But the case under discussion cannot fairly be brought under such declaration, for it lacks the essential relation to the cause of action in which the defendant attended as a witness. Although the action against defendant is founded upon the same cause of action mistakenly brought by plaintiff in the first suit, yet, it is entirely separate and independent of the original action and cannot be said to be in aid thereof. The plaintiff could not have made defendant a party of the first cause, after it was instituted, but the first action had to be concluded and a wholely new proceeding commenced. As declared in the case of *Lamb v. Schmitt*,[8] the test for determining whether or not the privilege should be extended is "whether the immunity itself, if allowed, would so obstruct the judicial administration in the very cause for the protection of which it is involved as to justify withholding it." Here the granting of the privilege will in no way interfere with the original cause; on the contrary, it brings forth testimony which permits the achievement of justice upon the true state of facts.

Another instance where it is said that the exemption will be refused, is where the party or witness does not act *"bona fide."*[9] It would seem to be an answer to this proposition, merely to state that, although there have been such pronouncements, there is no case which defines its meaning, and no case in New Jersey in which such immunity has been denied for this reason. In fact, the only cases in which such principle has been invoked is where the witness appears with the intention of imposing upon the court, as to justify as bail where he knows himself to be insolvent,[10] or where the service was for an action of malicious prosecution,[11] and where he comes before the court to deliberately

7. Lamb v. Schmitt, 285 U.S. 222, 52 S. Ct. 317, 76 L. Ed. 720 (1931); Central Farmer's Trust Co. v. Rorick et al., 57 F. 2d 664 (C.C.A. 5th 1932).

8. *Supra*, note 7.

9. Selby v. Hills, *supra*, note 1; Walpole v. Alexander, *supra*, note 1; *Ex parte* Cobbett, *supra*, note 1.

10. Meekins v. Smith, *supra*, note 1.

11. Muller v. Sanborn, 79 Md. 364, 29 Atl. 522, 25 L.R.A. 721, 47 Am. St. Rep. 421 (1894).

commit perjury.[12] But even in these cases, it is not so much the fact that they acted *mala fides,* as that the claimants of the privilege committed a tort or wrong by coming before a court to falsify and deter in the administration of justice. Clearly in this case, the defendant as a witness did not come to hamper the administration of justice (as demonstrated in the preceeding paragraph), where the denial of immunity for such imposition is proper. While the defendant came with the purpose of serving his own ends, and perhaps in pursuance of a concocted plan, yet he came to give testimony which could be conclusive only of the proper determination of the relative rights of the parties before the court; and no legal wrong or injustice is done to the court or to the plaintiff, by coming to bear true testimony, for if he had not come into this state there would be no opportunity of service.

The question of *"bona fides"* is sometimes invoked in matters of deviation of the witness while returning from the trial, to determine whether or not such deviation was allowable.[13]

In view of the fact that some of our New Jersey cases are cited for the support of the principle as to *"bona fides,"* it is necessary briefly to review them to observe whether they, in fact, deny immunity for the reason that the witness did not act in good faith." In *Mulhearn v. Press Publishing Co.* Case,[14] the words "good faith" are used without any elaboration or definition, in the recital of the general proposition, and it is a case where the protection of the witness was given. Thus the phase was calculated only to indicate that there are exceptions to the general rule.[15] A careful analysis of the matter of *Brown v. Brown*[16] clearly demonstrates that this case does not hold that immunity will be withheld because the claimant thereof did not act in good faith, but the question of "good faith" related to the controversy whether or not the deserting wife's residence continues to be that of the husband, or whether she established an independent residence in another state, sufficient to sustain the immunity granted to a non-

12. *Ex parte* Levi, 28 F. 651 (W.D. S.C. 1886).
13. Selby v. Hills, *supra,* note 1; Walpole v. Alexander, *supra,* note 1.
14. *Supra,* note 2. To same effect, see Miller v. Dungan, *supra,* note 2.
15. See 19 A.L.R. 828 (1921).
16. 112 N.J.Eq. 600, 165 Atl. 643 (Ch. 1933).

resident. The court there held that the wife in leaving husband did so in bad faith and was guilty of desertion and, therefore her residence remained that of the matrimonial domicile, which was New Jersey, where the wife was served while a party to an action; and not entitled to absolute immunity.[17] Thus, we must conclude that there is no case in New Jersey which defines the meaning of the phrase *"bona fide"* nor which has shown circumstances where the court has refused to invoke the rule for the lack of good faith.

The only apparent harassing point in this case is the fact that the witness will be allowed to escape the prosecution of his civil wrong, which evasion was conceived in fraud and collusion. However, it is not essentially at variance from the case where the non-resident witness left the state, in which he entered as a witness, with the manifest intention of prohibiting service of process upon him for a cause of action which arose against him while a resident in such state. Yet this is the ordinary case in which the immunity is granted without hesitation, even though the court allows him to be free from such cause.[18] Where such testimony is necessary for the proper administration of justice, the immunity from service of a civil process should not be revoked as an indirect method of punishing the claimant thereof for any criminal infractions it might be proved he committed.

That denial of immunity should be very restrictive because of the necessity of the policy, is illustrated by the language of *Jones v. Krauss*[19] as follows: "It is true, such protection was neither solicited nor extended in advance of his coming; but will it be consistent with the dignity and justice which should always characterize judicial conduct, to refuse to give him now, because we have his testimony, the protection we would have extended to him to get his testimony if it had been asked for in advance? I am very decidedly of the opinion it will not."

17. Massey v. Colville, *supra*, note 2; Kutschinski v. Kutschinski, *supra*, note 3.
18. See Halsey v. Stewart, *supra*, note 2.
19. *Supra*, note 2.

RESTRICTIVE COVENANTS — CONSTRUCTION — STIPULATIONS AS TO TIME—Defendant entered into an employment contract with petitioner, a real estate broker. The contract provided that defendant should not enter the real estate business in Hudson County for one year after the termination of the employment, and that if defendant violated the agreement and petitioner was forced to invoke the jurisdiction of the court to enforce the contract, the one year period should be deemed to commence on the date of the final entering of judicial decree or final affirmance on appeal.[1] Defendant violated the contract and entered the real estate business in spite of the restriction. Petitioner prays for an injunction and accounting. *Held*: petitioner's act of invoking court aid postponed operation of the restrictive covenant until granting of the instant decree. Injunction granted, accounting denied. *J. I. Kislak, Inc. v. Coffin et al.*, 127 N.J.Eq. 535, 14 Atl. 2d 42 (E. & A. 1940).

The *raison d'etre* of the restrictive covenant is obviously that petitioner wanted to and was seeking to insulate himself against competition from a man whom he himself had trained in the intricacies of the real estate business. Defendant knew many of petitioner's business secrets and current prospects through his position of trust and confidence as Manager of the Industrial Department of petitioner's organization. The insertion of such a provision in the employment contract was a reasonable and proper way for petitioner to protect himself, in the event of just such an exigency as arose here.[2] Obviously such confiden-

1. Section 10 of the contract reads: " * * * in the event of the termination of this contract or of the employment hereunder for any cause, the party of the second part shall not enter into the real estate brokerage, real estate management * * * or any other branch of the real estate business then conducted by the party of the first part * * * directly or indirectly for a period of one year after the due and lawful termination of this contract. * * * However, in the event that the party of the second part violates the provisions of this paragraph and in consequence the party of the first part finds it necessary to invoke the jurisdiction of the courts * * * to enforce the provisions of this paragraph of this Agreement, then the period of one year herein referred to shall be deemed to commence on the date when the final judicial decree is entered or is finally affirmed on appeal."

2. Owl Laundry Co. v. Banks, 83 N.J.Eq. 230, 89 Atl. 1055 (Ch. 1914). *Held*, that a two-year restriction from entering business in Hudson County was fair and proper protection to employer.

tial knowledge as that possessed by defendant could easily be turned against petitioner by an ungrateful employee unless petitioner provided, in the contract of employment, a method to render such knowledge of no avail to such employees until it had been rendered comparatively innocuous by the passing of a reasonable time. The period of greatest danger to petitioner's business was immediately after the employment of defendant by petitioner terminated. After a year the secrets would be stale and useless and the prospects no longer ready and willing to do business, so that petitioner would have little to fear at defendant's hands after the passing of a year.[3] The information possessed by defendant as Industrial Manager of petitioner's business organization is not such information as is readily accessible to the public. There were confidential listings that are very valuable, and many others detailed items of data and information which was brought in daily by the various salesmen employed by petitioner and carefully kept on file, as highly valuable property. This property right of petitioner was not to be treated lightly because of its intangeability. On the contrary, defendant is bound by an implied contract not to use such trade data outside of his employment by petitioner, even in the absence of an express contract to that effect.[4] Therefore, defendant would have been violating a property right for which petitioner has the right to recover, even had no stipulation been made to that effect in the employment contract.

Defendant agreed not to enter the real estate business in Hudson County for one year after the termination of his employment by petitioner. This was definitely stated in the contract and there can be no fair question as to what was meant. Defendant violated this covenant and should certainly be made to pay for his disregard of petitioner's property right. Defendant made sizeable commissions for himself by using petitioner's trade data during the first year after he left peti-

3. Middleton v. Brown, 47 L. J. Ch. 411 [1883].

4. Stone v. Grasselli, 65 N.J.Eq. 756, 55 Atl. 736 (E. & A. 1903)—employees will be enjoined from using trade information to the detriment of their employer before or after leaving his employ. See also, Taylor Iron & Steel Co. v. Nichols, 73 N.J.Eq., 69 Atl. 186 (E. & A. 1907); Albalene Exterminating Co. v. Oser, 125 N.J.Eq. (Ch. 1939).

tioner's employ. Surely it would be a miscarriage of justice to allow defendant to appropriate petitioner's property and make no accounting for it. The period of restraint was to commence "after the due and lawful determination of this contract," which of course means immediately upon such termination. Any other construction would be contrary to the obvious intent of the contract and absolutely absurd. An apparently unambiguous contract may be open to construction when, if taken literally, it would lead to an absurdity.[5] To permit the secondary clause to govern the contract would be to thwart the only reasonable intent of the parties thereto, because very patently the provision that the year of restraint should be deemed to commence on the date of final decree by the court was only an auxiliary and additional clause, and *not* a substitution. The second clause was clearly intended to come into effect only if and when the first was violated, and then as a penalty to defendant for breaching the contract. We must take the contract as a whole and gather the purpose of the parties from all of its component parts.[6] Although a single clause, the second in this case, literally construed would lead to one result: we must still look to the instrument as the sum of all of its parts and extract the intent of that whole.[7] Therefore in analyzing and construing a contract we must reconcile all of its parts if possible.[8] If two clauses such as these cannot stand together, the earlier clause prevails.[9] In the case under consideration the first clause is the primary and most significant of the two, and deserves to stand alone if the second is incompatible. Surely the prime consideration was to have defendant remain out of business while the information was fresh in his mind. The second clause was only put in as additional security to petitioner if defendant breached his contract, as he did. In such a case it seems

5. Clappenback v. New York Life Insurance Co., 136 Wis. 626, 118 N.W. 245 (1908).

6. Stevens v. Coirin, 93 N.J.L. 502, 108 Atl. 247 (E. & A. 1919).

7. Chase v. Bradley, 26 Me. 531 (1847).

8. Chancellor Union Land Co. v. Jaffe, 104 N.J.L. 394, 140 Atl. 395 (E. & A 1928).

9. Vickers v. Electrozone Commercial Co., 67 N.J.L. 665, 52 Atl. 467 (E. & A. 1902). If uncertainty is not such as to completely void the instrument, the earlier of two incompatible clauses prevails.

quite reasonable to give more credit to the first clause which contributes more essentially to the contract than to the second clause, which contributes less.[10] This contract was not one which extended an alternative to defendant. He did not have a choice between refraining immediately upon leaving petitioner's employ or of taking his restraint at a later date at his own whim.[11] The meaning should be clear that he was to refrain immediately upon leaving petitioner's employ, and might enter into business in Hudson County during the first year thereafter on pain of incurring a *further* restraint of one year from the date of final adjudication against him.

Defendant should not be allowed to escape accounting for profits made by him in violation of his contract, or the purpose of the whole contract will be defeated. Defendant was properly restrained for an additional period of one year from the date of final entering of judgment on appeal, as a punitive measure because he did not carry out his contract obligation. This means that he should be made to account not only for his profits for one year from the date of the final decree, but also for the period of one year from the date that he left petitioner's organization.

It would clearly be wrong to deny petitioner the right to an accounting of profits made by defendant during the first year after he left petitioner. Such would be the result of construing the contract exactly as it is written, without any thought as to the manifest intention of both parties when the contract was entered into. We must fulfill a reasonable construction of the contract if possible,[12] and that cannot be done if we allow petitioner's rights to be trampled on because the court ignores what it knows to be the true intent of the contract. Defendant should be enjoined from entering the business of real estate in Hudson County for one year from the final adjudication on appeal, and also should give the accounting recommended by the trial court.

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10. Smith v. Davenport, 34 Me. 520 (1852).
11. American Ice Co. v. Lynch, 74 N.J.Eq. 298, 70 Atl. 138 (Ch. 1908).
12. CLARK ON CONTRACTS (1894), p. 589.

SEPARATION AGREEMENTS—EFFECT OF DIVORCE AND REMARRIAGE. —After separation the parties entered into an agreement providing for payment to the wife of fifteen dollars a week. The agreement was made August 31, 1937, and the wife obtained a Nevada divorce November 20, 1937. The decree provided that the agreement, a copy of it being attached to the decree, "be and the same is hereby ratified and adopted by the court and by reference made a part of this decree to the same extent and with the same force and effect as if set out at length herein; and the parties be and they hereby are ordered and directed to comply therewith and to execute the terms thereof." The husband knew at the time of the making of the agreement of his wife's intention to obtain a divorce. A few months after the divorce the wife remarried. The husband ceased the payments upon discovering the remarriage. The wife sues on the contract to recover the arrearages. *Held,* the agreement was not merged in the decree and a money decree awarded. *Corbin v. Matthews*, 127 N.J. Eq. 121, 11 A. 2d 603 (ch. 1940).

This case is a novel attempt by the wife to sue on a separation agreement after she has obtained a divorce decree incorporating that contract in it. This procedure would permit her to sue without exposing her to the defences[1] the husband might bring to a suit on the decree itself.

This attempt should fail because according to both Nevada and New Jersey law, the wife having elected to ask the court to order compliance with the agreement, the agreement becomes merged in the decree.[2] In the case of such a merger in a foreign divorce decree, equity will not entertain an action for arrearages there being an adequate remedy at law.[3] Hence, the wife should not have succeeded in this action.

Even if, as the court held, there was no merger of the agreement in

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1. From the circumstances of this case, it seems probable that either collusion or fraud upon the Nevada courts might have been found had the issue been raised.

2. Aseltine v. Second Judicial District, 62 Pac. 2d 701 (Nev. 1936); Lewis v. Lewis, 2 Pac. 2d 131 (Nev. 1931); *cf.* Halstead v. Halstead, 74 N.J.Eq. 596, 70 Atl. 928 (Ch. 1908); Rennie v. Rennie, 85 N.J.Eq. 1, 95 Atl. 571 (Ch. 1915).

3. Bennett v. Bennett, 63 N.J.Eq. 306, 49 Atl. 501 (E. & A. 1901); Bullock v. Bullock, 57 N.J.L. 508, 31 Atl. 1024 (S. Ct. 1895); Hughes v. Hughes, 125 N.J.Eq. 47, 4 Atl. 2d 288 (E. & A. 1938); Kossower v. Kossower, 142 Atl. 30 (E. & A. 1928).

the decree, it would seem that the payments under a separation agreement should not be continued after the subsequent divorce and remarriage. The court of chancery will enforce an agreement for separate maintenance up to the time of divorce.[4] Such agreements, however, will be enforced only at the discretion of the court for money already due under them,[5] and are not necessarily binding, but may be modified according to the circumstances.[6] In fact, until the decision in this case, there was authority for the proposition that such contracts, even though made for the joint lives of the parties, lost their force after divorce.[7] Hence, it would seem, in this state, that such separate maintenance agreements are not binding and will be enforced only at the discretion of the court.[8] Since, after remarriage, it is no longer the defendant's duty to support his wife, that duty having devolved upon another man by her remarriage, it appears to the writer that no consideration of public policy requires the enforcement of the agreement nor would justice be served by such enforcement.

Though the court should find that there was no merger and that a separate maintenance agreement may be enforced after divorce and re-

4. Calame v. Calame, 25 N.J.Eq. 548 (E. & A. 1874); Aspinwall v. Aspinwall, 49 N.J.Eq. 302, 24 Atl. 926 (E. & A. 1892); Vandegrift v. Vandegrift, 63 N.J.Eq. 124, 51 Atl. 200 (Ch. 1902); Halstead v. Halstead *supra* note 2; Whittle v. Schlemn, 93 N.J.L. 78, 106 Atl. 819 (S. Ct. 1919); *aff'd* 94 N.J.L. 112, 109 Atl. 305 (E. & A. 1919); Corrigan v. Corrigan, 115 N.J.Eq. 49, 169 Atl. 555 (Ch. 1933); Moller v. Moller, 121 N.J.Eq. 175, 188 Atl. 505 (Ch. 1936)

5. Adams v. Adams, 17 N.J.Misc. 234, 8 Atl. 2d 214 (Ch. 1939); Patton v Patton, 58 Atl. 1019 (Ch. 1904); Second National Bank v. Curie, 116 N.J.Eq. 101, 172 Atl. 560 (E. & A. 1934).

6. Hires v. Hires, 91 N.J.Eq. 366, 110 Atl. 513 (Ch. 1920); *aff'd* 92 N.J.Eq. 451, 112 Atl. 498 (E. & A. 1920); Aiosa v. Aiosa, 119 N.J.Eq. 385, 183 Atl. 219 (E. & A. 1935).

7. Hires v. Hires, *supra* note 6; Stern v. Stern, 112 N.J.Eq. 8, 163 Atl. 149 (Ch. 1932); Lester v. Lester, 122 N.J.Eq. 532, 195 Atl. 381 (Ch. 1937). *Contra*, Buttlar v. Buttlar, 71 N.J.Eq. 671, 65 Atl. 485 (Ch. 1906); Hedges v. Hedges, 112 N.J.Eq. 111, 163 Atl. 660 (Ch. 1932) (but in these two cases the agreement would seem to have been just since there was an actual property consideration); Mayhew v. Chapman, 116 N.J.Eq. 254, 173 Atl. 96 (Ch. 1934) (where the husband was held to have ratified the agreement by his laches in continuing payments six years after divorce with his knowledge).

8. See *ante* note 5.

marriage, yet, from the circumstances of the instant case, it would appear that this was an agreement for the payment of alimony both pendente lite and permanent, for the agreement was made August 31, 1937, and the divorce obtained in Nevada, November 20,1937, which seems scarcely more than enough time to make the trip, the necessary arrangements, the establishment of residence, the institution and conclusion of the proceedings. An agreement to pay alimony will not be enforced since it is against public policy as laid down in the Divorce Act, such agreements being merely evidential.[9]

In any case, where, as in this state, the parties are incapable of contracting with each other because of their marital status and must apply to a court of conscience for the enforcement of such contracts, it would seem that such a court should not compel one man to support another man's wife.

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9. Sobel v. Sobel, 99 N.J.Eq. 376, 132 Atl. 603 (E. & A. 1925); Greenberg v. Greenberg, 99 N.J.Eq. 461, 133 Atl. 768; Apfelbaum v. Apfelbaum, 115 N.J.Eq. 555, 171 Atl. 798 (E. & A. 1934); Phillips v. Phillips, 119 N.J.Eq. 462, 183 Atl. 220 (E. & A. 1935); Cohen v. Cohen, 121 N.J.Eq. 299, 189 Atl. 366 (Ch. 1936); Polyckronos v. Polyckronos, 17 N.J.Misc. 250, 8 Atl. 2d 265 (Ch. 1939).