RECENT CASES

CONFLICT OF LAWS—LAW APPLICABLE TO BREACH OF LIFE INSURANCE POLICY.—The defendant, then a resident of New York City, obtained from the complainant a life insurance policy, which also provided for payment of disability benefits. Two years after the issuance of the policy, it lapsed for non-payment of premium. After a reinstatement, a successive lapse and reinstatement followed, under which defendant applied for disability benefits. Complainant filed bill praying that the policy be rescinded and cancelled because of fraudulent answers to the reinstatement application. The defendant contended that the policy was a New York contract, under whose insurance laws notice is prescribed to the policy-holder prior to forfeiture for non-payment of premiums, *Held,* the New York statute had no extra-territorial effect on a policy executed and to be performed in New Jersey. Decree entered for complainant. *Prudential Insurance Co. v. Milonas,* 118 N. J. Eq. 343, 179 Atl. 107 (Ch. 1935).

It is well settled that an application for a policy is a mere offer to the insurer, and that the contract does not come into existence until after acceptance by the home office, as in this case, at Newark.[1]

We are concerned in this case only with the ability of the New Jersey court to deprive a New York resident of a right which he holds validly by a statute of his state. We have said that the contract was a valid one by virtue of execution in New Jersey. There is a great distinction, however, between the law determining the validity of a contract and the law controlling the breach of the same contract. The former is at the place of performance.[2]

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1. Northampton Mutual Live Stock Insurance Co. v. Tuttle, 40 N. J. L. 476 (Sup. Ct. 1878); Hemhauser v. Metropolitan Life Ins. Co., 106 N. J. Eq. 15, 149 Atl. 633 (Chanc. 1930).

2. In Scudder v. Union National Bank, 91 U. S. 406 (1875), the court concisely stated these three rules as the law of conflicts applied to contracts:

(1) Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made.

(2) Matters connected with its performance are regulated by the law prevailing at the place of performance.

(3) Matters respecting the remedy depend upon the law of the place where the suit is brought.

Though the contract was not an insurance contract, it is not apparent why these

In the principal case performance on the part of the defendant, in the form of the payment of premiums, was to be at the Newark home office, or in New York to the agent who held complainant's official receipt. This court decided that this last provision was a mere privilege for the convenience of the out-of-town policyholder which did not act as taking performance out of New Jersey.

It is well known that, as a matter of universal insurance practise, policyholders of foreign insurance companies invariably pay premiums at the local agent's office. Query—can such action be denied as representing performance of the contract in the local state? We submit that no matter what the provisions on its face may purport to be, the legal consequences of an option to pay at two different places must apply.

This law was fundamentally laid down in the case of *Morgan v. New Orleans Mobile & Texas Railroad.*[4] The court therein answered the question (what law shall govern a contract made in one state, and to be performed partially in that state and partially in another state?) by stating, "In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption, that where

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rules are not applicable to insurance contracts. New Jersey in the elaborate case of Mayer v. Roche, 77 N. J. L. 681, 75 Atl. 235 (E. & A. 1909), laid down the rule that the law of the state governs which "the parties to a contract intended or may fairly be presumed to have intended." This rule was adopted in Commercial Credit Corp. v. Boyko, 103 N. J. L. 620, 137 Atl. 534 (E. & A. 1927), Basilea & Calandra v. Spagnolo, 80 N. J. L. 88 (Sup. Ct. 1910), and was alluded to in the principal case by the court in its language that the parties "intended that the policy contract when issued should be performed in New Jersey. . . ." We submit that the court should be unconcerned with the intention of the parties and that the better rule imposes that law upon the contract which the place of performance indicates. There is a definite tendency to this last rule in the later New Jersey cases. Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554 (E. & A. 1911); Dennison v. Dennison, 98 N. J. Eq. 230, 130 Atl. 463 (1925) *aff'd,* 99 N. J. Eq. 883, 133 Atl. 919 (1926); Cockrell v. McKenna, 104 N. J. L. 592, 142 Atl. 20 (E. & A. 1928); Runkle v. Smith, 89 N. J. Eq. 103, 103 Atl. 382 (Chanc. 1918). Cf. Swetland v. Swetland, 105 N. J. Eq. 608, 617, 149 Atl. 50 (Chanc. 1930). See 58 N. J. L. 228; sec. 370, Restatement of the Conflict of Laws, which supports last rule.

3. See Expressmen's Mutual Benefit Ass'n. v. Hurlock, 9 Md. 585, 46 Atl. 957 (1900), where Maryland was held to have been the place of performance, even though the contract was made in New York, on the fact that assessments and dues were paid by the Maryland members to the local representatives in that state.

4. Reported 2 Woods, 244 (C. C. of U. S. 1876).

a contract is to be performed in a different jurisdiction, the parties must be intended to have in view the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail."

Thus, by a different method, we are brought to the application of New Jersey law to the breach of this insurance contract. We must decide, therefore, just as the court did in the principal case, that the New York statute could have no application to this insurance policy.

FRAUDULENT CONVEYANCE—PREFERENCE OF CREDITORS.—The defendant in both cases transferred over a million dollars worth of securities to the *X* Co. at a time when the defendant was insolvent. Ten days after this transfer, the commissioner of banking and insurance took possession of defendant's property and business. In a case involving the same parties[1] the complainants succeeded in having the transfer set aside,[2] and the securities were ordered delivered to the commissioner of banking and insurance. In the case at bar, complainants now move for a decree that the securities be paid first to them and the balance should only be available to other creditors. Two of the complainants in the present case are not judgment creditors, while one, the Central-Penn Nat. Bank, recovered judgments by default several months after the commissioner of banking and insurance had taken possession of the property of the defendant. *Held,* the commissioner's action in seizing the debtor's assets was similar in effect to the appointment of a receiver of an insolvent corporation,[3] and the decree was for the equal benefit of all creditors. *Central-Penn. Nat. Bank v. N. J. Fidelity and Plate Glass Co.; Industrial Acceptance Corp. v. same,* 119 N. J. Eq. 266, 182 Atl. 262 (Ch. 1935).

1. 117 N. J. Eq. 548, 182 Atl. 262 (Ch. 1935).

2. V. C. Backes held the transfer to have violated § 64 of the GEN. CORP. ACT; 2 N. J. COMP. STAT. at 1638.

3. Hammer v. Israel, 89 N. J. Eq. 481, 106 Atl. 125 (Ch. 1918); Gererotsky v. Hotel Co., 85 N. J. Eq. 63, 95 Atl. 865 (Ch. 1915); Doane v. Atlantic Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625 (E. & A. 1889). In Stanton v. Metropolitan Lumber Co., 107 N. J. Eq. 345, 152 Atl. 653 (Ch. 1930), the court held that property of a cor-

The issue before the court was whether the securities which were turned over to the *X* Co. should be restored to the commissioner for the equal benefit of all general creditors of defendant or whether the complainants should receive preference and the balance go to other creditors. The answer to this question depends, as far as the Central-Penn Bank is concerned, upon the status of the commissioner of banking and insurance now in possession of the assets of defendant; *i. e.*, complainant cannot be preferred to other creditors if the action of the commissioner constituted a seizure of the assets of the debtor in the same sense as does the appointment of a receiver of an insolvent corporation.[4]

The usual situation where a party who has obtained a judgment at law, files a "bill for the purpose of setting aside a fraudulent conveyance and thereby subjecting the property to the payment of the judgment of the creditor and the service of process thereunder, creates a lien in equity upon the equitable estate of the debtor in the property so conveyed."[5] By virtue of the equitable lien obtained by the judgment creditor who alone files a bill to set aside the fraudulent conveyance made by the debtor to a third person, he is preferred over all other creditors, even though they have judgments superior to his.[6] But, following in the usual path, when the insolvent estate is seized by the agent of the law, as when a receiver is appointed for an insolvent corporation, a creditor can no longer acquire a lien on the property and thus obtain a preference.[7] This

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poration in the possession of a receiver, in insolvency, is held in *custodia legis, cum onere*, for the benefit of all legal claimants. A receiver appointed is an independent legal entity created by statute to whom immediately upon his appointment the title to all the assets of the independent corporation passes.

4. V. C. Bigelow says at 269: "It must have been the intention of the legislature that the commissioner, on taking possession, represents creditors in the same manner as would a receiver and that he have equal power to collect assets for the benefit of creditors. The legislature could not have meant after the commissioner should take possession, to leave creditors to scramble for advantage among themselves, or to permit them to prosecute for their individual benefit suits to set aside voidable transfers."

5. Bradley v. United Wireless Telegraph Co., 79 N. J. Eq. 458, 460, 93 Atl. 1084 (Ch. 1911).

6. Dey v. Allen, 77 N. J. Eq. 522, 78 Atl. 674 (Ch. 1910).

7. The agent of the law represents both the debtor and the creditors, and is clothed with the attributes and equities of creditors, and he may challenge a transfer void as to them. Graham Button Co. v. Spielman, 50 N. J. Eq. 120, 24 Atl. 571 (Ch. 1892) (receiver of an insolvent corporation was appointed); Brockhurst v.

seizure by the receiver creates a lien which is as effectual as the lien of execution and levy, and embraces all the property of the debtor or that may in some way be made available for the payment of his debts; the lien of the receiver includes even the debtor's equitable estate in property fraudulently alienated.[8] After a receiver is appointed, a creditor cannot secure for himself a preference, nor can he disturb the all-embracing lien that the receiver has.[9] And where the creditor proceeds with a bill in equity subsequent to the appointment of a receiver, the creditor's bill is for the benefit of all the creditors.[10]

The problem presented by the case at bar resolves itself into a construction, both in power and effect, of the position occupied by the commissioner of banking and insurance.[11] To succeed in obtaining preference, complainants rely on the slim ground of lack of title in the commissioner of banking and insurance in order to maintain a bill to set aside the transfer. But even in the usual situation, a receiver does not avoid a transfer or conveyance by virtue of any title vested in him, but as a representative of both the debtor and creditors and particularly by the force of the lien that springs up from the moment he is appointed. In such a case, the receiver does not file a bill or sue by virtue of any title in himself, but he sues as lienor.[12]

Cox, 71 N. J. Eq. 703, 64 Atl. 182 (Ch. 1906) (receiver of an insolvent partnership was appointed); Pillsbury v. Kingon, 33 N. J. Eq. 287, 36 Atl. 556 (Ch. 1880) (assignee for the benefit of creditors brought suit); Lehbeck & Betz Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 704 (Ch. 1902) (executor of an insolvent estate); Stevens v. Peoples' Home Journal, 113 N. J. Eq. 516, 167 Atl. 769 (Ch. 1933) (receiver under the Securities Act).

In such cases, if the representative of creditors refuses to sue, one of the creditors may sue for the benefit of all creditors similarly situated. Currie v. Knight, 34 N. J. Eq. 485 (Ch. 1881).

8. Graham Button Co. v. Spielman, *supra;* Pillsbury v. Kingon, *supra.*

9. Trustees of Sea Isle City Realty Co. v. First Nat. Bank of Ocean City, 87 N. J. Eq. 84, 99 Atl. 929 (Ch. 1917).

10. Jones v. Fayerwather, 4 N. J. Eq. 237, 255 (E. & A. 1889).

11. Complainants contend that the commissioner has no title but is merely a custodian and hence was not capable of maintaining a bill to set aside the transfer in question. Two of the complainants, while they are not judgment creditors, are confident in their positions to seek preference by virtue of being parties to a bill that seeks to set aside a fraudulent transfer.

12. Bull v. International Power Co., 86 N. J. Eq. 275, 98 Atl. 382 (Ch. 1916); Cavagnaro v. Tire Co., 90 N. J. Eq. 532, 107 Atl. 643 (Ch. 1919); Hayes v. Pierson, 65 N. J. Eq. 353, 45 Atl. 1091 (E. & A. 1903).

An examination of the commissioner's power to so act shows quite clearly that in essence his position is the same as that of a receiver appointed by the chancellor. Pursuant to the statute,[13] the chancellor might, upon application made by the commissioner of banking and insurance, appoint a receiver[14] with the same powers and duties as a receiver appointed under the provisions of the Corporation act. The statute was amended[15] to permit the commissioner, at his discretion, to take possession himself of the property and business of the company in lieu of applying for a receiver. Later, this was altered[16] to read that in case the commissioner should refuse to take possession, then the Court of Chancery, on the petition of the attorney-general or any creditor or stockholder, could appoint a receiver with the same powers and duties as if appointed under the Corporation Act.[17] But it should be remembered that a receiver can not be appointed unless the commissioner refuses to act.

The court expresses the fundamental view that a creditor, once the debtor's assets are in the custody of the law, cannot for his sole benefit exercise rights which exist for the equal benefit of creditors as a class. Such a view finds firm support in past adjudications.[18] Relying on Section 64 of the Corporation Act to sustain its contentions, the court is careful to point out that the primary object of the statute is to secure all the creditors of such institutions an equal distribution of its assets.[19] Thus,

13. N. J. P. L. 1902, at 407.

14. At 269, V. C. Bigelow says: "this section as originally enacted provided that in the event an insurance company should become insolvent or should suspend its ordinary business for want of funds to carry on the same the chancellor might appoint a receiver with the same powers and duties as if appointed under the provisions of the Corporation Act."

15. N. J. P. L. 1930, at 288.

16. N. J. P. L. 1931, at 599.

17. V. C. Bigelow says at page 269: "such a receiver as a representative of creditors, could set aside transactions which are void as to them although good as to the company; and no creditor, after appointment of the receiver, could obtain, by his diligence, advantage over other creditors."

18. Wetherbee v. Baker, 35 N. J. Eq. 501 (Ch. 1882). In Mallory v. Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205 (Ch. 1895), V. C. Pitney enunciates this interpretation, saying "the clear policy of our Corporation Act is that the assets of an insolvent corporation should be equally divided among its creditors."

19. Expressed in Van Wagoner v. Paterson Savings Bank, 10 N. J. Eq. 13 (Ch. 1854), and by V. C. Backes in Active Mortgage Co. Apex Building Co., 104 N. J. Eq. 569, 146 Atl. 353 (Ch. 1929).

a creditor attacking the transfer in violation of Section 64, must do so for the equal benefit of creditors as a class.[20]

STATUTE OF LIMITATIONS—WORKMEN'S COMPENSATION—EFFECT OF COMMUTED PAYMENTS.—Petitioner filed claim for compensation against his employer. By agreement of compromise and order of the commissioner the award was commuted. More than two years after the award was made, but within two years of the date when he would have received the last payment if no commutation had been awarded, he filed a claim for increased disability compensation. Prosecutor moved to dismiss the petition. *Held,* the statutory period does not operate against the employee until after the day compensation would have been paid him if no commutation had in fact been made. *Anderson v. Public Service Electric & Gas Co.,* 114 N. J. L. 515, 177 Atl. 865 (Sup. Ct. 1935).

The Workmen's Compensation Act provides that the compensation thereby awarded may be commuted by the Workmen's Compensation Bureau if it appears that such commutation will be for the best interest of the employee or his dependents.[1] Unless so approved, the compensation payments shall be commuted.[2] Sec. (d) expressly characterizes commutation as a departure from the normal method of payment, to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. It has been held that the consent of the employer to commuted payment is not required.[3] Sec. (f) provides for review of an award within two years from the date when the injured

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20. The statutory scheme would be defeated rather than effectuated, if a voidable transfer should be set aside for the benefit of a single creditor instead of creditors as a class. The result would be to merely substitute one preference for another. When a preference which was accepted in good faith is set aside, the preferred creditor is not deprived of his dividend in the estate, but shares *pari passu* with other creditors in all assets including those he has been forced to surrender. Turp v. Dickinson, 100 N. J. Eq. 41, 134 Atl. 888 (Ch. 1926); Schneider v. Hamilton Trust Co., 116 N. J. Eq. 55, 172 Atl. 517 (Ch. 1934).

1. Pamph. Laws 1919, Ch. 93, p. 210, Sec. 21 (b).
2. *Idem* Sec. (c).
3. Panacona v. Vulcanite Portland Cement Co., 37 N. J. L. J. 75 (C. P. 1914).

person last received a payment on the ground that the incapacity of the employee has subsequently increased, or review at any time on the ground that the disability has diminished.[4]

There are no cases holding that an employer is entitled to reimbursement on such ground; nor has an employer ever received back from the employee payments made to him. The employer's right to a reduced award clearly applies only to future payments, and a commutation would seem definitely to deprive the employer of the right secured him in Sec. (f) *supra*.[5] There appears no justification for depriving the employer of his rights entirely, and at the same time granting the employee the double privilege of a lump sum payment plus the right to modify the award within two years of the date when the last payment would have been made if the employee had not chosen, with the full approval of his guardian, the Bureau, to accept the commuted amount in settlement and thereby determine the employer's right to review for diminished disability. The act does not provide for a third method of payment which would combine the advantages of both in favor of the employee. The instant case arrives at that inescapable result.

The English act provides duly for review of a periodical payment award, and it has been held that where there has been a commuted award by agreement, there can be no modification for increased disability.[6] It is well settled in New Jersey that a claim for additional disability will not be permitted where there has been a final and complete adjudication of the issues on the merits between the parties.[7] The rule is not questioned; but it is urged that where there has been no final adjudication, a commuted payment should be regarded as a last payment within the intendment of Sec. (f) *supra*. It is submitted that the payment referred to is that payment pursuant to the agreement or com-

4. Pamph. L. 1931, Ch. 279

5. In line with this view, see O'Connor v. Babcock & Wilcox Co., 38 N. J. L. J. 85 (C. P. 1915), where on application for commutation it was held that the first element to be determined is whether the injury is of such nature as to remove the question for all practical purposes of the possibility of the petitioner's disability becoming lessened or removed altogether. The fair inference is that because the employer is not entitled to reimbursement in such event, commutation cannot fairly be allowed unless the possibility is remote.

6. Howell v. Blackwell, W. C. Rep. (Eng.) 186, 5 B. W. C. C. 293 (1912).

7. Herbert v. Newark Hardware & Plumbing Supply Co., 107 N. J. L. 24, 151 Atl. 502 (Sup. Ct. 1930).

promise entered into, or award made, which marks an end of the employer's liability thereunder. Whether accepted voluntarily by the employer or imposed on him, his liabilities are fixed; and it is respectfully urged that the limitation period should begin to run from the date when the employer fully and completely discharges those liabilities.

Under this view, in the case of periodical payments the employer's liability continues until the date when the last payment becomes due. In the case of a commuted award, his liability ceases upon payment of the lump sum.

WILLS—CREDITORS RIGHTS AGAINST THE DONEE OF A POWER.—Bill to determine whether the assets comprising a trust fund, over which testatrix had the power of appointment, are chargeable with the payment of the administration expenses, including taxes of the estate of the testatrix and of her debts, when she had exercised that power in favor of volunteers. *Held,* the property appointed is deemed in equity part of donee's assets and is subject to demands of donee's creditors in preference to claims of donee's voluntary appointees, only to the extent that donee's own estate is insufficient to satisfy their demands. *Seward et al. v. Kaufman et al.,* 119 N. J. Eq. 44, 180 Atl. 857 (Ch. 1935).

The cases in the various jurisdictions are not in accord on this question. The English doctrine holds that such property may be reached[1] and this doctrine has been followed in many of the states. In Massachusetts it has been stated that when a donor gives to another power of appointment over property the donee of the power does not thereby become the owner of the property but if the power is exercised his creditors may reach it. In *Clapp v. Ingraham,*[2] the facts were identical with those in the case at bar, and it was held that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The Supreme Court of the United States, in *United States v. Field,*[3] held: "Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal assets of his estate, and (in the absence

1. Townsend v. Windham, 2 Ves. Sen. 1, 9, 10; Ex parte Caswall, 1 Atk. 559, 560.
2. 126 Mass. 200 (1879).
3. 255 U. S. 257, 18 A. L. R. 1461 (1920).

of statute), if it passes to the executor at all, it does so, not by virtue of his office, but as a matter of convenience, and because he represents the rights of creditors." The donee has no title whatever to the property because the power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The rule was first applied in this state in *Crane v. Fidelity Union Trust Company,*[4] where it was held that where estate of one executing a power of appointment becomes exhausted, the estate of the donor of the power is subject to payment of the debts of the one exercising the power. The right to exercise the power is not property and cannot be reached by creditors. Hence where the donee fails to execute the power, (in the absence of statute) the creditors have no redress against the trust estate.[5] On no theory of fact is the property appointed the property of the donee of the power. But very early equity grafted onto these bare facts a principle of fair dealing. That principle was founded on the idea that a man ought to pay his debts if he could. It was accordingly held that a man of integrity, in debt, having a general power to give away the property of another ought to give it to his creditors if they could be paid in no other way, rather than to give it to persons who have no legal claim upon it. This is purely a doctrine of equity and had its origin in England.[6] The courts of this state have followed it so far as it concerns creditors but have not extended it to the payment of administration expenses and taxes of the estate of the donee. Why they have not extended it to the payment of administration expenses and taxes of the estate of the donee is not clear, and the cases are of no help because the courts have dismissed it without comment. It has been suggested that the reason lies in the fact that it is a purely equitable doctrine and the courts feel it must be confined within reasonable bounds. The jurisdictions which do not follow the rule at all seem to go along on the theory that it is not the donee's property and therefore his creditors should not have it. Some of them base it on the fact that the donor never intended it to be used in that manner. Regardless of these views it is submitted that the one followed by our courts is the sounder rule.

4. 99 N. J. Eq. 164, 133 Atl. 205 (Ch. 1926).

5. Holmes v. Coghill, 7 Ves. Jr., 499, 507, 32 Eng. Rep. 201 (1802), *aff'd,* 12 Ves. Jr. 206, 33 Eng. Rep. 79 (1806); Gilman v. Bell, 99 Ill 144, 150 (1881).

6. Its history, underlying basis, and application are fully discussed in O'Grady v. Wilmot (1916) 2 A. C. 231.

PRIVILEGES AND IMMUNITIES—SERVICE BY NON-RESIDENT ON NON-RESIDENT.—The plaintiff, a non-resident served the Commissioner of Motor Vehicles with a summons and complaint; thereupon, that official forwarded a copy of the suit and complaint to the defendant, who, upon entering a special appearance, moved to vacate and set aside the attempted service.[1] *Held,* service by a non-resident of the state of New Jersey upon another non-resident through the medium of the Commissioner of Motor Vehicles is ineffective. *Charles v. Fischer Baking Co. et al.,* 14 N. J. Misc. 18, 182 Atl. 30 (Sup. Ct. 1935).[2]

There is no more fundamental concept in our process for the administration of justice than that which necessitates adequate notice to parties involved in legal controversies.[3] To be effectual, the process purporting to give notice must be served upon the proper person, in due time and in the manner prescribed by law.[4] Unless otherwise provided by statute,

1. The defendant insisted that the act, *infra* note 2, gives the right only to residents of the state of New Jersey to effectuate service thereunder. In reply, it was contended that the act is unconstitutional since it prejudiced the rights of non-resident citizens.

2. This mode of service is provided for by N. J. COMP. STAT. (Supp. 1930) at 1048, as amended by N. J. P. L. 1933, Ch. 69. "From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under law of the state of New Jersey providing for registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the state of New Jersey, without a New Jersey registration or license, shall, by the acceptance and operation of such automobiles within the state of New Jersey, make and constitute the Commissioner of Motor Vehicles of New Jersey his, her, or their agent for the acceptance of process in any civil suit or proceeding by any resident of the state of New Jersey against such chauffeur, operator, or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the state in which a motor vehicle operated such chauffeur, or operator, or such owner is involved; the acceptance of the said privilege or the operation of said motor vehicle shall be the signification of his, her, or their agreement that any such process against him, her, or them which is so served shall be of the same legal force and validity as if served upon him, her, or them personally."

3. Smith v. Apple, 6 F. (2d) 559 (C. C. A. Kans., 1926); N. J. Turnpike Co. v. Hall, 17 N. J. L. 337 (Sup. Ct. 1839); Hess v. Cole, 23 N. J. L. 116 (Sup. Ct. 1861). See also HARRIS, PRACTICE AND PLEADING IN NEW JERSEY. § 68 and cases cited therein.

4. Brewster v. City of Newark, 11 N. J. Eq. 114 (Ch. 1856); North Baptist Church v. City of Orange, 54 N. J. L. 111, 22 Atl. 1004 (Sup. Ct. 1891); City Publishing Co. v. Jersey City, 54 N. J. L. 437, 24 Atl. 571 (Sup. Ct. 1892). See also HARRIS, *loc. cit. supra* note 4.

notice can be served only by residents of a state upon those within the physical boundaries of that state. In the *Fischer* case,[5] it was contended that, if the statute,[6] which provided for substituted service upon a non-resident, was restricted in operation to suits instituted by residents, it was unconstitutional in violation of the Federal Constitution,[7] for the right to institute and maintain all actions in the courts of the state must be included among the privileges and immunities of citizens of the several states.[8] But a person is not denied, in a constitutional or rational sense[9] the privilege of resorting to the courts to enforce his rights when he is given free access to them[10] even though service of process is facilitated and made more certain for a resident than for a non-resident.[11]

5. 14 N. J. Misc. 18, 182 Atl. 30 (Sup. Ct. 1935).

6. *Supra* note 2.

7. The specific objection was to that part of the statute which reads, "in any civil suit or proceedings by any resident of the state of New Jersey." It was alleged that this contravened ART. 4, § 2 and AMEND. 14, § 1 of the U. S. CONST.

8. Corfield v. Coryell, 4 Wash. C. C. 371 (Pa. 3rd Cir., 1823). "Privileges and immunities of citizens of several states is confined to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments and which have at all time been enjoyed by the citizens of several states which compose this union. . . . They may, however, be all comprehended under the following general heads . . . to institute and maintain actions of any land in the courts of the state."

9. Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553, 562 (C. C. A. 8th, 1920). "The constitutional requirement is satisfied as a non-resident is given access to the courts of the state on terms which in themselves are reasonable and adequate for the enforcing of any right he may have, even though they may not be technically and precisely the same in extent as those accorded resident citizens." See also Slaughter House Case, 16 Wall. 36, 76 (U. S. Sup. Ct. 1872); Blake v. McCluny, 172 U. S. 239, 248 (1898); Chambers v. Baltimore and Ohio Ry. Co., 207 U. S. 145, 155 (1907).

10. If service of process can be procured, according to legal procedure, on the defendant within the state, an action can still be maintained. County, Adm'x. v. Passaic County Borax Co., 68 N. J. L. 273, 58 Atl. 386 (E. & A. 1902). "If service can be made, the suit proceeds. The right to institute the suit is nowhere abridged and if service can be made, a non-resident has equal rights with a resident as to its maintenance."

11. Blake v. McCluny, *supra* note 9. "Such a regulation of internal affairs of a state can not be reasonably characterized as hostile to the fundamental rights of citizens of other states. . . . It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the constitution to citizens of the several states."

The crux of the constitutional problem hinges on the differentiation between *citizen* and *resident*. It has been repeatedly held that the two words are neither synonymous or inclusive, one of the other.[12] The statute of New Jersey does not discriminate against citizens of another state as such nor does it deny citizens of another state any right to maintain an action in the courts of this state on the same terms as resident citizens; the sole discrimination apparent is that between resident and non-residents.[13] The grant or denial of privileges, based upon distinction in residence, may be founded on a rational consideration emphasizing the difference between citizens and residents without involving the impairment of constitutional rights.

USE AND OCCUPATION—VENDOR AND PURCHASER.—Plaintiff sought to charge the defendant for the use and occupation of lands into which the defendant had entered under a contract for sale from the plaintiff. *Held,* one in possession of lands under a contract for sale and purchase is not liable for the use and occupation thereof; a tenancy must exist to support such an action; and an action in the nature of assumpsit for use and occupation can arise only on a contract, express or implied. *Roselle*

See also Cheming Canal Bank v. Lowery, 93 U. S. 72 (1876); Aultman and Taylor Co. v. Syme, 79 Fed. 238 (1897); Klotz v. Angle, 220 N. Y. 347 (1917); Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315, 325, 19 N. E. 625 (1889).

12. La Tourette v. McMaster, 248 U. S. 465, 470 (1918); Cummings v. Wings, 31 S. C. 427, 10 S. E. 107 (1889). In Douglas v. N. Y., N. H. & Hart. R. R. Co., 279 U. S. 377 (1928) Justice Holmes held: "However often the word resident may have been used as the equivalent to citizen and for whatever purposes residence may have been assumed to follow citizen, there is nothing to prohibit the legislature from using resident in the strict primary sense of one actually living in a place for the time irrespective even of domicile." See also Adams v. Penn. Bank of Pittsburg, 35 Hun. (N. Y.) 393 (1885); Duquesne Club v. Penn. Bank of Pittsburg, 35 Hun (N. Y.) 390 (1885); Robinson v. Oceanic Steam Navigation Co., *supra* note 12; Klotz v. Angle, *supra* note 12.

13. In a case similar to the one under review the court referred to Cummings v. Wingo, *supra* note 13, thus: "The service of process as provided in the act is denied non-residents not because they are citizens of another state but only because they are not citizens of this state. The right to use the provisions of this act would be denied as well to a citizen of this state, who was a non-resident at the time as it would to a citizen of another state not residing here." Grace v. Insurance Co., 109 U. S. 278 (1882).

Park Building and Loan v. Friedlander, 116 N. J. L. 32, 181 Atl. 316 (Sup. Ct. 1935).

Where a party has occupied premises belonging to another "it follows as a matter of course that the party in possession is bound to pay for the use and occupation unless he can show an agreement to the contrary or some satisfactory reason why he should not be charged."[1] But in *Brewer v. Adm'rs of Conover*[2] the court held that no action can be maintained for use and occupation where the relation of landlord and tenant does not exist and that the relation does not exist where the defendant enters land under a contract for purchase and sale or for a deed.

Where a vendor is unable to convey good title to a vendee occupying lands under a contract for sale, it is not possible for him to convert the relation set up by the contract for sale into a landlord and tenant relationship in order to charge the vendee for use and occupation,[3] for an implied contract cannot exist where there is an existing express contract covering the identical subject.[4] The New Jersey Supreme Court in *Donovan v. Brenning*[5] held that the landlord and tenant relationship necessary to support an action for use and occupation could not be said to exist even when the defendant entered into possession under a provision for that purpose contained in the contract for sale, which the plaintiff later for reasons strictly *dehors* the contract could not enforce.

It is possible, moreover, for an occupier of lands to be a tenant for certain purposes and still not be a tenant for the purpose of charging him for use and occupation.[6] Such is the position of a vendee in possession of lands under a contract to purchase, whether written or verbal. He

1. Ex'rs. of Conover v. Conover, 1 N. J. Eq. 403 (Ch. 1831). The burden of proof is on the defendant. *Ibid.*

2. 18 N. J. L. 214 (Sup. Ct. 1841).

3. 7 Q. B. 611.

4. Voorhees v. Ex'rs of Woodhull, 33 N. J. L. 494 (E. & A. 1869).

5. 79 N. J. L. 202, 74 Atl. 253 (Sup. Ct. 1909).

6. Freeman v. Headley, 33 N. J. L. 523 (E. & A. 1869). Referring to the New York case of Smith v. Stewart, 6 Johns 46, the court said: "The better opinion is that he (the occupier of lands under a contract for sale) never was strictly a tenant, and never entitled to notice to quit, nor liable to distress, nor liable to an action of assumpsit for rent. He may not be a tenant for the three purposes named and yet for the purpose of being prohibited when called to surrender, from disputing the title of the person from whom he derived possession and for being liable for unauthorized spoliation when thus lawfully in possession, he may well be considered a tenant."

is a tenant at will for the purpose of sustaining an action on the case in the nature of waste for destruction committed in possession of the lands.[7]

Although the landlord tenant relationship is necessary to support an action for use and occupation,[8] this action does not necessarily suppose a demise; rather the law will imply a contract to pay rent from the mere fact of occupation unless the character of the occupancy be such as to negative the existence of a tenancy.[9] The inference of a tenancy may be negatived by acts on the part of the landlord amounting to a repudiation of that relation.[10]

Thus, where the vendee enters into possession under a contract for sale and later successfully repudiates the contract on the ground that title is unmarketable and thereafter continues to occupy the premises after tender and refusal of the deed, he is liable to the owner for the fair rental value of the premises during the period of occupation.[11]

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7. McKenna v. Reade, 105 N. J. L. 408, 144 Atl. 812 (E. & A. 1928). One occupying lands under these conditions, however, is not such a tenant as to be entitled to three months notice to quit. Van Valkenburgh v. Den ex Dem Rahway Bank, 23 N. J. L. 583 (E. & A. 1851).

8. Kertesz v. Feldheim, 6 N. J. Misc. 8, 139 Atl. 703 (Sup. Ct. 1927), *aff'd*, 105 N. J. L. 239, 143 Atl. 917 (E. & A. 1928). Here the plaintiff made a contract to sell premises on December 14; the vendee was to have the right to occupy immediately although title was not to pass until Jan. 1. On December 15 the vendee leased the premises to the defendant. The court held that the plaintiff could not recover from the defendant for use and occupation for the reason that no landlord or tenant relationship existed between the parties. In Stewart v. Fitch and Boynton, 31 N. J. L. 17 (Sup. Ct. 1864) the plaintiff owned land on the Delaware River; the defendant occupied mud flats between the high and low water mark which adjoined the plaintiff's property but which did not belong to the plaintiff. In order to avoid unpleasantness, the defendant paid the plaintiff some money for occupation. It was held that this payment created no implied promise to pay for the occupation in the future.

9. Chambers v. Ross, 25 N. J. L. 293 (Sup. Ct. 1855).

10. In Mason v. Haurand, 79 N. J. L. 375, 75 Atl. 452 (Sup. Ct. 1910), *aff'd*, 82 N. J. L. 645, 82 Atl. 892 (E. & A. 1911) the plaintiff gave notice to the defendant who is holding over after a life tenancy that she would hold him liable for double rent under the statute (GEN. STAT. 1921, § 27) for double rent. This was tantamount to an election to hold the defendant as a trespasser. The court said that the plaintiff could thereafter allege that the landlord and tenant relation existed.

11. Wheaton v. Collins, 90 N. J. L. 29, 100 Atl. 157 (Sup. Ct. 1917), *aff'd*, 91 N. J. L. 236, 103 Atl. 201 (E. & A. 1918). Reasonable value in an action for

WILLS—CAVEAT—JUDGMENT CREDITOR.—Testator's last will and testament contained no direct devise or bequest to his son. A judgment creditor of the son filed a caveat against the probate of the will. *Held,* a judgment creditor of an heir at law may caveat against the probate of a will which prevents property from descending to the judgment debtor. *In re Van Doren's Estate,* 119 N. J. Eq. 80, 180 Atl. 841 (1935).

The question is: Who are parties in interest within the meaning of the statute?[1] A mere creditor of an heir at law of the testator, without more, may not caveat a will,[2] but if such creditor had an attachment on the real estate descended to the heir at the time mentioned, he is definitely a party aggrieved, since such attachment would be a real interest in the land, which might be followed up by a perfect title subject to being defeated by admission of the will to probate. The test appears to be that the creditor must have an interest in the property, as distinct from motive, in order to be a party in interest.[3] A reason for this rule would be the possibility of enormous litigation in case every creditor of every heir or next of kin should contest. The right of a mere creditor to contest is recognized in other jurisdictions upon the theory that the conduct of the heir in refusing to file a caveat if the will is invalid, is in effect a fraud upon creditors.[4]

It is not required in this state that execution of judgment be levied upon real property to make the judgment creditor a party in interest[5] since real property vests automatically in the heir upon the death of the testator, subject to being divested by the provisions of the will. Conversely no one may caveat a will unless his legal rights are involved in the action so taken.[6] A grantee or assignee of the heir or next of

use and occupation is for the jury. Humphreys v. Humphreys and Ryan, 11 N. J. Misc. 477, 166 Atl. 712 (Sup. Ct. 1933). The Illinois Sup. Ct. has held that if one acquires possession of land under a contract for sale, and refuses to perform the contract, the vendor can not maintain assumpsit for use and occupation, but may in ejectment recover mesne profits. McNair v. Schwarz, 16 Ill. 24 (Sup. Ct. 1854).

1. ORPHANS CT. ACT, 3 N. J. COMP. STAT., at 3816, § 14.
2. Smith v. Bradstreet, 16 Pick. (Mass.) 264 (1834); In re Langevin, 45 Minn. 429, 47 N. W. 1133 (1891); Seward v. Johnson, 27 R. I. 396, 62 Atl. 569 (1905).
3. 1 PAGE, WILLS, § 551.
4. Brooks v. Paine, 123 Ky. 271, 90 S. W. 600 (1906).
5. Middleditch v. Williams, 47 N. J. Eq. 585, 21 Atl. 290 (E. & A. 1890).
6. *Ibid.*

kin of property which should pass by intestacy may contest a will.[7] A creditor of the testator and of the executor and principal devisee, without benefit of judgment, might claim to have a will exhibited for probate, where there was reason to believe that there was a will in the hands of an executor.[8] It follows that anyone who might claim to offer a will for probate may also file a caveat against a will.

7. Allen v. Pugh, 206 Ala. 10, 89 So. 470 (1921).
8. Stebbins v. Lathrop, 4 Pick. (Mass.) 33 (1826).