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Case Notes

CASE NOTES

Conflict of Laws—*Babcock* Rule Applied to Determination of Limitation on Liability in Wrongful Death Action.—Decedent, a New York domiciliary, died when an airplane of defendant, a Massachusetts corporation, crashed in Massachusetts en route from New York to Nantucket. The ticket was purchased in New York. Plaintiff, executor of the decedent's estate, brought an action under the Massachusetts wrongful death statute[1] in the United States District Court for the Southern District of New York.[2] The beneficiaries of the action, decedent's widow and four children, were not domiciliaries of New York when the suit was commenced: two children were California domiciliaries, and the widow and remaining children, though domiciled in New York when the accident occurred, had since moved and were domiciled in Maryland at the time of suit. Plaintiff, relying on *Kilberg v. Northeast Airlines, Inc.*[3] and *Pearson v. Northeast Airlines, Inc.*,[4] moved that defendant's affirmative defense, that liability be limited to the amount provided in the Massachusetts statute, be stricken, because limitations on recovery in wrongful death actions are contrary to New York's public policy. *Held*, motion denied. The New York policy, as expressed in *Kilberg* and *Pearson*, was intended only for dependents who are domiciled in New York at the time of suit, and the forum had no basis for disregarding the liability limitation when, as here, the jurisdictions (California and Maryland) which had the superior interest in the surviving dependents would have enforced it. *Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D.N.Y. 1963).

In matters concerning choice of law in tort liability, New York has recently undertaken a sudden departure from its former position. Traditionally the law of the *locus delicti* applied to all substantive issues involving existence and extent of liability.[5] Then came *Kilberg*, which arose out of the same occurrence upon which the instant case was decided. There the New York Court of Appeals, in dictum,[6] said it would refuse to enforce the Massachusetts limitation because to do so was contrary to New York's public policy, even though the Massa-

1. Mass. Gen. Laws Ann. ch. 229, § 2 (1955). This statute provided that the amount recoverable if defendant were held liable was not to exceed $15,000. Note that the statute has since been amended to provide for a recovery of not more than $30,000. Mass. Gen. Laws Ann. ch. 229, § 2 (Supp. 1963).

2. Jurisdiction was based on diversity of citizenship. Thus the federal court, sitting as a New York court, was required to apply New York conflicts principles. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

3. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

4. 199 F. Supp. 539 (S.D.N.Y. 1961), aff'd en banc, 309 F.2d 553 (2d Cir.), reversing 307 F.2d 131 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963).

5. See, e.g., Goodrich, Conflict of Laws 260 (3d ed. 1949).

6. 9 N.Y.2d 34, 41, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137 (1961). The complaint alleged two causes of action—one for wrongful death and the other for breach of defendant's contract of safe carriage. The court's holding was limited to affirmance of the dismissal of the contract cause, which was the only issue before the court. See Dyke v. Erie Ry., 45 N.Y. 113 (1871).

chusetts statute, as the law of the *locus delicti*, would be—at least under present law—the necessary basis for the cause of action and would control as to the standard of conduct required to determine liability.[7] One year later *Pearson* followed, in which the dictum of *Kilberg* was accepted as the prevailing law of New York, and therefore was to be applied by federal courts sitting in New York in diversity cases. *Pearson* added that it was not a denial of full faith and credit for the forum to apply its policy against limitations on liability in wrongful death actions when enforcing a right created under the *lex loci* containing such a limitation. Finally, *Babcock v. Jackson*[8] completely overturned the traditional approach and formulated a "significant contacts" theory, under which the choice of law New York will hereafter make in determining issues of tort liability will be governed by the law of the jurisdiction which has the *superior interest* in the particular issue involved.[9] As yet few guidelines have developed to assist the forum in choosing between jurisdictions having conflicting interests.[10] The present decision represents an attempt to provide such a guide, at least with respect to wrongful death actions.

Judge McGohey in the instant decision pointed out that the vital distinction between the facts of this case and those of *Kilberg* and of *Pearson* was that, in the latter instances, the intended beneficiaries of the wrongful death proceedings—the dependents of the decedent—were domiciled in the forum state, whereas here the forum lacked such interest. Although *Kilberg* had given expression to New York's interest " 'in providing its residents *or users of transportation facilities there originating* with full compensation for wrongful death,' "[11] Judge McGohey felt that the above cases were concerned primarily with the protection of the beneficiaries of the action, reasoning from the *purpose* behind the enactment of wrongful death statutes.[12] Thus in choosing the

7. In his concurring opinion in Kilberg, Judge Fuld, who wrote the majority opinion in Babcock v. Jackson (see note 8 infra), said that the wrongful death statute of New York might be applied in its entirety since New York was the jurisdiction having "the most significant contacts." But according to Judge Fuld, the court of appeals was constrained from so holding because of the well-established precedent of that court that the New York wrongful death statute (N.Y. Deced. Est. Law § 130) would not be given extraterritorial effect in cases where injury and death occur outside of the state. 9 N.Y.2d at 44-45, 172 N.E.2d at 531, 211 N.Y.S.2d at 140-41 (concurring opinion). In light of the revisionary view of the court of appeals expressed in Babcock v. Jackson, New York in the future might apply the entire wrongful death statute of the state found to have the most significant contacts.

8. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

9. Babcock refused to apply Ontario's automobile guest statute to bar a personal injury action by a New York domiciled plaintiff against a New York domiciled defendant, where Ontario's only contact with the occurrence was that it happened to be the locus delicti. See 32 Fordham L. Rev. 158 (1963).

10. See generally Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212 (1963); Currie, id. at 1235, 1241; Leflar, id. at 1251; Reese, id. at 1253.

11. Gore v. Northeast Airlines, Inc., 222 F. Supp. at 52.

12. Id. at 52-53. In support of this contention, the judge referred to two New York

jurisdiction which has the "superior interest" in the issue of the extent of recovery in such an action, the determining factor seems to be the domicile of the dependents.

Turning then to these jurisdictions—California and Maryland—the court, in a statement pregnant with confusion,[13] posed the question of whether New York would refuse to enforce the Massachusetts limitation if it were found that California, were it the forum, would itself refuse to enforce it.[14] Finding that the conflicts principles of California would require the courts of that state to make an automatic application of the *lex loci delicti* in determining this issue, it held that New York, as a disinterested forum, would be impelled similarly to apply the Massachusetts limitation.

Maryland, on the other hand, is compelled by statute[15] to apply the entire substantive rules of liability of the state in which the tort occurred, leaving only procedural matters to the forum. This, too, would require New York's disinterested submission to the hypothetical determination of a Maryland court.[16]

The language in which the argument was couched, however, leads to doubt as to the precise effect Judge McGohey gave to the law of the states of domicile. At first glance it appears that the forum was sitting as a court of the state with the strongest interest and applying its entire law, including its conflicts principles. But, perhaps significantly, he did not answer the question of whether New York would honor the interests of California or Maryland, if it were assumed that the latter *would* assert "an interest in securing full indemnity for its domiciliaries."[17] This omission would be logical if, as may be, the decision was based on the *lack* of New York's interest in the recovery, rather than on the *existence* of California's or Maryland's interest.[18] Can it not be argued, in

cases in which the Kilberg rule was applied, in both of which it appeared that the dependents of the deceased New York domiciliary were themselves residents of New York. Riley v. Capital Airlines, Inc., 13 App. Div. 2d 889, 215 N.Y.S.2d 295 (4th Dep't 1961) (memorandum decision); Bopp v. Bell, 18 App. Div. 2d 914 (2d Dep't 1963) (memorandum decision). From the finding here that New York had no interest in the welfare of persons not domiciled therein, it followed that the Kilberg rule was not applicable.

13. See notes 17-19 infra and accompanying text.

14. "New York would appear to have a basis for disregarding the damage limitation with respect to the decedent's California children only if it were assumed that, if California had asserted an interest in securing full indemnity for its domiciliaries deprived of their expectation of future support by an injury outside the State, New York would honor that interest." 222 F. Supp. at 53.

15. Md. Ann. Code art. 67, § 2 (1957). Note that this statute is inapplicable to cases wherein Maryland is the place of death. See State ex rel. Thompson v. Eis Automotive Corp., 145 F. Supp. 444 (D. Conn. 1956).

16. Implicit in this determination is the proposition that the recovery limitation is substantive rather than procedural. Since the forum characterizes, it is proper to look to New York law for an answer to this question. Thus, in view of Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), it appears that the above proposition is correct.

17. See note 14 supra.

18. The following language from the opinion indicates that that may have been the more important factor: "It can hardly be argued that New York has a legally recognizable

support of this approach, that only the public policy of the *forum* against liability limitations, as in *Pearson*, can justify the ignoring of such a limitation in applying the wrongful death statute of the *locus delicti*, and that, in the case of a *disinterested* forum, the full faith and credit clause of the Constitution requires the application of the entire Massachusetts statute? It is submitted that this is the implication to be drawn from Judge Kaufman's opinion in *Pearson*, wherein he stated:

> We therefore see no escape from the proposition . . . that a legitimately interested state may, under the circumstances of this case, apply a firmly fixed and long existing policy *of its own*, although this would remove a defense provided by an "integral" provision of the locus' statute creating the cause of action.[19]

If so, the present case does not represent an application of the *Babcock* rule that the choice of law is to be determined by reference to the law of the state with the strongest interest, but is a decision simply on the issue of whether the interest of the forum is strong enough to justify the application of *its* public policy as against some of the provisions of an applicable foreign statute, even under full faith and credit.

If not—that is, if Judge McGohey did not answer the question posed in the previous paragraph simply because he was not required to under the facts of the case—there exists an anomaly in this particular application of *Babcock*. For here we have *Babcock* supposedly requiring a New York court to determine the controversy by blindly adhering to the law of the place where the wrongful act occurred, because the states having the predominant interest in the recovery are "behind the times" in their approach to choice of law problems. The result here is to pay veiled respect to remnants of the "vested rights" doctrine which the *Babcock* court was so strenuous in rejecting. It seems frivolous to distinguish between the application by a New York court of the conflicts principles of jurisdictions which follow the old approach and the adherence to this approach by the New York courts themselves.

The better solution, although one which is still fraught with difficulty, might be to interpret the *Babcock* decision as requiring reference to the *internal* law of the jurisdiction which has the superior interest in the issue in question. The dicta in *Babcock*, to the effect that, if New York were called upon to decide the issue of defendant's negligence, it would be determinable according to Ontario's own standards of care, rather than by reference to the law which an *Ontario court* might apply (assuming that Ontario might make a different choice of law as to this issue) would appear to lend support to this interpretation. Insofar as the instant situation is concerned, this would mean that New York, as the forum, was simply required to ascertain whether California and/or Maryland has a strong public policy, similar to New York's, against recovery limitations in wrongful death actions. If so, the present court should have applied that policy and granted plaintiff's motion to strike defendant's affirma-

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interest in the decedent's adult California domiciled children, sufficient to justify New York's courts in refusing to apply [the Massachusetts limitation] . . . ." 222 F. Supp. at 53.

19. Pearson v. Northeast Airlines, Inc., 309 F.2d at 562 (en banc). (Emphasis added.)

tive defense. The difficulty with this solution, besides the possibility of a violation of full faith and credit,[20] is whether New York would thus be giving extraterritorial effect to California and Maryland law, in contravention of due process of law. The due process argument was raised, and dismissed, by Judge Kaufman in the *Pearson* case, and its application here appears doubtful, in view of the fact that the relevant inquiry would involve not an application of those states' wrongful death statutes, but rather the enforcing of their public policies with regard to their own domiciliaries.[21]

This much is made clear by the instant case: under the *Babcock* rule, in determining various aspects of a cause of action, the "superior interests" of several states may be controlling, depending on the particular issue in controversy. No longer will the law of a single jurisdiction whose interest is strongest with reference to only some parties or aspects of the litigation, necessarily defeat the interests of other jurisdictions in altogether different issues.

Constitutional Law—Closing of Schools in Only One County of the State of Virginia Held Constitutional Under Both State and Federal Constitutions.—Each school year since 1959, plaintiffs, the Division Superintendent and the School Board of Prince Edward County, submitted to the county Board of Supervisors estimates of the money needed to operate the public free schools and requested that the board levy a tax to meet these estimates. The Board of Supervisors refused to levy such a tax, and as a result, no public free schools have been in operation in Prince Edward County since that date, while similar schools in other localities throughout the state remained open. Meanwhile, the school board received funds, characterized as the constitutional minimum, from the General Assembly. These funds were used for the physical upkeep of the county high schools. In addition, the Board of Supervisors and the General Assembly awarded scholarships to parents without discrimination as to race[1] which enabled the majority of white children to attend nonsectarian

20. See note 19 supra and accompanying text.

21. "A violation of the Due Process Clause of the Fourteenth Amendment requires not only that there be a deprivation of property—and we have found none here—but also some unreasonable or unreasoned imposition of liability. In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out-of-state event." 309 F.2d at 563. It is submitted that such an application of the policies of California and Maryland for the welfare of their domiciliaries would be reasonable rather than arbitrary.

1. As of 1961, five of approximately 1800 Negro children and 1327 of approximately 1500 white children in Prince Edward County received scholarships. All five Negro children were attending public schools outside Prince Edward County. Private schools organized by the Prince Edward County Christian Association, where one third of the total number of Negro children were in attendance, have been denied accreditation by the State Board of Education. Allen v. School Bd., 198 F. Supp. 497, 499, 501-02 (E.D. Va. 1961), rev'd on other grounds sub nom. Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963), cert. granted, 375 U.S. 391 (1964).

segregated schools operated by the Prince Edward School Foundation, a private educational corporation. Defendants, members of the Negro race, contended that the Superintendent of Public Instruction, the State Board of Education, and plaintiffs are under a mandatory duty to establish, maintain and operate public free schools in Prince Edward County under the provisions of the Virginia Constitution and the fourteenth amendment to the United States Constitution. Plaintiffs, denying that they are under any such duty, brought this action for a declaratory judgment[2] to obtain an adjudication of their rights, duties and responsibilities. In affirming the decision of the Circuit Court of the City of Richmond, the Supreme Court of Appeals of Virginia held that (1) the General Assembly is under no duty to maintain schools where the local authorities refuse to appropriate funds necessary for their operation; (2) the absence of public free schools in one county while they are being maintained in other counties does not violate the equal protection clause of the fourteenth amendment; and (3) scholarships can be given for the education of children residing in a county where no public free schools are in operation.[3] *School Bd. v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963).

2. Va. Code Ann. § 8-578 (1950).

3. In reaching the latter conclusion, the court simply stated that it perceived "nothing in or out of the statutes [Va. Code Ann. §§ 22-115.29-.35 (1964)] to render these scholarships unavailable to any eligible child in Prince Edward county . . . ." School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565, 579 (1963). Unfortunately, the dissent makes no reference to the scholarship plan. However, in an earlier decision in the present litigation—Allen v. School Bd., 198 F. Supp. 497, 503-04 (E.D. Va. 1961), rev'd on other grounds sub nom. Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963), cert. granted, 375 U.S. 391 (1964)—a federal district court found that the granting of these scholarships in a locality where no public schools were operating was contrary to the objectives of the plan. District Judge Lewis argued that the grants were established to afford each student freedom in choosing private or public schooling, and that in order to qualify for a scholarship, the child had to be eligible to attend the public school in his locality. Furthermore, the plan's validity under the first and fourteenth amendments appeared to be open to serious question.

May the Commonwealth give scholarships to children to attend private schools, but exclude some private schools solely because they are church related? The statute which sets forth the objectives of the plan provides that they are only available "for the education of children in nonsectarian private schools . . . ." Va. Code Ann. § 22-115.29 (1964). In Everson v. Board of Educ., 330 U.S. 1, 16 (1947), Mr. Justice Black, speaking for the Court, stated: "[The State of New Jersey] cannot exclude individual . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." (Emphasis omitted.) See also Sherbert v. Verner, 374 U.S. 398 (1963) where the Court upheld the right of a Seventh Day Adventist to collect unemployment compensation, even though she refused, on religious grounds, to accept a position which required work on Saturdays.

Is not the indirect aid in the present case within the holding of Cooper v. Aaron, 358 U.S. 1, 19 (1958): "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"?

Since the instant court concerned itself with neither query, we merely raise the questions here.

The litigation involving the school authorities of Prince Edward County began with *Davis v. School Bd.*,[4] a suit instituted by members of the Negro race in a federal district court in 1952. There it was decreed that state constitutional[5] and statutory requirements[6] that white and Negro students attend segregated schools violated neither the Civil Rights Act[7] nor the fourteenth amendment. This decision was reversed in 1954 by the United States Supreme Court *sub nom. Brown v. Board of Educ.*[8] Upon rehearing the case was remanded to the district court for the issuance of orders and decrees consistent with the Court's opinion.[9] In 1955, the district court vacated its original decree but did not issue a mandatory injunction ordering desegregation.[10] Plaintiffs applied to the same court for such an injunction in 1956, but it was refused.[11] Upon application to the resident district judge in 1957, the court declined to issue a desegregation order but reserved to plaintiffs the right to renew its motion at a later date.[12] On appeal, the Court of Appeals for the Fourth Circuit reversed and ordered the district court to issue decrees ordering the school authorities to make a "prompt and reasonable" start toward ending discrimination in the schools.[13] In 1958, the district court issued such an order, but added that such action could be deferred until 1965.[14] In 1959, the court of appeals again reversed the district court and ordered it to issue a decree requiring immediate integration of the public free schools of Prince Edward County.[15] On April 22, 1960, the district court complied.[16] The effect this decree was intended to have, however, was completely neutralized by the action taken by the Board of Supervisors at the end of the 1958-1959 school year.[17] It was then that the

4. 103 F. Supp. 337 (E.D. Va. 1952).

5. Va. Const. art. IX, § 140 (1902).

6. Va. Code Ann. § 22-221 (1964).

7. 18 Stat. 335 (1875).

8. 347 U.S. 483 (1954). Four cases, all involving segregation in public schools, were decided in this case.

9. Brown v. Board of Educ., 349 U.S. 294 (1955).

10. Davis v. School Bd., 1 Race Rel. L. Rep. 82 (E.D. Va. 1955).

11. Davis v. School Bd., 142 F. Supp. 616 (E.D. Va. 1956). The federal statute under which the court was formed, 28 U.S.C. § 2281 (1958), required the constitutionality of a state statute be in issue. Since the statutes this case was concerned with had already been declared unconstitutional in the Brown decision, there was no such issue. Hence the court did not have the power to grant the relief desired.

12. Davis v. School Bd., 149 F. Supp. 431 (E.D. Va.), rev'd per curiam sub nom. Allen v. School Bd., 249 F.2d 462 (4th Cir. 1957), cert. denied, 355 U.S. 953 (1958).

13. Allen v. School Bd., supra note 12, at 465.

14. Allen v. School Bd., 164 F. Supp. 786 (E.D. Va. 1958).

15. Allen v. School Bd., 266 F.2d 507 (4th Cir.) (per curiam), cert. denied, 361 U.S. 830 (1959).

16. See Griffin v. Board of Supervisors, 322 F.2d 332, 334 (4th Cir. 1963), cert. granted, 375 U.S. 391 (1964).

17. This action was apparently in accord with the policy of the Board expressed as early as May 3, 1956. For on that date, the Board of Supervisors adopted an affirmation, signed by 4,216 citizens over twenty-one years of age, which provided as follows: "[T]he separation of the races in the public schools of this county is absolutely necessary and

Prince Edward School Foundation was formed. This privately endowed educational corporation did not use any public school facilities or receive any financial aid directly from the state. However, since the 1960-1961 school year, scholarships and a tax-credit system were made available to the parents of children attending the segregated schools of the Foundation.[18]

Another suit was brought in the federal district court in 1961. While abstaining from deciding whether the schools should be reopened, the court did restrain the continuance of the scholarship and the tax-credit system.[19] Plaintiffs thereafter applied for a writ of mandamus ordering the Board of Supervisors to appropriate funds for school purposes. The writ was denied by the Supreme Court of Appeals of Virginia.[20] In 1962, plaintiffs returned to the district court which ordered the schools reopened.[21] In an attempt to void this decision, defendants appealed the district court ruling and instituted the present action in the Virginia Circuit Court for the City of Richmond. On appeal, the decision of the district court was reversed, but judgment was reserved pending the outcome of the instant case.[22]

In the words of the court the principal issue raised in the decision under consideration was:

> whether . . . [under] Article IX of the Virginia Constitution and the statutes enacted pursuant thereto . . . the Commonwealth of Virginia is required and has the mandatory duty . . . to establish, maintain and operate public free schools in Prince Edward county.[23]

[we] do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county." 1 Race Rel. L. Rep. 780. See Allen v. School Bd., 198 F. Supp. 497, 499 (E.D. Va. 1961).

18. See 204 Va. at —, —, 133 S.E.2d at 567, 578-79; Allen v. School Bd., 198 F. Supp. at 501. Under the tax-credit system, $56,000 was credited to the Prince Edward School Foundation as payments on account of county tax bills for the 1960-1961 school year. At the same time, scholarships paid out to the white students attending the Foundation's schools amounted to approximately $132,000. 198 F. Supp. at 502-03.

19. Allen v. School Bd., 198 F. Supp. 497 (E.D. Va. 1961). It appeared that plaintiffs were instituting a suit in the state courts of Virginia to determine whether the Commonwealth has a mandatory duty to maintain public schools in the county. This was one of the reasons for the abstention. Id. at 501.

20. Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 227 (1962). The court held that the levy of a local tax for school purposes by a board of supervisors is done at the discretion of the board and mandamus will not issue where a discretionary power is involved.

21. Allen v. School Bd., 207 F. Supp. 349 (E.D. Va. 1962). Before the decision denying mandamus was rendered, plaintiffs had filed a supplemental complaint with the district court. Allen v. School Bd., 28 F.R.D. 367 (E.D. Va. 1961). Also, the district court simultaneously denied a motion that the United States intervene as party plaintiff and that the State of Virginia and several state officials be added as parties defendant. Allen v. School Bd., 28 F.R.D. 358 (E.D. Va. 1961).

22. Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963), cert. granted, 375 U.S. 391 (1964).

23. 204 Va. at —, 133 S.E.2d at 570.

The Virginia public school system has evolved by virtue of numerous constitutional and statutory provisions; no single provision embodies the entire system.[24] Section 129 of article IX of the constitution requires that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State."[25] The sections immediately following particularize this legislative duty. By enacting a comprehensive school code, it has been held, the General Assembly fulfills its duty under section 129.[26] Under the code, the actual operation of the schools is left to local school boards.[27] These local boards, however, are subject to the general supervision of the state Board of Education[28] and therefore act as state agencies.[29]

To finance the operation of local schools, the constitution requires the General Assembly to allocate certain minimal funds.[30] In order to supplement these admittedly inadequate funds,[31] the legislature is further authorized to grant such additional sums "as it may deem best,"[32] and local governing authorities are empowered to levy a property tax "to be apportioned and expended by the local school authorities . . . in establishing and maintaining such schools as in their judgment the public welfare may require . . . ."[33]

That the exercise of this power to levy a supplementary local tax lay exclusively within the discretion of the local governing authorities was early established in *School Bd. v. Shockley*,[34] which held:

> [I]t is obvious that it was the purpose of this section to vest in the local authorities of each county and school district of the state the *exclusive* power to determine what additional sums, *if any*, should be raised by local taxation . . . . [T]he necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power.[35]

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24. Va. Const. art. IX, §§ 129-42, comprise the constitutional provisions, while the statutory provisions are contained in Va. Code Ann. §§ 22-1 to -275.25 (1964). In interpreting these provisions, it is necessary to construe them as a whole. See Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952); Board of Supervisors v. Cox, 155 Va. 687, 156 S.E. 755 (1931); City of Portsmouth v. Weiss, 145 Va. 94, 133 S.E. 781 (1926); Funkhouser v. Spahr, 102 Va. 306, 46 S.E. 378 (1904).

25. Va. Const. art. IX, § 129.

26. School Bd. v. Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937) (per curiam); Board of Supervisors v. Cox, 155 Va. 682, 156 S.E. 755 (1931).

27. Va. Const. art. IX, § 133 (providing for the establishment of the local school boards).

28. Va. Const. art. IX, § 130 (providing for the establishment of the state board).

29. E.g., Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960).

30. Va. Const. art. IX, § 135.

31. School Bd. v. Shockley, 160 Va. 405, 412, 168 S.E. 419, 422 (1933).

32. Va. Const. art. IX, § 135.

33. Va. Const. art. IX, § 136.

34. 160 Va. 405, 168 S.E. 419 (1933).

35. Id. at 413, 168 S.E. at 422. (Emphasis added.) See Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 227 (1962). See also Board of Supervisors v. School Bd., 182 Va. 266, 28 S.E.2d 698 (1944); School Bd. v. Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937) (per curiam).

It has long been the practice of the General Assembly to appropriate such additional funds "as it may deem best" only on a basis of matching those raised by the local governing authorities.[36] Accordingly, the granting of necessary supplemental state aid is conditioned on the levying of a local property tax for school purposes.

Having assessed these aspects of the Virginia Constitution, the instant court concluded that under such a "local option or home rule system . . . the operation of the schools is left to the determination of the local authorities."[37] When, therefore, the local authorities of Prince Edward County refused to appropriate funds, the General Assembly was under no duty to assume that responsibility and to operate schools in that locale.[38]

Conceding that the duty of day-to-day operation of the schools rests on the local school boards and not the General Assembly, Chief Justice Eggleston, the lone dissenter,[39] nonetheless argued that section 129, requiring the legislature to *maintain* free public schools *throughout* the state, clearly denotes a duty to *support* these institutions *in every part of* the Commonwealth.[40] While in the past the General Assembly may have adequately discharged its duty of *support* by acting through local authorities, the fact that one of these state agencies failed to perform its function of appropriating funds with which to *operate* the schools did not absolve the legislature of its duty to *maintain* them by allocating funds necessary for the *support* of "*every . . . school district in the State.*"[41]

Harrison v. Day,[42] a recent Virginia decision, lends support to Chief Justice Eggleston's views. There the court interpreted the language of section 129 as meaning "that the State *must support* such public free schools in the State as are necessary to an efficient system . . . ."[43] While admitting that it is for the General Assembly to determine what might constitute such a system, the court went on to say that the word "efficient" must be given its ordinary meaning. That is, it

> embraces . . . factors [such as] . . . a sufficient number of schools with adequate buildings and equipment, a sufficient number of competent teachers, and other basic matters associated with the public school system.[44]

In the instant case, the State neglected to support the public free schools in Prince Edward County for several years. As a result, there were no such schools in operation in that county. As Chief Justice Eggleston asked:

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36. 204 Va. at —, 133 S.E.2d at 576.

37. Id. at —, 133 S.E.2d at 569.

38. Id. at —, 133 S.E.2d at 577.

39. Justices Spratley, Whittle, Snead, I'Anson and Carrico concurred with Justice Buchanan in a separate opinion. Id. at —, 133 S.E.2d at 580.

40. Id. at —, 133 S.E.2d at 582 (dissenting opinion). See Savage v. Commonwealth ex rel. State Corp. Comm'n, 186 Va. 1012, 1020, 45 S.E.2d 313, 317 (1947).

41. 204 Va. at —, 133 S.E.2d at 583 (dissenting opinion). (Emphasis added.)

42. 200 Va. 439, 106 S.E.2d 636 (1959).

43. Id. at 450, 106 S.E.2d at 646. (Emphasis added.)

44. Ibid.

How can there be an efficient system of public free schools without any such schools? How can there be an efficient system of public free schools "throughout the state" so long as there are no such schools in Prince Edward county?[45]

Relying further on the local option feature of the Virginia school system, the instant court held that the closing of the schools in Prince Edward County did not violate the equal protection clause of the fourteenth amendment.[46] In other areas of governmental action where a locality has been given the option of performing a specific function, it has been held that complete termination of that function in one locality, even though done to avoid integration, did not violate the fourteenth amendment.[47] In drawing an analogy to the type of case under consideration, the court in *Griffin v. Board of Supervisors*[48] said:

[T]here is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command. . . . [W]hen there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws . . . .[49]

Since the local option system was present here and no students, white or Negro, were attending a public free school in Prince Edward County, the instant court concluded that there was no violation of the fourteenth amendment.

In deciding the latter point, however, the majority made no reference to *Hall v. School Bd.*[50] That case involved a Louisiana statute which gave the local school board an option to close the public free schools upon a vote of its qualified electors. Pursuant to its prerogative, the School Board of St. Helena Parish closed all its public schools. Finding that the clear purpose of the statute was to avoid integration, a United States district court held it unconstitutional primarily because

inevitably, another effect of the statute is to discriminate geographically against all students, white and colored, in St. Helena or any other community where the schools are closed under its provisions. . . .

Thus, it is clear enough that, absent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds.[51]

Since education at the primary and perhaps also at the secondary level is a function which has been assumed by the states, the local option feature of the statute, whose operation involved an unreasonable classification, did not save it. To put it in the language of the court, "when a parish wants to lock its

45. 204 Va. at —, 133 S.E.2d at 583 (dissenting opinion).

46. Id. at —, 133 S.E.2d at 579-80.

47. E.g., Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960) (local swimming pool); City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (local public parks).

48. 322 F.2d 332 (4th Cir. 1963), cert. granted, 375 U.S. 391 (1964).

49. Id. at 336-37 (dictum).

50. 197 F. Supp. 649 (E.D. La. 1961) (per curiam), aff'd per curiam, 368 U.S. 515 (1962).

51. 197 F. Supp. at 656.

school doors, the state must turn the key."[52] It is interesting to note that in *James v. Almond*,[53] an early Virginia school closing case, the United States district court committed itself to a principle similar to that enunciated in *Hall*:

> While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of taxpayers. . . . We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system.[54]

In the case under consideration, there were schools being maintained by the state acting through state agencies and supported partly by state funds, in all parts of the state except Prince Edward County. The inaction of the county Board of Supervisors was aimed expressly at avoiding the law of the land as interpreted by the Supreme Court—the desegregation of the races in a public school system. Under the rules of *Hall* and *James*, such was clearly depriving the citizens of Prince Edward County of equal protection under the law. Accordingly, the local option device should not be deemed a saving feature and the closing of the schools does violate the fourteenth amendment.

It is submitted that the closing of the schools in Prince Edward County did violence to the fourteenth amendment guarantees. While a state may be under no obligation to provide an education for any of its citizens, where it does, it must do so for all of them. To allow a state to assume such a responsibility and then in an area of state action to permit, via a local option device, the abdication of that responsibility would be to allow a state to avoid its own duty of affording its citizens equal protection under the law. By refusing to recognize the rights of citizens of Prince Edward County, guaranteed to them under the Constitution, it appears that the instant court has issued "a clear invitation to the federal courts to step in and enforce such rights."[55]

Constitutional Law—Establishment of Religion—Affording an Opportunity for Voluntary Recitation of Prayer in Public School Not a Violation of the First Amendment.—Students in a New York public school kindergarten class were precluded by the school's principal from voluntarily reciting certain

52. Id. at 658.

53. 170 F. Supp. 331 (E.D. Va.) (per curiam), appeal dismissed, 359 U.S. 1006 (1959). This case involved a statute authorizing the Governor of the State to take control of any public free school or schools which had been desegregated and to close them. The Governor, acting under this statute, closed several schools in the City of Norfolk after they had been ordered integrated. The court held the closing to be violative of the fourteenth amendment since it did not afford equal protection under the law to both white and Negro students residing in Norfolk, because other schools remained open throughout the state.

54. Id. at 337. See also Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), aff'd per curiam, sub nom. Faubus v. Aaron, 361 U.S. 197 (1959).

55. 204 Va. at —, 133 S.E.2d at 584 (dissenting opinion).

prayers[1] each day in their classrooms. The principal's action was upheld by the New York City Board of Education and the Board of Regents of the State of New York. Parents of the children brought an action in the United States District Court for the Eastern District of New York to enjoin the school authorities from interfering with the recitation of the prayers, claiming that such interference amounted to an unconstitutional prohibition of the free exercise of religion and an abridgment of the freedom of speech.[2] The court granted plaintiffs' motion for summary judgment and held, relying on *Zorach v. Clauson*,[3] that the allowance of voluntary prayer, not pursuant to a state statute requiring its recitation, did not tend to establish a religion in violation of the first amendment. *Stein v. Oshinsky*, 224 F. Supp. 757 (E.D.N.Y. 1963).

Engel v. Vitale[4] declared unconstitutional as an establishment of religion the recitation in public schools of a "nondenominational,"[5] state-composed prayer, even though participation was voluntary. The Supreme Court stated that the fact that the prayer was denominationally neutral[6] and that observance was on a voluntary basis did not serve to free it from the limitations of the establishment clause. The clause was violated by the mere enactment of a law which was religiously motivated.[7]

Ten years earlier, in *Zorach v. Clauson*,[8] the Court had upheld a New York City released-time program under which public school children were permitted, on request of their parents, to leave the school grounds once a week in order to obtain religious instruction. The program involved neither the use of public

1. The two prayers involved were:

"God is Great, God is Good
And we thank Him for our Food, Amen," and
"Thank You for the World So Sweet
Thank You for the food we eat
Thank You for the birds that sing
Thank You God for everything."

Stein v. Oshinsky, 224 F. Supp. 757 (E.D.N.Y. 1963).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

3. 343 U.S. 306 (1952).

4. 370 U.S. 421 (1962), 31 Fordham L. Rev. 201. See also Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031 (1963); Sutherland, Establishment of Religion According to Engel, 76 Harv. L. Rev. 25 (1962); 27 Albany L. Rev. 119 (1963); 46 Marq. L. Rev. 233 (1962).

5. Some have questioned whether the term "nondenominational prayer" is a contradiction in terms. It has been suggested that several nontheistic and polytheistic "religions" could not ascribe to the Regents' prayer. Cahn, On Government and Prayer, 37 N.Y.U.L. Rev. 981, 991-94 (1962).

6. See note 5 supra.

7. "From the Supreme Court's opinion one fact emerged clearly: the Court read the establishment clause as—Congress shall make no laws respecting religion. It actually deleted the concept of 'establishment' from its reasoning." 31 Fordham L. Rev. 201, 205 (1962). (Italics omitted.)

8. 343 U.S. 306 (1952).

facilities for religious purposes[9] nor the expenditure of public funds to this end. The Court held that school boards may constitutionally make "adjustments of their schedules to *accommodate* the religious needs of the people."[10]

There was, in the present case, no affirmative imposition of a state-composed, or even state-sanctioned, prayer or religious observance. It therefore escaped the *Engel* indictment that "government . . . should stay out of the business of writing or sanctioning *official* prayers . . . ."[11] In fact, there was here not only an absence of affirmative aid to religion, but an absence of state law altogether—affirmative *or* negative—relative to the voluntary recitation of prayer. Thus the court found a reasonable enough precedent in *Zorach's* "accommodation" doctrine.

Can it be argued, however, that *Engel* has, sub silentio, overruled *Zorach*? It appears that, under *Engel's* interpretation of the establishment clause, a state would be prohibited from enacting *any* law (and a state agency would be prohibited from taking any official action) the purpose of which would be to accommodate the public service to the spiritual needs of some, or all, of the people.[12] It is clear that an overruling of *Zorach* was not required under the *facts* of *Engel*, but the *Engel* reasoning is difficult to reconcile with *Zorach*.

A reconciliation of the two cases was suggested by Mr. Justice Brennan in his concurring opinion in *School Dist. v. Schempp*,[13] in which the Court held unconstitutional the state-sanctioned reading of the Bible and recitation of the Lord's Prayer in public schools.[14] Mr. Justice Brennan interpreted the establishment clause as allowing, even after *Engel*, "involvements of religious with secular institutions"[15] in cases concerning: (1) a conflict between the establishment clause and the free exercise clause of the first amendment; (2) invocational prayers in legislative bodies; (3) the use of religious documents or practices for legitimate secular purposes; (4) tax exemptions for religious in-

9. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court held that a ruling by an Illinois board of education which permitted teachers from any religious group (subject to the approval of the superintendent of schools) to use public school facilities for the purpose of giving religious instruction to those children whose parents requested it, violated the establishment clause.

10. 343 U.S. at 315. (Emphasis added.)

11. 370 U.S. at 435. (Emphasis added.) Note that although the prayers involved in the instant case, if sanctioned by the school, were sanctioned only in the negative sense—they were not forbidden. They were not official in any sense of the term.

12. See note 7 supra.

13. 374 U.S. 203, 230 (1963) (concurring opinion).

14. Mr. Justice Clark, writing for the Court, distinguished Zorach v. Clauson from the facts of the cases at bar as follows: "Applying the Establishment Clause principles to the cases at bar we find that the States are requiring . . . these exercises . . . as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clauson." 374 U.S. at 223. (Italics omitted.)

15. Id. at 295.

stitutions; and (5) patriotic exercises which have lost their religious connotation.[16]

Under this reasoning, then, *Zorach* would appear to support the instant decision only if it could be shown that the denial by the school of the opportunity for reciting these prayers constituted a violation of the free exercise clause.[17] Again, a reading of Mr. Justice Brennan's concurring opinion in *Schempp* indicates that this would not amount to an interference with plaintiffs' freedom of religion. In distinguishing between the constitutionality of accommodating chaplains in penal institutions and the armed services, and the sponsorship of religious exercises in public schools, he stated that "the student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner."[18]

Further, the recital of prayer, assuming a majority of the students participate, would, perhaps, subject those unwilling to pray to the "suspicion or obloquy" of their peers, "by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity . . . ."[19] In this regard, it would seem irrelevant that the prayers were not composed by the State, so long as they were sanctioned by the school, a state agency.

The question also remains whether the original rule of *Zorach v. Clauson* was properly applied by the present court. Does not the present decision turn the *permission*, given by *Zorach*, to the state to accommodate religion into a *requirement* that the state do so in all cases not prohibited by the establishment clause? The Supreme Court has yet to take that position.[20]

Equity—Constructive Trust Will Not Be Imposed Upon Real Property Where Defendant Fraudulently Breached Oral Promise To Advance Money for Its Purchase and Purchased It for Himself.—Plaintiff executed a written contract to purchase real property from the Republic of Haiti for 240,000 dollars and made a 10,000 dollar downpayment. Before the closing date she offered to resell the property to defendants, upon their oral promise to advance the money for the closing and thereafter buy the land for 278,000 dollars. As a result of defendants' failure to advance the money, plaintiff was

16. Id. at 296-304.

17. If so, it would amount to a preference of irreligion over religion—the converse of dictum in Everson v. Board of Educ., 330 U.S. 1 (1947), to the effect that a preference of religion over irreligion is violative of the establishment clause. There is also dictum in Everson proscribing discrimination by reason of religion or the lack of it. Id. at 16.

18. 374 U.S. at 299.

19. Id. at 289.

20. Cf. Mr. Justice Brennan's language in Schempp: "I do not say that government must provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so." Id. at 299. (Italics omitted.)

unable to close title, and defendants subsequently bought the land from the vendor for 243,000 dollars. In a suit to impose a constructive trust on the property in her favor, plaintiff alleged that defendants had never intended to carry out their oral promise, and that defendants made their promises to plaintiff to prevent her from closing with other possible purchasers and to enable them to buy the property themselves at a substantial profit. On appeal from a denial of defendants' motion for summary judgment,[1] the appellate division held[2] that plaintiff was not entitled to the relief sought, since even if defendants had performed their oral promise, they, not plaintiff, would have been left with legal title.[3] Chief Judge Desmond, one of three dissenters from a memorandum affirmance by the New York Court of Appeals, adopted the position that a constructive trust should have been imposed, finding it to be the only remedy which would redress the harm done to the plaintiff by the actual fraud of the defendants, and that a confidential relationship between the parties, which is ordinarily required to obtain this relief, need be shown only where the facts are insufficient to sustain a finding of actual fraud. *Sutton v. Sandler*, 13 N.Y.2d 1007, 195 N.E.2d 303, 245 N.Y.S.2d 591 (1963) (memorandum decision).

The constructive trust is recognized, particularly in the United States, as an equitable remedy of extensive scope.[4] Several commentators have attempted to clarify the concept by categorizing the varied situations in which constructive trusts have been decreed.[5] In practice, the remedy has been employed to prevent unjust enrichment resulting from fraud,[6] misrepresentation,[7] undue influence,[8] duress,[9] mistake[10] and crime.[11] In the absence of actual

1. Sutton v. Sandler, 36 Misc. 2d 480, 231 N.Y.S.2d 129 (Sup. Ct. 1962).

2. Sutton v. Sandler, 18 App. Div. 2d 362, 239 N.Y.S.2d 389 (1st Dep't), aff'd mem., 13 N.Y.2d 1007, 195 N.E.2d 303, 245 N.Y.S.2d 591 (1963).

3. "Consequently the equitable maxim that equity regards as done what ought to have been done . . . has no application." Id. at 363, 239 N.Y.S.2d at 391.

4. Scott, Constructive Trusts, 71 L.Q. Rev. 39 (1955). It is also referred to as a trust "ex maleficio," trust "ex delicto," trust "in invitum," or "involuntary" trust. Bogert, Trusts and Trustees § 471 (2d ed. 1960).

5. See Costigan, Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession, 28 Harv. L. Rev. 237 (1915); Costigan, The Classification of Trusts as Express, Resulting, and Constructive, 27 Harv. L. Rev. 437 (1914); Scott, Conveyances Upon Trusts Not Properly Declared, 37 Harv. L. Rev. 653 (1924).

6. E.g., Pink v. Title Guar. & Trust Co., 274 N.Y. 167, 8 N.E.2d 321 (1937); Falk v. Hoffman, 233 N.Y. 199, 135 N.E. 243 (1922); Stephens v. Evans, 190 Misc. 922, 75 N.Y.S.2d 909 (Sup. Ct. 1947).

7. E.g., Lloyd v. Phillips, 272 App. Div. 222, 71 N.Y.S.2d 103 (4th Dep't 1947).

8. E.g., Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168 (1949) (constructive trust decreed where deceased was prevented by defendants from changing her will); Mullin v. Mullin, 119 App. Div. 521, 104 N.Y. Supp. 323 (2d Dep't 1907).

9. See Bogert, op. cit. supra note 4, § 474.

10. E.g., Lamb v. Schiefner, 129 App. Div. 684, 114 N.Y. Supp. 34 (2d Dep't 1908); Scott v. Freedom Development Corp., 219 N.Y.S.2d 494 (Sup. Ct. 1961) (conveyance included more land than that to which grantee was entitled).

11. See Bogert, op. cit. supra note 4, §§ 476-78. A constructive trust may be imposed

fraud,[12] it has been decreed where there has been a breach of a confidential or fiduciary relationship, referred to by the courts as constructive fraud.[13] Constructive trusts imposed on these grounds are common in cases where there has been a refusal to reconvey by one who has received a deed on oral trust, or on an oral or implied promise to hold for the grantor[14] and reconvey to him or some third person[15] upon the grantor's direction. However, it is not the mere violation of or refusal to perform the oral agreement which will "put the court in motion" to impress a constructive trust.[16] The confidential relationship itself must have been the inducement for the conveyance which resulted in unjust enrichment.[17] It has also been generally recognized that the Statute of Frauds is no defense to such an action brought for breach of an oral agreement to reconvey, where the transfer has been procured through fraud, duress or undue influence, or where the land has been conveyed to one who occupies a confidential relationship to the transferor.[18]

Actual fraud alone has been held to support the imposition of a constructive trust where the fraud had been committed against one who would otherwise have acquired or retained title. Thus, where a conveyance is obtained through intentionally false statements as to material facts, such as falsely representing oneself as the agent of another,[19] or representing that a deed is

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on property or proceeds of property obtained through larceny, embezzlement, forgery or murder.

12. E.g., Pink v. Title Guar. & Trust Co., 274 N.Y. 167, 8 N.E.2d 321 (1937); Randolph v. Randolph, 28 Misc. 2d 66, 212 N.Y.S.2d 468 (Sup. Ct. 1961) (interest in real property obtained by fraud through an invalid marriage).

13. See Farano v. Stephanelli, 7 App. Div. 2d 420, 424, 183 N.Y.S.2d 707, 711 (1st Dep't 1959); Frick v. Cone, 160 Misc. 450, 458, 290 N.Y.S. 592, 601 (Sup. Ct. 1936), aff'd mem., 251 App. Div. 781, 298 N.Y.S. 173 (4th Dep't 1937).

14. E.g., Foreman v. Foreman, 251 N.Y. 237, 167 N.E. 428 (1929) (property inherited from mother held on oral trust for father); Sinclair v. Purdy, 235 N.Y. 245, 139 N.E. 255 (1923) (deed held in trust by sister for brother); Moglia v. Clark, 256 App. Div. 847, 9 N.Y.S.2d 413 (2d Dep't 1939) (memorandum decision) (oral promise of daughter to hold in trust for father). Cf. Fraw Realty Co. v. Natanson, 261 N.Y. 396, 185 N.E. 679 (1933).

15. E.g., Moyer v. Moyer, 21 Hun 67 (App. Div. 4th Dep't 1880) (deed held on oral trust by son for other children). Cf. Oursler v. Armstrong, 8 App. Div. 2d 194, 186 N.Y.S.2d 829 (1st Dep't 1959), rev'd, 10 N.Y.2d 385, 179 N.E.2d 489, 223 N.Y.S.2d 477 (1961).

16. Sinclair v. Purdy, 235 N.Y. 245, 253, 139 N.E. 255, 258 (1923).

17. Farano v. Stephanelli, 7 App. Div. 2d 420, 424, 183 N.Y.S.2d 707, 711 (1st Dep't 1959). See also Goldsmith v. Goldsmith, 145 N.Y. 313, 318, 39 N.E. 1067, 1068 (1895); Wood v. Rabe, 96 N.Y. 414, 426 (1884); Hifler v. Calmac Oil & Gas Corp., 10 N.Y.S.2d 531, aff'd mem., 258 App. Div. 78, 16 N.Y.S.2d 104 (4th Dep't 1939).

18. 1 Scott, Trusts § 44, at 313 (2d ed. 1956). See Comment, The Confidential Relationship Theory of Constructive Trusts—An Exception to the Statute of Frauds, 29 Fordham L. Rev. 561 (1961).

19. Lloyd v. Phillips, 272 App. Div. 222, 71 N.Y.S.2d 103 (4th Dep't 1947).

a power of attorney,[20] or that the grantee is unmarried,[21] a court of equity will grant relief.

The constructive trust remedy, as defined in the *Restatement of Restitution*,[22] has three elements: (1) the holding of legal title by the one against whom the constructive trust is to be imposed; (2) an equitable duty on his part to convey to another; (3) unjust enrichment if title be retained by him. The first element was satisfied in the instant case since the defendants held legal title. The appellate division answered the inquiry as to the second element by stating that since "equity regards as done that which ought to be done," defendants were under no equitable duty to convey to the plaintiff. Had their alleged oral agreement been carried out, title to the property would eventually have vested in defendants.[23]

If the defendants here had agreed to purchase the property with money advanced by the *plaintiff*, and to reconvey it to *her*, a constructive trust could have been decreed upon defendants' refusal to reconvey.[24] Both unjust enrichment and a fiduciary relationship of principal and agent[25] would have existed. The power of a court of equity to order this relief in the case of land purchased with stolen funds would also support the decree.[26]

However, no case has been found wherein the party in whose favor a trust is imposed would not, had there been no wrongdoing on the part of the defendant, have ultimately received or kept possession of the property. On the contrary, relief has been denied to plaintiffs who asked that a constructive trust be impressed on the proceeds of an insurance claim. The court reasoned that it was not the insurance claim which the defendants wrongfully obtained from the plaintiffs.[27] The plaintiffs never had any "proprietary" or "possessory" rights in it. The court stated that "the purpose of impressing a constructive trust on specific property is to put the parties in *status quo* and prevent unjust enrichment."[28]

Similarly, in the instant case, the plaintiff had been the victim of an alleged fraud, but the property upon which she sought to have the court impress the constructive trust was *not* the property of which she was defrauded. She was

20. Kahm v. Klaus, 64 Kan. 24, 67 Pac. 542 (1902).

21. Davis v. Cummins, 195 S.W. 752 (Mo. 1917). A constructive trust was decreed in favor of a woman defrauded of her property through marriage to one who did not disclose a prior existing marriage. In an action involving the heirs of each, her heirs prevailed.

22. Restatement, Restitution § 160 (1937). See also Restatement (Second), Trusts § 1, comment e (1959).

23. 18 App. Div. 2d at 363, 239 N.Y.S.2d at 390-91.

24. See Bogert, Trusts and Trustees § 487, at 167-68 (2d ed. 1960).

25. Ibid. See also 1 Scott, Trusts § 2.5, at 38 (2d ed. 1956).

26. See Bogert, Trusts and Trustees § 476 (2d ed. 1960); 4 Pomeroy, Equity Jurisprudence §§ 1058b-c (5th ed. 1941).

27. California Airparts Corp. v. Rubino, 21 Misc. 2d 490, 192 N.Y.S.2d 180 (Sup. Ct. 1959).

28. Id. at 493, 192 N.Y.S.2d at 185, citing Seaver v. Ransom, 224 N.Y. 233, 236, 120 N.E. 639, 640 (1918).

defrauded of her expected profit. Since the defendants paid for the property with their own funds, it is difficult to argue that they were unjustly enriched merely by virtue of their retention of the property. Thus, since the second and third conditions[29] for the exercise of equity's power were not met, the constructive trust must fail.

The effect of the Statute of Frauds upon equity's discretion to grant this relief must also be considered. Generally, a misrepresentation as to one's intentions to carry out an oral agreement which the Statute of Frauds requires to be in writing is not such an actual fraud as will move a court of equity to act.[30] An exception to this rule exists where there is a confidential relationship[31] or an attempt to create a trust by a deed given on an oral promise to reconvey.[32] Neither was present in the instant case. If the contract had been written, any fraud by way of misrepresentation of present intention would have presented no problem, since the written contract could be specifically enforced. Equity will not extend a remedy to one who has neglected to use the safeguards that the law demands.[33]

Whether, on the other hand, plaintiff had an adequate legal remedy can be better determined if the alleged oral agreement is considered as two separate contracts: (1) an oral contract by which defendants were to advance money to plaintiff, for which plaintiff's forbearance in selling to other prospective purchasers was adequate consideration; and (2) an oral agreement for the sale of the property by plaintiff to defendants. The oral contract for sale should not be considered because it is unenforceable under the Statute of Frauds,[34] and since defendants held title, the intent of the parties had been carried out. However, the plaintiff appears to have had a cause of action for damages resulting from defendants' failure to advance the money. In addition, the plaintiff could have based her claim on a theory of tortious interference with contract and prospective advantage. The defendants allegedly were aware that the plaintiff had a contract with the original vendor of the real property and that she had received offers from other prospective purchasers. Dean Prosser lists among the "expectancies" protected from interference with prospective advantage[35] the opportunity of obtaining customers where there is some background of business experience on the basis of which it is possible to estimate with a fair amount of accuracy both the value of what was lost and the likelihood that the plaintiff would have received it if the defendant had not interfered. Damages in this situation are commonly awarded on the basis of lost profits.[36] Finally, if the allegations of the plaintiff were true, actual

29. See authorities cited note 22 supra.

30. Hunt v. Hunt, 171 N.Y. 396, 402, 64 N.E. 159, 160 (1902); Dung v. Parker, 52 N.Y. 494, 500 (1873).

31. Grote v. Grote, 121 App. Div. 841, 106 N.Y. Supp. 986 (1st Dep't 1907).

32. See Bogert, Trusts and Trustees § 496, at 243 (2d ed. 1960).

33. 2 Pomeroy, Equity Jurisprudence § 425, at 189-90 (5th ed. 1941).

34. N.Y. Real Prop. Law § 259.

35. See Prosser, Torts § 107, at 746-47 (2d ed. 1955).

36. Id. at 747 & n.62. See McCormick, Damages § 30 (1935).

fraud existed by reason of defendants' misrepresentations as to their intentions to advance money. This, from the reasoning of *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*,[37] is sufficient to state a cause of action in tort for fraud and deceit. In *Channel Master* the plaintiff corporation, which required a dependable supply of aluminum (rather than money) in large quantity, charged that the defendant falsely represented that it was capable of meeting a specified monthly requirement and that it had not entered binding commitments with other customers. The plaintiff, relying on such representations, refrained from securing commitments for future supplies from others (as the plaintiff in the instant case refrained from obtaining other purchasers to advance the money) and was thereby injured in its business. The court held that it was sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged. Furthermore, since the action was in tort, depending not upon agreement, but rather on misrepresentation of fact relied on by the plaintiff to its detriment, the court held that the Statute of Frauds was no defense:

> If the proof of a promise or contract, void under the statute of frauds, is essential to maintain the action, there may be no recovery, but, on the other hand, one who fraudulently misrepresents himself as intending to perform an agreement is subject to liability *in tort* whether the agreement is enforcible or not.[38]

Whether the New York Court of Appeals will extend the holding in *Channel Master* to cover real property cases falling within the Statute of Frauds is questionable. The *Channel Master* rationale was applied in *Terris v. Cummiskey*,[39] where a purchaser recovered from the builder of a house who had fraudulently induced the purchaser to enter a contract for construction and sale by falsely representing his intentions and ability to build a dry cellar in the house. However, the contract was not oral and was substantially performed, and the misrepresentation primarily concerned ability to perform, rather than intention. The reasons for applying a tort theory in *Channel Master* and the instant case are nonetheless the same,[40] since allegations of fraudulent misrepresentation of intention to perform were present in both cases. Thus, the plaintiff here appears to have had an adequate remedy[41] at law if her allegations could be proved.

37. 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958).

38. Id. at 408, 151 N.E.2d at 836, 176 N.Y.S.2d at 263.

39. 11 App. Div. 2d 259, 203 N.Y.S.2d 445 (3d Dep't 1960).

40. See Llewellyn, The Common Law Tradition 473 (1960) for a criticism of the Channel Master decision. But see Rohan, The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result Jurisprudence"?, 32 Fordham L. Rev. 51, 59 (1963).

41. See generally Comment, Must the Remedy at Law Be Inadequate Before a Constructive Trust Will Be Impressed?, 25 St. John's L. Rev. 283 (1951).

Full Faith and Credit—Action To Quiet Title—Nebraska Decision That It Had Jurisdiction Over Land Under the Missouri River Held Res Judicata on the Courts of Missouri as Between the Private Party Litigants.—Petitioners, Nebraska residents, brought an action in a Nebraska court to quiet title to bottom land situated under the Missouri River. Respondent, a Missouri resident, appeared and fully litigated the question of jurisdiction, the issue being whether the land remained in Nebraska after a change in the river's course.[1] A finding for petitioners was affirmed by the Supreme Court of Nebraska.[2] Respondent subsequently filed suit in a Missouri court to quiet title to the same land. The suit was removed to a federal district court, which held that the Nebraska judgment was binding on the courts of Missouri.[3] The court of appeals reversed, reasoning that the Nebraska judgment could not bind Missouri on the question of Nebraska's jurisdiction over the subject matter of this particular suit.[4] The Supreme Court granted certiorari to decide whether the doctrine of full faith and credit applies to cases involving jurisdiction over real property.[5] That Court reversed and held that the parties to the action could not retry the question of jurisdiction in Missouri since the issue had already been settled between them in Nebraska. *Durfee v. Duke*, 375 U.S. 106 (1963).

The Constitution provides that each state shall give full faith and credit to the judicial proceedings of every other state.[6] This provision, which extends to federal courts,[7] has been so broadly interpreted as to "become a part of national jurisprudence . . . ."[8] Although there are some exceptions to this doctrine,[9] the Supreme Court has made it quite clear that the occasions for

1. A court has no jurisdiction to affect land directly that is not within its jurisdiction. In Carpenter v. Strange, 141 U.S. 87 (1891), the issue was whether the courts of New York could pass judgment on real estate in Tennessee. The Court commented: "To declare the deed . . . null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res." Id. at 106. (Italics omitted.) See also Fall v. Eastin, 215 U.S. 1 (1909); accord, Deschenes v. Tallman, 248 N.Y. 33, 161 N.E. 321 (1928).

2. Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

3. Duke v. Durfee, 215 F. Supp. 901 (W.D. Mo. 1961).

4. Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962). The court commented that although Missouri was not prevented from bringing an action in the future, "we are inclined to feel that the courts of a state which is directly and adversely affected by the first forum's determination in its state's favor of the situs of land as between the two states should be able properly to inquire into the jurisdictional grounds . . . ." Id. at 220.

5. Durfee v. Duke, 371 U.S. 946 (1963).

6. U.S. Const. art. IV, § 1.

7. 28 U.S.C. § 1738 (1958). See Davis v. Davis, 305 U.S. 32, 40 (1938).

8. Riley v. New York Trust Co., 315 U.S. 343, 349 (1942).

9. A state, for instance, need not give full faith and credit to a judgment which violates the due process clause. Griffin v. Griffin, 327 U.S. 220, 232 (1946) ("Since by virtue of the due process clause the judgment is ineffective in New York to adjudicate petitioner's rights . . . it cannot be made the instrument for enforcing elsewhere the obligation . . . ."). The same result follows when the original cause is dismissed on the basis of the statute of

granting such exceptions are rare.[10]

In 1945, the Supreme Court decided *Williams v. North Carolina* (II),[11] and held that a state's jurisdiction over the subject matter of an ex parte divorce action could be challenged in a subsequent proceeding outside the state.[12] Subsequently, *Sherrer v. Sherrer*,[13] a case in which both parties had appeared in the original action, limited *Williams* to situations where there had been no opportunity to litigate the question of jurisdiction.[14] Both cases involved divorce proceedings and out-of-state jurisdiction over the marital res.

There is a direct analogy between the instant case and *Sherrer*. Here both parties appeared in Nebraska and there was full opportunity to litigate the question of jurisdiction. Unless there be some distinguishing factor between jurisdiction over a marital res and jurisdiction over real property, there can be no question that Nebraska's decision was binding in Missouri as to the rights of the parties. The respondent argued here that Missouri would not be bound because a state has far more interest in a tract of real property than it does in a marital res. This assertion is not free from doubt;[15] nonetheless, even if

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limitations. Stokke v. Southern Pac. Co., 169 F.2d 42 (10th Cir. 1948). Nor need a state be bound by an out-of-state decision based on the penal laws of the other state. Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) (dictum); Huntington v. Attrill, 146 U.S. 657, 675-76 (1892) (dictum); Loucks v. Standard Oil Co., 224 N.Y. 99, 102, 120 N.E. 198 (1918) ("'The courts of no country execute the penal laws of another.'") (dictum). In some situations it appears that states might be exempted from recognizing a foreign decree on the ground that it was in conflict with the public policy of the state in which the collateral action was brought. See In re Lorok, 93 Ohio App. 251, 269, 114 N.E.2d 65, 74 (1952) (dictum); Earle v. Earle, 141 App. Div. 611, 126 N.Y. Supp. 317 (1st Dep't 1910); Milwaukee County v. M. E. White Co., 296 U.S. 268, 277 (1935) (by implication). Similar exemptions have been allowed when the party could show he never in fact appeared in the original action, Hall v. Lanning, 91 U.S. 160 (1875), or when the original decision was in contravention of federal pre-emption, Kalb v. Feuerstein, 308 U.S. 433 (1940), or of sovereign immunity, Turner v. United States, 248 U.S. 354, 358 (1919) (by implication).

10. See Williams v. North Carolina (I), 317 U.S. 287 (1942). The Court commented: "[T]his Court has been reluctant to admit exceptions in case of judgments rendered by the courts of a sister state, since the 'very purpose' of Art. IV, § 1 was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.'" Id. at 295. (Italics omitted.)

11. 325 U.S. 226 (1945).

12. Id. at 230.

13. 334 U.S. 343 (1948).

14. Id. at 355-56. "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another to hold that the vital rights . . . may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings . . . in which the defendant has participated." (Italics and footnote omitted.)

15. A state has a vital interest in "the marital status, . . . [the] protection of off-spring, property interests, and the enforcement of marital responsibilities . . . ." 317 U.S. at 298.

respondent were to carry the point that the state has a greater interest in real property, the question remains whether that interest is superior to interests served by the doctrine of res judicata. The Court said in *Sherrer* that the fact that "vital interests are involved in . . . litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation."[16] Accepting this rationale, how can one disagree with the present Court's finding that "no . . . overriding considerations are present here,"[17] particularly in light of the Court's holding that only the parties themselves were bound by the Nebraska decision? The Court made it clear that the Nebraska determination would not be binding on the state of Missouri should ownership of the land later be disputed by those states.[18]

Mr. Justice Black, in his concurring opinion, expressly reserved judgment on the question of whether the parties to the instant case would continue to be bound if Missouri were to bring a successful action to determine jurisdiction or if the two states signed an interstate compact giving Missouri jurisdiction.[19] The reservation appears to be in contravention of the policy expressed in *Land v. Dollar*.[20] In that case petitioners claimed that certain stock was being illegally held and offered for sale by the maritime commission. They brought suit against the individual members of the commission. In dicta, the Supreme Court stated that the original court's decision, although not binding on the United States, would be final as to the litigants.[21] Further, since the instant case is an outgrowth of *Sherrer*, the ensuing extension of the entire effect of that decision would preclude the reservation of Mr. Justice Black. The cases following *Sherrer* held that a party with no standing in the original forum could not collaterally attack the decision outside the forum.[22] Following that

16. 334 U.S. at 356.

17. 375 U.S. at 114.

18. The Court commented: "Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them . . . ." Id. at 115. See Land v. Dollar, 330 U.S. 731, 736-37 (1947).

19. "[W]e are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two States under Art. I, § 10, that the disputed tract is in Missouri." 375 U.S. at 117. See Land v. Dollar, 330 U.S. 731, 736-37 (1947).

20. 330 U.S. 731 (1947).

21. Id. at 736-37. The Court noted in reference to United States v. Lee, 106 U.S. 196 (1882): "Though the judgment was not res judicata against the United States . . . it settled as between the parties the controversy over possession." Id. at 737. (Italics omitted.)

22. In Johnson v. Muelberger, 340 U.S. 581 (1951), the Supreme Court held that a Florida divorce can not be challenged outside Florida by a third party who would not have standing to attack the divorce collaterally in Florida. The present decision could not prevent Missouri from suing Nebraska; yet, if Missouri did not have standing in Nebraska to attack the holding collaterally, it could not do so outside Nebraska.

rationale, a subsequent successful action by Missouri against Nebraska or an interstate compact favoring the state of Missouri, although altering rights and duties as between third parties, would not affect the litigants in the instant case. The sole effect of subsequent action of either nature on the parties would be that petitioners would then own land located in Missouri rather than Nebraska. Mr. Justice Black's reservation would be pertinent only if Nebraska agreed to re-open decisions affected by an interstate compact or a successful action brought by Missouri. This chain of results seems a remote possibility, and is at best a weak reason for such a reservation.

Practice and Procedure—New Jersey "Abandons" Immunity From Process Traditionally Awarded to Nonresidents Attending Judicial Proceedings. —Defendant, a New York resident, was executor and a beneficiary of a New Jersey estate. In conformance with New Jersey law, he filed a power of attorney with the surrogate, appointing him agent for the acceptance of process affecting the estate. Plaintiff commenced an action against the estate and defendant appeared in response to a summons served on the surrogate. While in the state for that purpose, defendant was personally served with process initiating an action against him in his individual capacity. Respondent's motion to quash the service on the grounds that he was a nonresident attending court proceedings, and therefore immune from service, was granted by the trial court. Plaintiff appealed to the superior court, appellate division, and the supreme court, certifying the question on its own motion, reversed the trial court. It held, in a 5-to-2 decision, that defendant was not immune from service. The court stated that "the doctrine of immunity moves in a direction wholly inconsistent with today's concept of justice"[1] and suggested that the doctrine of immunity be replaced by the application of the doctrine of forum non conveniens. *Wangler v. Harvey*, 41 N.J. 277, 196 A.2d 513 (1963), *petition for rehearing denied*, No. 4260, Sup. Ct., Jan. 15, 1964.

The immunity afforded nonresidents from service of process while voluntarily *"going to, staying at, or returning from"*[2] another judicial proceeding was recognized in New Jersey in the case of *Halsey v. Stewart*.[3]

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1. Wangler v. Harvey, 41 N.J. 277, 285, 196 A.2d 513, 517 (1963).

2. 4 N.J.L. 366, 367 (Sup. Ct. 1817).

3. 4 N.J.L. 366 (Sup. Ct. 1817). Defendant, a nonresident, was served while in New Jersey for the prosecution of a case in which he was a party. The court held him immune from service because to hold otherwise would discourage nonresidents from attending judicial proceedings, leave the courts inaccessible to some, and interrupt the judicial proceeding.

There is an earlier New Jersey case on record, Rogers v. Bullock, 3 N.J.L. 516 (Sup. Ct. 1809), discussing immunity, but that was a case of statutory immunity granted to residents when served with subpoena to appear in another county. It was discounted as being authority for nonresidents in Dungan v. Miller, 37 N.J.L. 182 (Sup. Ct. 1874) and

The doctrine of *Halsey* has been applied to plaintiffs,[4] defendants[5] and witnesses.[6] Immunity, aside from the situation where a nonresident is served while defending a suit,[7] has been granted to a defendant at a hearing,[8] a plaintiff in a summary proceeding,[9] a witness before a court commissioner[10] or before a master in chancery.[11] It has been applied to a defendant answering a summons issuing from a police court[12] and a witness who appeared in a representative capacity.[13] The doctrine was extended in *Riewold v. Riewold*[14] to protect a nonresident witness who was giving testimony before a notary public concerning a case in another state.

Conversely, immunity was denied where the individual claiming it was found

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Jones v. Knauss, 31 N.J. Eq. 211 (Ch. 1879). In the case of nonresidents, a voluntary appearance is necessary.

See also Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (Sup. Ct. 1920), where it was held that it "is thoroughly settled in this state by a line of cases beginning with Halsey v. Stewart . . . that a party to a suit while necessarily going to, staying at, or returning from the court, is equally privileged from the service of a summons or of a capias in a civil action." Id. at 352, 110 Atl. at 710. (Emphasis omitted.)

4. Richardson v. Smith, 74 N.J.L. 111, 65 Atl. 162 (Sup. Ct. 1906).

5. Younger v. Younger, 5 N.J. Super. 371, 69 A.2d 219 (App. Div. 1949); Herman v. Arndt, 116 N.J.L. 150, 182 Atl. 830 (Ct. Err. & App. 1936); Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (Sup. Ct. 1920); Dungan v. Miller, 37 N.J.L. 182 (Sup. Ct. 1874); Cook v. Cook, 132 N.J. Eq. 352, 28 A.2d 178 (Ct. Err. & App. 1942); Golde v. Golde, 108 N.J. Eq. 519, 155 Atl. 677 (Ch. 1931); Prescott v. Prescott, 95 N.J. Eq. 173, 122 Atl. 611 (Ch. 1923); Allen v. Plowman, 14 N.J. Misc. 251, 183 Atl. 899 (Dist. Ct. 1936) (dictum).

6. Randall v. Randall, 14 N.J. Super. 110, 81 A.2d 400 (Ch. 1951); Mulhearn v. Press Publishing Co., 53 N.J.L. 153, 21 Atl. 186 (Sup. Ct. 1890); Riewold v. Riewold, 121 N.J. Eq. 134, 188 Atl. 72 (Ch. 1936); Brown v. Brown, 112 N.J. Eq. 600, 601-02, 165 Atl. 643, 644 (Ch. 1933) (dictum); Jones v. Knauss, 31 N.J. Eq. 211 (Ch. 1879). Cf. N.J. Rev. Stat. § 2A:81-21 (1951), granting immunity from civil or criminal process in a matter which arose prior to entrance, to a person who voluntarily enters the state in obedience to a summons to testify in a criminal proceeding.

7. Younger v. Younger, 5 N.J. Super. 371, 69 A.2d 219 (App. Div. 1949).

8. Herman v. Arndt, 116 N.J.L. 150, 182 Atl. 830 (Ct. Err. & App. 1936).

9. Richardson v. Smith, 74 N.J.L. 111, 65 Atl. 162 (Sup. Ct. 1906).

10. Mulhearn v. Press Publishing Co., 53 N.J.L. 153, 21 Atl. 186 (Sup. Ct. 1890).

11. Dungan v. Miller, 37 N.J.L. 182 (Sup. Ct. 1874).

12. Allen v. Plowman, 14 N.J. Misc. 251, 183 Atl. 899 (Dist. Ct. 1936) (dictum).

13. Mulhearn v. Press Publishing Co., 53 N.J.L. 153, 21 Atl. 186 (Sup. Ct. 1890). A vice-president appeared as a representative of a corporation and, while still in the State, was served with process in his representative capacity.

14. 121 N.J. Eq. 134, 188 Atl. 72 (Ch. 1936). Cf. Morgan v. Morgan, 15 N.J. Misc. 101, 188 Atl. 258 (Ch. 1936), aff'd, 122 N.J. Eq. 2, 192 Atl. 508 (Ct. Err. & App. 1937), where the court said in dictum that it would not apply immunity to a nonresident who entered the state to confer with his wife's attorney at the unofficial suggestion of the prosecutor.

to have perpetrated a fraud on the court,[15] or where his entrance into the state was not voluntary.[16]

The instant case is not the first in recent years to affect the doctrine of *Halsey*. In *Korff v. G & G Corp.*,[17] the court held that nonresidents who invoke the aid of the New Jersey courts cannot claim immunity when subjected to cross-actions in the same suit. *Grober v. Kahn*,[18] relying on and expanding *Korff*, subjected the nonresident plaintiff to process in a suit arising out of the same set of facts where the nonresident plaintiff simply utilized New Jersey judicial facilities to take a deposition before a New Jersey commissioner. Thus, while *Korff* stated that the cases had to be connected in form, *Grober* stated that it was enough that they be connected in substance. Both cases, however, involved situations where the nonresident was the proponent in a cause of action, and the factual situations were similar.

Although the court cited *Korff* and *Grober* as authority for limiting the doctrine of *Halsey*, it did not connect the holdings. It discussed neither parties nor factual situations—the grounds of the *Korff* and *Grober* decisions—but merely denied immunity and advocated the doctrine of forum non conveniens as an adequate substitute. Justice Proctor, concurring, felt that immunity should be denied for the additional reason that "withholding immunity . . . is consistent with our firm commitment to the enlightened policy that just and expeditious

15. Baskerville v. Kofsky, 18 N.J. Misc. 325, 13 A.2d 562 (C.P. 1940).

16. See Rutledge v. Krauss, 73 N.J.L. 397, 63 Atl. 988 (Sup. Ct. 1906). The court held that the coming into the state "as a fugitive from justice under extradition is not to be considered in the same light as the voluntary coming into our state . . . ." Id. at 399, 63 Atl. at 989. The immunity was granted in Golde v. Golde, 108 N.J. Eq. 519, 155 Atl. 677 (Ch. 1931), where defendant waived extradition. Cf. N.J. Rev. Stat. § 2A:160-34 (1951), granting immunity from civil process arising out of the same set of facts to a person who waives extradition on a criminal charge, either until after conviction or, if acquitted, until he has time to return to the state from which he came.

Immunity has been granted in one type of involuntary appearance. The courts have termed an appearance induced through trickery as "involuntary," but, in light of the equities involved, have granted immunity. Williams v. Reed, 29 N.J.L. 385 (Sup. Ct. 1862).

17. 21 N.J. 558, 122 A.2d 889 (1956). Plaintiffs, creditors of defendant, had a receiver appointed on the grounds of misuse of company funds. The Penneys brothers filed a claim with the receiver. Defendant's president had also diverted some of her son's money, and a guardian was appointed to protect his interests. The guardian discovered that the money had been diverted to the brothers and filed a counterclaim against them through the defendant, and a cross-action against their company after having it joined as a defendant. They moved for dismissal, claiming immunity as nonresidents.

The present court's reliance on Korff seems to be based on dictum. Korff did not hold that immunity should not be granted. It held that immunity is not involved in cross-actions. However, both Grober and the instant case have interpreted this as a limiting of the Halsey doctrine.

18. 76 N.J. Super. 252, 184 A.2d 161 (Ch. 1962). G.K. brought an action against H.K. By order of the New York Supreme Court, G.K. had to take the deposition of a New Jersey resident before a court commissioner. While in New Jersey for that purpose, he was served and ordered to appear in the present action against H.K.

disposition at one time and place of all matters in controversy between the parties is to be encouraged."[19] However, he would have stopped there without overturning *Halsey*. Justice Francis, dissenting, agreed that the doctrine should be limited. He disagreed, however, with its limitation in this instance because defendant "was under a duty to the estate to defend the action, and seek exoneration of the estate . . . ."[20] He argued that the doctrine of immunity should not be replaced by forum non conveniens, but rather it should be tested by the same underlying considerations.[21]

However, it must be noted that the dissent was more disturbed by the retrospective effect of the court's holding than by the attendant change of law.[22]

The instant case, in effect, eliminated all distinctions between residents and nonresidents and substituted for the immunity doctrine that of forum non con-

19. 41 N.J. at 287, 196 A.2d at 519.

20. 41 N.J. at 290, 196 A.2d at 520. Justice Francis' argument appears to be that this was not an action where a party was trying to use the court to his own advantage. It was the special situation where a party enters the State, not on his own behalf, but on the behalf of another. Inasmuch as he has not entered for himself, he should not be subject to service in his individual capacity.

21. Considerations underlying the use of forum non conveniens are "the private interest of the litigant; . . . the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; . . . relative advantages and obstacles to fair trial; . . . administrative difficulties [of] . . . congested [calendars]; . . . localized controversies [which should be] decided at home; . . . trial . . . in a forum that is at home with the . . . law that must govern the case . . . ." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

The dissent's argument that immunity be tested by the considerations underlying forum non conveniens is without basis. There seems to be little difference between replacing immunity by forum non conveniens or testing it by the same considerations underlying forum non conveniens. The result is the same.

22. "If the Court wishes to wipe out a nonresident's freedom from service of process . . . ample justification exists for such a course. . . . But, in my judgment the overruling of the immunity principle should be done prospectively and not applied to this case." 41 N.J. at 293, 196 A.2d at 522. The logical outgrowth of Korff and Grober is to withhold immunity from a nonresident defendant where the factual situation of the two cases is the same, but this should not be done where defendant has a fiduciary duty to defend, and this defense points out the possibility of his personal liability. 41 N.J. at 293-94, 196 A.2d at 522.

However, the decisions point out that "our courts have adhered to the prevailing common-law doctrine that the overruling of a judicial decision is retrospective in nature." Arrow Builders Supply Corp. v. Hudson Terrace Apartments, Inc., 16 N.J. 47, 49, 106 A.2d 271 (1954) (per curiam). Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (App. Div. 1960). Cf. Johnson v. State, 18 N.J. 422, 428-29, 114 A.2d 1, 4 (1955) (dictum), cert. denied, 350 U.S. 942 (1956), adhering to the general rule, but pointing out that it does not apply "where contract or property rights have vested or where extreme hardship would result." Id. at 429, 114 A.2d at 4.

veniens.[23] However, the court's apparent hesitancy in not emphatically striking out for forum non conveniens[24] raises doubt and could possibly create a vacuum as to the applicable law.

This vacillation was unnecessary. There is little justification for the distinction between residents and nonresidents[25] and ample justification for the substi-

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23. This suggestion is not new. Substitution has heretofore been advocated in Note, Immunity of Non-Resident Participants in a Judicial Proceeding from Service of Process —A Proposal for Renovation, 26 Ind. L.J. 459, 462-65 (1951).

24. On two different occasions, the court's language seems to point out that it has not thoroughly discarded immunity. "Pursuant to the usual practice under a motion to dismiss based on forum non conveniens, the granting of immunity will be considered an exception rather than the rule." Wangler v. Harvey, 41 N.J. at 286, 196 A.2d at 518. (Italics omitted.) The court said further that if defendant was enticed into the jurisdiction, the trial court should dismiss. However, it did not say on what grounds. Id. at 287, 196 A.2d at 518. The court was also silent on the status of statutory immunity.

25. Many arguments have been advanced for the granting of immunity to nonresidents. The courts ought to be open and accessible to all. Randall v. Randall, 14 N.J. Super. 110, 81 A.2d 400 (Ch. 1951); Riewold v. Riewold, 121 N.J. Eq. 134, 188 Atl. 72 (Ch. 1936); Halsey v. Stewart, 4 N.J.L. 366 (Sup. Ct. 1817). It prevents hindrance and interruption of the judicial process. Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (Sup. Ct. 1920); Halsey v. Stewart, supra. It maintains the dignity of the court; Randall v. Randall, supra. It is based on public policy. Ibid.; Klaiber v. Frank, 13 N.J. Super. 388, 80 A.2d 470 (L. 1951), rev'd on other grounds, 9 N.J. 1, 86 A.2d 679 (1952); Herman v. Arndt, 116 N.J.L. 150, 182 Atl. 830 (Ct. Err. & App. 1936); Michaelson v. Goldfarb, supra; Brown v. Brown, 112 N.J. Eq. 600, 165 Atl. 643 (Ch. 1933). It encourages the attendance of necessary participants. Michaelson v. Goldfarb, supra; Mulhearn v. Press Publishing Co., 53 N.J.L. 153, 21 Atl. 186 (Sup. Ct. 1890); Massey v. Colville, 45 N.J.L. 119 (Sup. Ct. 1883); Dungan v. Miller, 37 N.J.L. 182 (Sup. Ct. 1874); Halsey v. Stewart, supra; Prescott v. Prescott, 95 N.J. Eq. 173, 122 Atl. 611 (Ch. 1923).

These arguments have been subjected to strong criticism. The argument that courts should be accessible to all "cuts both ways and leads to the conclusion that non-resident parties should be amenable to, rather than privileged from, service of process." Note, 33 Harv. L. Rev. 721, 723 (1920). The application of the doctrine leads to the anomalous result of closing the courts to residents who want to sue nonresidents. Keeffe & Roscia, Immunity and Sentimentality, 32 Cornell L.Q. 471, 474 (1947). See Note, 26 Ind. L.J. 459, 460 (1951).

The same treatment can be given to the argument that service interrupts the judicial process by distracting suitors. It has been argued that "litigants always and everywhere are subject to distraction," and that it is illogical to say that distraction will affect a nonresident, but it will not bother a resident. Keeffe & Roscia, supra at 475; Wangler v. Harvey, 41 N.J. at 284, 196 A.2d at 517. "The test should not be the sentimental one of distraction but the real one of obstruction." Keeffe & Roscia, supra.

Further, the argument that the dignity of the court is affronted by service of process lost its vitality when the arrest of parties to a civil action ceased. Wangler v. Harvey, supra. It seems that the dignity of the court is more affronted than maintained by the granting of immunity, especially where the court quashes its own process. Keeffe and Roscia, supra at 477.

It has also been contended that "generally speaking, the public policy [argument is] . . .

tution of doctrines, for forum non conveniens ignores technical distinctions and decides the rights of both parties by the same standard, *i.e.*, the accomplishment of substantial justice.[26]

Traditionally, immunity was "founded . . . upon the convenience . . . of the court itself,"[27] having for a basic purpose the achievement of justice.[28] Similarly, "the doctrine of *forum non conveniens* is . . . [basically] an equitable one and its application is . . . [discretionary with] the trial court."[29] "[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."[30]

When a court, applying the immunity theory, nullifies the service of process, it must recognize that the defendant was actually served and, realistically, the court is simply declining to exercise its jurisdiction. Is this result, or the reason for the result, really any different when, invoking forum non conveniens, the court acknowledges that service is proper, but it resists jurisdiction to prevent injustice, even though jurisdiction may be authorized by a general venue statute?[31]

Had the court taken this definitive step, it would not have been necessary for it to go further to achieve the desired result, for "the present tendency [in applying forum non conveniens] is to avoid a rigid formula and to weigh

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nothing more than a catch-all manner of enunciating all the arguments . . . ." Wangler v. Harvey, supra at 285, 196 A.2d at 517. See Note, 26 Ind. L.J., supra at 461.

It appears that the most valid argument advanced for immunity is that it encourages the attendance of necessary parties. However, it has been felt that even this should only apply to witnesses. Wangler v. Harvey, supra at 284, 196 A.2d at 517; Note, 33 Harv. L. Rev., supra at 723. See cases cited note 6 supra.

26. In a factual situation analogous to the instant case, a New Jersey court held that forum non conveniens was a proper remedy for a resident who was served outside his home county. Massey v. Colville, 45 N.J.L. 119 (Sup. Ct. 1883). And in Brown v. Brown, the court, in denying immunity to a resident, stated that "the privilege [of immunity] is not limited solely to non-residents; it may also be invoked by residents. The relief granted, however, is different . . . [in that a non-resident] is entitled to have the service set aside; . . . [while the resident] is only entitled . . . to be protected as to the venue of the action." 112 N.J. Eq. 600, 601, 165 Atl. 643, 644 (Ch. 1933). See Kutschinski v. Kutschinski, 112 N.J. Eq. 341, 164 Atl. 560 (Ct. Err. & App. 1933), to the same effect.

In the general sense, a change of venue is an intrastate application of forum non conveniens.

27. Lamb v. Schmitt, 285 U.S. 222, 225 (1932). The test "is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it." Id. at 228.

28. Baskerville v. Kofsky, 18 N.J. Misc. 325, 13 A.2d 562 (C.P. 1940).

29. Vargas v. A. H. Bull S.S. Co., 25 N.J. 293, 295, 135 A.2d 857, 858 (1957) (per curiam), cert. denied, 355 U.S. 958 (1958).

30. Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947).

31. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).

sundry factors, private and public, which bear upon the justness of a plaintiff's choice."[32]

32. Starr v. Berry, 25 N.J. 573, 584, 138 A.2d 44, 49 (1958). A possible motivation for the court's treatment is that the rejection of immunity is of little consequence. With the exception of completely foreign actions, personal jurisdiction may be acquired by service in the defendant's state, provided there are minimal contacts with the forum and sufficient notice is given to apprise the defendant of the outstanding suit. International Shoe Co. v. Washington, 326 U.S. 310 (1945). See N.J. Super. Ct. R. 4:4-4 (Summons. Personal Service). Under the facts in the instant case, personal jurisdiction could have been acquired through service under R. 4:4-4(i) (cause of action arising out of the ownership of real property) and can now be acquired under R. 4:4-4(j) (service outside the state) (eff. Jan. 3, 1964).