RECENT CASES

BANKS AND BANKING—POWERS—INDEMNITY TO GUARANTOR OF DEPOSITS—ULTRA VIRES.—The defendant, along with twenty-six other banks in Hudson County, agreed to indemnify the plaintiff bank if it would take steps to prevent the Second National Bank from closing. It is apparent from the statement of facts in the case that the twenty-seven indemnifying banks as well as the plaintiff feared that if there were a run on the Second National Bank, (this was in July 1931) there would be a panic and a general run on all the banks in Hudson County. It cost the plaintiff $2,227,156.22 to prevent the run. The plaintiff seeks to recover the defendant's share of the loss sustained, $66,847.67. *Held*: the contract to indemnify is not *ultra vires*. *Trust Co. of New Jersey v. Jefferson Trust Co.*, 14 N.J.Misc. 656, 186 Atl. 732 (Sup. Ct. 1936).

One of the problems arising directly out of the depression and facing the courts recently has been the position of banks which undertook to aid other embarrassed banks during the period of banking uncertainty. In the early years of the depression, it frequently happened that when one bank in a community was in danger of closing, another bank or banks would step in and guarantee the deposits of the weak bank. The prime reason motivating this action on the part of bankers was the fear lest a run on one bank in the community would shake public faith to such a point as to precipitate a general run and a consequent wiping out of all the banks concerned. The legal problem arises from the fact that the courts have either held or freely admitted that a bank has no power to become an accommodation guarantor.

In a recent case in Maine[1] the court refused to allow the guarantor bank to recover on the grounds that the contract was *ultra vires* and void as against public policy. In handing down its decision, the court observed:

> "How are the depositors protected by the maintenance of a cash reserve, if overnight a bank may, without any addition to its own assets, assume the liabilities of one or more other banks? Is there any reason in restricting the amount which a bank may loan

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1. Gardiner Trust Co. v. Augusta Trust Co., 134 Me. 191, 182 Atl. 685 (1936).

and at the same time permitting it to assume an unrestricted liability as a guarantor?"

In New York, the court denied recovery on the ground that the guarantee made by the Clearing House Committee was not authorized by the member banks.[2] Despite its refusal to allow recovery, the court intimated that recovery in the case was desirable and held that the clearing house banks had the power in a banking crisis, in order to avoid loss to their own depositors and stockholders, to make the necessary commitments to keep one of their own members from failing.

In the *Trust Co. of N. J.* case, the defendant moved to strike the complaint on the ground that the contract was *ultra vires* and void as against public policy. The court denied the motion and sustained the complaint, saying that the New Jersey statute[3] which gives trust companies the powers "necessary to carry on the business of banking" gave the power to make such a contract. The court relied on Mr. Justice Beasley's definition of "necessary power". In construing "power necessary to a corporation" Mr. Beasley said that the phrase did not mean "Simply power which is indispensable" but "a power which is obviously appropriate and convenient to carry into effect the franchise has always been deemed a necessary one".[4] Inasmuch as an *ultra vires* contract cannot be held valid because of the supposed indirect benefits that may accrue from its performance,[5] it would seem that the court took the only way out.

There is no doubt as to the social desirability of the court's decision. The United States Supreme Court, however, in interpreting a similar provision in the federal statute[6] regulating national banks has held differently. In *Texas & P. R. Co. v. Pottorff*,[7] *the* plaintiff sought

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2. O'Connor v. Bankers' Trust, 289 N.Y.S. 252, 270, 272 (1936).

3. Ch. 27, P. L. 1920, p. 50 (N. J. COMP. STAT. SUPP. 1924, §§ 221-6a, 221-6b).

4. State Railroad and Transportation Co. v. Hancock, 35 N.J.L. 537, 545 (E.&A. 1871).

5. *In re* Bankers Trust, 27 Fed. (2d) 912 (1928).

6. Title 12 U. S. C. A., § 24. It is interesting to note that the court in the main case remarked on the similarity between the N. J. statute, footnote 3 *supra*, and the federal statute but did not notice the construction placed on the federal statute.

7. 291 U. S. 245, 78 L. Ed. 777 (1934).

to recover as a preferred creditor after a bank had failed. The bank had pledged $50,000 in Liberty bonds to secure the plaintiff's deposit. In answer to the argument that the pledge was incidental to the general grant of powers "necessary to carry on the business of banking," Mr. Justice Brandeis said, "There is no basis for the claim that the power to pledge assets is necessary for deposit banking".

On the basis of the law prior to 1930 it was held that the pledging of assets by a national bank to secure deposit of funds by a municipality is not implied from the general grant of powers "necessary to carry on the business of banking".[8] In 1930, however, an act was passed allowing national banks to pledge assets to secure municipal deposits in cases where a state bank can.[9]

Although it is not desirable that the statute allowing for "necessary powers" be stretched too far, it is equally undesirable that it be construed oppressively. Certainly the court did not err on either side of the line in the principal case.

EQUITY—INJUNCTION AGAINST PROCEEDING IN ANOTHER STATE —JURISDICTION.—Complainant filed a bill in New Jersey to restrain defendant from proceeding with a suit for divorce instituted in Mexico. *Held* (adopting the reasons of the advisory master in the Court of Chancery), the bill must be dismissed for want of jurisdiction, since, neither party being domiciled in New Jersey, the marital *res* is not present upon which the proposed relief must operate. *Marquis v. Marquis*, 121 N.J.Eq. 288, 189 Atl. 388 (E.&A. 1937).

The soundness of the reason for denying the injunction stated by the advisory master and adopted by the court appears doubtful.[1] If the

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8. City of Marion, Ill. v. Sneeden, 291 U. S. 262, 78 L. Ed. 787 (1934).

9. Chap. 604, 46 stat. at L 809, U. S. C. A. title 12, sec. 90. *Vide*, 92 A. L. R. 803.

1. The opinion relies largely on Greensaft v. Greensaft, 120 N.J.Eq. 208, 184 Atl. 529 (E.&A. 1936). In that case, the complainant filed a bill in New Jersey to restrain the defendant from proceeding with an Arkansas divorce suit. Before final decree, the defendant obtained a decree of divorce in the Arkansas suit. The court below declared the decree null and void and directed the

marital *res* does not have its situs in New Jersey and neither of the parties is domiciled here, it is well settled that New Jersey has no power to dispose of the *res*.[2] The theory is that only the state of the domicile may destroy the *res*; and it may do so because it is a matter of social interest to that state. The decision in the principal case rested on the assumption that the proposed relief would operate on the *res* itself. The question may be raised: will the decree operate on the *res*? Has the bill been brought for that purpose? The bill is addressed to the inherent power of equity to act in *personam* upon the defendant, over whom, he having been personally served in New Jersey, it has jurisdiction to restrain him from using the courts of another state for an inequitable purpose. It is difficult to conceive how a decree enjoining the defendant from proceeding with his suit in Mexico will operate on the *res*. It would merely restrain the conduct of the defendant to prevent a fraud upon and vexation to the complainant. It can hardly be said that because the court affords protection to the complainant because of her interest in the martital status it assumes control over the marital *res*. It would seem that the action is purely *in personam*.

The court having jurisdiction over the parties and the decree being *in personam*, it does not matter whether or not the *res* is in New Jersey.

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defendant to apply to the Arkansas court to vacate the decree. The Court of Errors and Appeals reversed, on the ground that the court did not have jurisdiction over the marital res, neither party being domiciled in New Jersey. It would seem that the court in the principal case was misled by an isolated and, perhaps, ill-considered statement: "Neither party being a resident of this state, they were not subject to the jurisdiction of the court of chancery, and the bill should have been dismissed." The principle used to dispose of the case was this: " . . . the jurisdiction of the court to deal with the foreign divorce must rest if at all upon the residence in this state of either one or the other of the parties." The former statement can hardly have been intended as a general rule but merely as disposing of the case at bar in a loose way. The problem before the court was its power to affect a foreign decree of divorce. Further, although the bill was originally brought to restrain divorce proceedings, it seems fairly obvious from the tenor of the court's language that on appeal it was not considering that fact at all. A bill to restrain a foreign divorce suit and a bill to nullify a foreign divorce are essentially different. The former is intended to restrain the defendant from pursuing an inequitable course of conduct. The latter seeks the preservation of the marital res which the decree, if valid, would destroy. The decision would seem to deal with the latter problem only.

2. Floyd v. Floyd, 95 N.J.Eq. 661, 124 Atl. 525 (E.&A. 1923).

It is no novel principle that a court of equity will direct the conduct of parties, over whom it has jurisdiction, despite the fact that the subject matter of the suit is without the state of the forum.[3] The decree is not intended to operate on the *res* but on the parties whose conduct it can and will direct. To say that because the marital *res* is outside the state the court does not have jurisdiction is contrary to a firmly established rule of equity. Further, it is not unusual equitable relief to enjoin foreign proceedings which are fraudulent or vexatious and harassing to the defendant.[4] Following these principles, it is surprising to hear the court say it did not have jurisdiction in the principal case.

It is possible, however, for the court to reach the same result by declining jurisdiction, if it may do so properly. It is submitted that it

3. Home Insurance Co. v. Howell, 24 N.J.Eq. 238 (Ch. 1873); Wood v. Warner, 15 N.J.Eq. 81 (Ch. 1862).

4. Grover v. Woodward, 91 N.J.Eq. 250, 109 Atl. 746 (Ch. 1920); Lehigh Valley R. R. Co. v. Andrus, 91 N.J.Eq. 225, 109 Atl. 746 (Ch. 1920); Von Bernuth v. Von Bernuth, 76 N.J.Eq. 177, 73 Atl. 1049 (Ch. 1909); Bigelow v. Old Dominion Copper Mining and Smelting Co., 74 N.J.Eq. 457, 71 Atl. 153 (Ch. 1908); Margarum v. Moon, 63 N.J.Eq. 586, 53 Atl. 179 (Ch. 1902); Kempson v. Kempson, 58 N.J.Eq. 94, 43 Atl. 97 (Ch. 1899), *aff'd.* on this point, 63 N.J.Eq. 783, 52 Atl. 360 (E.&A. 1902); Hutton's Executors v. Hutton, 40 N.J.Eq. 461, 2 Atl. 286 (Ch. 1908) (the case is interesting for the fact that the court enjoined proceedings in New York even though all parties were residents of New York).

In Von Bernuth v. Von Bernuth, *supra*, the complainant sought to enjoin a suit for separation brought in New York by her husband, a resident of New York. The wife, a resident of New Jersey, had first instituted suit for divorce in New Jersey. The defendant filed an answer denying the allegations of the petition. The husband thereupon started a suit for separation in New York, but later filed an amended answer and cross petition in the New Jersey suit, alleging desertion on the part of the wife. The husband was enjoined from proceeding with his suit for separation in New York.

It has been held that a wife's domicile follows her husband's, unless she acquire another elsewhere by his consent, or where she is justified in leaving him for a matrimonial offense. Rinaldi v. Rinaldi, 94 N.J.Eq. 14, 118 Atl. 685 (Ch. 1922); Floyd v. Floyd, *supra* note 2. In the Von Bernuth case, the complainant's domicile would supposedly be that of her husband, New York. But the court imposed no condition precedent that she bring herself within the exceptions to show that New Jersey had jurisdiction over the marital res. The place of her domicile was not considered. If the reasoning of the principal case be applied in such a situation, it would seem that the question of domicile would have to be determined in the restraint proceeding.

must be shown that the complainant has a more convenient forum before jurisdiction is declined. The doctrine of *forum non conveniens* has been used by a number of the courts where the parties were non-residents.[5] It is to be noted that there are two approaches in the application of this doctrine. One line of cases holds that actions between non-residents may be maintained by reason of comity only and that jurisdiction will be entertained only under special circumstances.[6] The other approach, which seems sounder, is that jurisdiction should be exercised in all proper cases unless there be strong reasons for declining.[7] It would seem that the latter is New Jersey's view. In *Sielcken c. Sorenson,* Vice-Chancellor Backes recognized the complainant's suable right, refusing jurisdiction only on the ground that the complaint had more adequate relief and a more suitable forum in New York.[8] In the principal case, the court might properly decline jurisdiction on a showing that the complainant had a more convenient forum for relief.

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5. Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152 (1933); Pietrarola v. New Jersey & Hudson R. R. Co., 197 N.Y. 434, 91 N.E. 120 (1910); Heine v. New York Life Insurance Co., 45 F. (2d) 426 (1930). See Blair, Paxton, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COL. LAW REV. (1929).

6. Arizona Commercial Mining Co. v. Iron Cap Copper Co., 233 Mass. 522, 124 N.E. 281 (1919); National Telegraph Mfg. Co. v. Dubois, 165 Mass. 117, 30 L.R.A. 628 (1896); Collard v. Beach, 81 N. Y. App. Div. 582, 81 N.Y. Supp. 619 (1903); Burdick v. Freeman, 120 N.Y. 420, 24 N.E. 949 (1890).

7. See Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

8. 111 N.J.Eq. 44, 161 Atl. 47 (Ch. 1932). The fact that the Irving Trust Co., a New York institution, would be a necessary party for complete relief, the necessity of taking testimony *de bene esse,* the presence of books of account in New York, all led the vice-chancellor to the conclusion that, although the complainant had a right to bring suit in New Jersey, there was a more convenient forum. See also, Kryn v. Kahn, 54 Atl. 870 (Sup. Ct. 1903); Hale v. Lawrence, 21 N.J.L. 714, 47 Am. Dec. 190 (E.&A. 1848). *Cf.* Hutton's Executors v. Hutton, *supra,* note 4; Tomson v. Tomson, 31 N.J.Eq. 464 (Ch. 1879).

EQUITY—INJUNCTION—EXECUTION OF JUDGMENT OF DISPOSSESS BY DISTRICT COURT—JURISDICTION.—A, a corporation of New Jersey, leased certain land and buildings from the B corporation, under a formal lease.[1] A entered into possession and expended a substantial sum of money in improving the buildings and transforming them into a modern hotel. Taking advantage of a 60-day grace clause in the first mortgage, the lessee, with knowledge if not actual consent of the lessor, made deferred payments on his obligations, which included the mortgage debt and taxes, current and accrued. On November 29, 1933, the last payment under the agreement completely removed the arrearages. The B corporation, lessor, with full knowledge of the manner of payments, on the failure of the A corporation to make the present payment of the amount due on December 1, instituted dispossess proceedings in the District Court and received judgment. The A corporation then filed a bill in the Court of Chancery to restrain the enforcement of said judgment for possession. The Court of Chancery granted an injunction,[2] and on appeal the Court of Errors and Appeals reversed the decision. *Held*—1—The Court of Chancery may not review errors committed by the law courts. 2—After a judgment of dispossess has been entered a court of equity may not restrain its enforcement in order to prevent a forfeiture, merely because the law court erred in a matter of law or because counsel failed to present its defense in the law court. *Red Oaks Inc. v. Dorez Inc.*, 120 N.J.Eq. 282, 184 Atl. 746 (E. & A. 1936).

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1. "The party of the second part shall advance during the said term of letting, the full carrying charges of the entire real property first above described to wit: Interest upon said first mortgage, taxes and assessments if any, insurance and amortization upon the said first mortgage; if at the end of any year of said term of letting, the amount so advanced by the said party of the first part is less than the sum of $3,000 he shall pay to the party of the first part, the difference between the amount so advanced and the said sum of $3,000; if at the end of any year of said term of letting, the amount advanced during said year by the party of the second part, as aforesaid, shall exceed the said sum of $3,000 the amount of such excess shall be charged against said party of the first part and repaid at the expiration of said period of letting or upon a sale of said real property as hereinafter provided for."

2. 118 N.J.Eq. 198, 178 Atl. 554 (Chan. 1935). The court held that relief in that court was not barred by entry of a judgment of possession in a district

It is beyond any question that the Court of Chancery, the present manifestation of the original Chancellor to the King of England, from its earliest beginning has been a court of conscience. For this very reason, in its gradual evolution into a court of standing equal in its physical aspects to a court of law, it has been entrusted with many extraordinary remedies in the pursuance of its judicial duties. It has become, in its development, the final protector of the rights of one aggrieved where no remedy existed at law, where the remedy at law was inadequate, where the decision at law was so oppressive as to shock the conscience of the equity court or where the injury that would result from the acts done, or from the enforcement of the judgment at law would be irreparable.[3] With this as a premise, in view of the above stated facts and subsequent decisions by that court, the final and brief decision of the Court of Errors and Appeals makes self-evident an inexplicable inconsistency and a broad departure from the acknowledged guiding principles of equitable jurisdiction.

At the outset we may dispose of the more technical aspect of the case involved in the appeal from the decision of the Court of Chancery. The petition of appeal submitted by the defendant appellant was fatally defective in that it stated no ground for appeal nor presented any of the points on which the decree was assailed. It stated, in effect, merely that the decree of the Court of Chancery "is erroneous for that the Chancellor should not have decreed as aforesaid,"[4] stating not even

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court where the correctness of that judgment is challenged and equitable rights are involved.

3. Arguments Proving from Antiquity the Dignity, Power and Jurisdiction of the Court of Chancery.—Reports in Chancery, Vol I (Hargrave) 1693, p. 7:

"What other use could there be for that court, or what could there be to denominate them Chancellors, but (as 'tis said before of the Chancellor under the Emperors) to relieve the distressed, to defend the weak, to be a refuge for the wrong, and to loose the wicked bands, wherewith the poor guiltless Man was oppressed by the rigor of the laws, which is a lively description of the office of the Lord Chancellor at this Day and for which cause (faith one) a chancery was ordained."

4. "And your petitioner humbly appeals from that part of the said decree which decree as aforesaid on the ground that the same is erroneous, for that the Chancellor should not have decreed as aforesaid, but should have dismissed the complainant's bill with costs to the defendant-appellant, your petitioner." (S. C. 347.)

one of the grounds for such conclusion. It has been definitely established and repeatedly followed by our highest court that "an appellant cannot be permitted to attack a decree in Chancery upon a ground of appeal which is nowhere stated in his petition of appeal."[5] Had the court been inclined to follow the dictates of its previous decisions it would have been dispositive of the case. Since, however, the court in its discretion decided to consider the appeal on the merits of the case, we may direct our attention to the problem of the jurisdiction of the court of chancery.

The jurisdiction of the court of chancery to prevent unjust forfeiture between landlord and tenant is too well established to admit of any questions,[6] having arisen very early in the history of English law.[7] Where the attempted forfeiture is based upon the non-payment

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5. Young v. McLaughlin, 111 N.J.Eq. 425, 162 Atl. 633 (E.&A. 1932); see also, N. J. Bldg. Loan & Invest. Co. v. Lord, 66 N.J.Eq. 344, 58 Atl. 185 (E.&A. 1903), when this court said: "Without adverting to any other answer that might be given to this contention (and such answer is not wanting) it is sufficient to say that no such 'ground of appeal' is to be found in the petition of appeal now before us. Rule 21 of this court requires the appellant to 'file a petition of appeal in which shall be briefly stated the order or decree complained of and the grounds of appeal'. The object of the rule is twofold—first, to apprise the court, through the petition and the answer thereto, of the issue between appellant and respondent; and secondly, 'to require a notice to the opposite party of the points in the proceedings which are to be made the subject of complaint in the appellate court.'"

In accord: Butterfield v. Third Av. Savings Bk., 25 N.J.Eq. 533 (E.&A. 1874); Cumberland Lumber Co. v. Clinton Hill Lumber Manufacturing Co., 57 N.J.Eq. 629, 42 Atl. 585 (E.&A. 1898); Supplee v. Cohen, 81 N.J.Eq. 500, 86 Atl. 366 (E.&A. 1913).

6. Windholz & Son v. Burke, 98 N.J.Eq. 471, 131 Atl. 386 (Ch. 1925); Sparks v. Lorentowicz, 105 N.J.Eq. 18, 147 Atl. 377 (Ch. 1929), *aff'd*, 106 N.J.Eq. 178, 150 Atl. 351 (E.&A. 1929); Milonas v. Harmony County Club, 108 N.J.Eq. 485, 155 Atl. 610 (Ch. 1931); Rivoli Holding Co., Inc., v. Ulicny, 109 N.J.Eq. 54, 156 Atl. 369 (Ch. 1931); 1 POM. (4th ed.) par. 381, 433 and notes.

7. Statute of 4 George II, c. 38, par. 3, 4. 2 TIFFANY, LANDLORD AND TENANT, 1412, par. 3. "Arguments proving"—*supra* note 3, p. 82.

"The inconveniences that would follow to the subjects if the chancery should not relieve after Judgments in cases of Frauds, Breaches of Trust, Forfeitures, etc., where the common law cannot relieve, would prove so great and intolerable a grievance, that no man could live under such laws, for any man that will take

of rent, relief is uniformly given upon payment of the amount due with appropriate interest and costs. Where the forfeiture is provided for merely as security for the payment of money, "Equity regards such payment as the real and principal intent of the instrument" and will relieve upon payment.[8] *A fortiori* should this be true where the lease contains no provision for forfeiture or re-entry upon default of rent, as here, and such forfeiture is threatened.[9]

In a number of cases forfeitures have been reviewed and set aside by the Court of Chancery. In *Brower v. The Board of Commissioners of Asbury Park*,[10] the city had declared a forfeiture and re-entered. The Court of Chancery held that the right of forfeiture had been waived by the city and possession was restored to the lessee. In *Rivoli Holding Co. v. Ulicny*,[11] a forfeiture had been declared and the landlord had made a forcible re-entry. The court there held that no right of forfeiture had been reserved for non-payment of rent, and "if there were, equity would relieve against forfeiture upon payment," and the

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advantage may obtain a judgment at law before the other can get a decree or injunction in chancery, what equity soever this case requires and then he must be remediless forever, and thereby all fraud, circumvention, corrupt and crooked and unconscionable dealings of crafty, deceitful persons would be countenanced, encouraged and abetted and ancient rules of equity and conscience smothered and suppressed upon the imaginary credit and reputation of a judgment at law which, tho of great weight, may be unconscionably gotten, especially since all men know, that not one judgment of a 100 is pronounced in court, nor the case so much as heard or understood by the judges, but entered by attorneys, which then they were not, but pronounced by the judges in open court."

N. J. Landlord & Tenant Act, 3 C. S. P. 3069; Fleming v. Fleming Hotel Co., 69 N.J.Eq. 715, 61 Atl. 157 (Ch. 1905).

8. 1 POM. *supra* note 5. MCADAM, LANDLORD & TENANT (3rd ed., vol. 1), p. 651. "Equity lies at the foundation of relief in the case of forfeiture, and good conscience is the beacon light that points the way out. Compensation is the panacea." TIFFANY, LANDLORD & TENANT, *supra* note 6.

9. Forfeiture is not confined to express stipulations, but may flow from provisions of law *dehors* the agreement between the parties but applicable to it. Sir Harry Peach v. Duke of Somerset, 1 Strange 447; WHITE AND TUDOR, LEADING CASES IN EQUITY, vol. 2, p. 12, § 1245; FULL ENGLISH REPRINT, vol. 93, p. 626; Windholz v. Burke, *supra*, note 5; Revoli Holding Co. v. Ulicny, *supra*, note 5.

10. 103 N.J.Eq. 176, 142 Atl. 648 (Ch. 1928).

11. 109 N.J.Eq. 54, 156 Atl. 369 (Ch. 1931).

tenant was restored to possession. In *Friedlander v. Grand*,[12] where the landlord dispossessed the tenant by force, the Court of Errors and Appeals held: "The legal remedy of the complainant, in case he is wrongfully evicted by his landlord, is an action for damages or ejectment.[13] But he may have an injunction against interference with his possession by the landlord if the circumstances of the case disclose that the relief at law is inadequate and the injury will be irreparable."[14]

If, then, relief will be granted to tenants, where actual possession has been obtained by force as in the *Brower* and *Rivoli* cases, why should the same relief be denied if it is sought before possession is delivered to the landlord by the constable under a warrant of possession? Can it then be fairly assumed that in order to obtain equitable relief in a question of this nature a use of force must be shown?

As a general proposition, "where a party has presented the matter which he claims as the ground of his relief to a court of law and the court has decided against him, or when, through his own negligence, he has failed to present it to the court in which the suit is pending, this court (chancery) can grant no relief. It has no authority to correct alleged errors of law and it will not aid a party who through sheer negligence has involved himself in difficulty.[15] "Equity will interfere with judgments at law only where there has been fraud, or mistake or accident in procuring the judgment and where the legal remedies are inadequate."[16] Then, too, as Vice Chancellor Berry has stated,

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12. 116 N.J.Eq. 537, 174 Atl. 506 (E.&A. 1934).

13. Miller v. Kutchinsky, 92 N.J.L. 97, 105 Atl. 20 (Sup. Ct. 1918).

14. McGann v. La Brecque, 90 N.J.Eq. 526, 107 Atl. 175 (Ch. 1919).

15. Reeves v. Cooper, 12 N.J.Eq. 223, 226 (Ch. 1859). See also, McGann v. LaBrecque Co., Inc., 91 N.J.Eq. 307, 109 Atl. 501 (E.&A. 1919); Rafferty v. Schutzer, 107 N.J.Eq. 613, 153 Atl. 626 (E.&A. 1930).

16. Kinney v. Ogden Admr., 3 N.J.Eq. 168 (Ch. 1834); Reeves v. Cooper *supra*, note 8; Brick v. Burr, 47 N.J.Eq. 189, 19 Atl. 842 (Ch. 1890); Clark v. Bd. of Ed., 76 N.J.Eq. 326, 74 Atl. 319 (E.&A. 1909); Commercial Nat. Tr. & Sav. Bk. v. Hamilton, 99 N.J.Eq. 492, 133 Atl. 703 (Ch. 1926), *aff'd*, 101 N.J.Eq. 249, 137 Atl. 403 (E.&A. 1927).

The rule in this case was stated: "The court of chancery will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the facts in question pending the suit, or the facts could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act

"since the famous controversy between Lord Coke and Lord Ellsmere in 1616 the power of the Court of Chancery to restrain the execution of a judgment of law upon equitable grounds has seldom been questioned."[17]

What greater basis for such relief can be presented than those involved in the present case;—no provision for forfeiture, a waiver of payment on due date, a judgment that is not binding and not appealable, an inadequate remedy at law, and an estoppel of the aggrieved party from interposing his defense at law.

It should be noted at this point that the defendant claims that his sole desire was a decision on the question as to whether or not the rent installments were in default if not paid on their respective due dates, or only if paid before the expiration of the grace period allowed by the first mortgage. The court held that the answer was plain[18] and that the lease being silent as to the time of payment the parties by

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of the opposite party, unmixed with negligence or fraud on his part; and that it matters not whether the defendant has presented to the law court the matter which he claims as the ground of his relief or through his negligence has failed to present it."

17. "Arguments proving"—*supra* note 3, p. 76. "In Chancery—nothing of the judgment is touched, only the corrupt conscience of the Party is corrected because he would take an advantage by Rigor of law against all equity in good conscience. As for example a case on a bond: Question at Law—was it sealed and delivered and the like and that being found by verdict, judgment followeth that the whole sum shall be paid. Whereas chancery examines (not sealing and delivery but) what was first due, what had been paid since, what remains unpaid and accordingly orders Party to take what is justly due unto him with damages and costs and will not suffer him to take £800 because he had a judgment for so much when it was proved that all was paid but £20. Party should take but what was justly due unto him notwithstanding the judgment."

18. Red Oaks v. Dorez, 118 N.J.Eq. 198, 203, 174 Atl. 554 (Ch. 1935). "It will be observed that there is nothing in the lease or agreement which preceded it, which specifies the time of payment of rental or carrying charges included therein. The agreement is not to pay, but to 'advance,' the full carrying charge. The ordinary construction of the word 'advance' is 'to pay beforehand.' Here it evidently meant that the lessee should put the lessor in funds to pay the carrying charges; and as a grace period of sixty days was allowed by the lessor for such payment, I think the lessee would have been in time if he had done so any time before the lessor was obliged to pay them to avoid default on the mortgage."

practical interpretation have supplied the omission, and their own interpretation of the language used must control.[19] Prior to the alleged default, the parties themselves interpreted this language to mean payment within the grace period of the first mortgage. Since it was only two days before the due date that the arrearages of taxes had been finally paid, and since the landlord waived payment on due date, it was, therefore, inequitable under the circumstances for him to insist on immediate payment.

Furthermore, the judgment of possession is not conclusive upon the parties,[20] and it is not binding upon them in any subsequent legal investigation.[21] If, then, it is not binding on the parties in any subsequent legal investigations, why should it be in any subsequent equitable investigations?

It is true that under section 113 of the District Court act[22] no appeal or certiorari[23] lies from the court's judgment, but the language of that section has been construed not to affect the pre-existing jurisdiction of the court of chancery to relieve again unjust forfeiture. In *McGann v. LaBrecque Co., Inc.*,[24] the court said: "The legal and equitable rights of parties remain the same after the judgment of possession as before." And in *McWilliams v. King & Phillips*,[25] the court held: "It does not seem at all probable that the legislature designed, by a prompt procedure before a justice of the peace, which is subject neither to appeal nor review by certiorari, to adjudge definitely the right to possession to houses and lands, no matter how difficult or

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19. Revoli Holding Co. v. Ulicny, 109 N.J.Eq. 54, 156 Atl. 369 (Ch. 1931); Kerney v. Johnson, 104 N.J.Eq. 244, 144 Atl. 808 (E. & A. 1928).

20. Reade v. Bodine, 2 N.J.Misc. 458 (Sup. Ct. 1924); Richardsen v. Smith, 74 N.J.L. 111, 65 Atl. 162 (Sup. Ct. 1906); Coe v. Haines, 44 N.J.L. 134 (Sup. Ct. 1882).

"It can be set up as a shield by the officer of the law, but not by the landlord."

21. McWilliams v. King & Phillips, 32 N.J.L. 21 (Sup. Ct. 1866).

22. Jacobsen v. Gruenberg, 100 N.J.L. 77, 125 Atl. 562 (Sup. Ct. 1924).

23. Certiorari lies only if the court has no jurisdiction. Stanley v. Horner, 24 N.J.L. 511 (Sup. Ct. 1854); Fowler v. Roe, 25 N.J.L. 549 (Sup. Ct. 1856); Morris Canal Co. v. Mitchell, 31 N.J.L. 99 (Sup. Ct. 1864); Shepherd v. Sliker, 31 N.J.L. 432 (Sup. Ct. 1866).

24. *Supra*, note 13.

25. *Supra*, note 19.

abstruce the questions of law involved, or how valuable the interest at stake might be."

It is further true that such judgments are neither *res adjudicata*, as was pointed out in the *Gruenberg* case,[26] nor dispositive of the rights between the parties, not even the right of possession, as was indicated by the Supreme Court in *Hopper v. Chamberlain*.[27]

Therefore, if neither party is concluded by the judgment and neither party can "plead it as an estoppel to further investigation of the right of possession," it must necessarily follow that the judgment influences no subsequent litigation between the parties, the legal and equitable rights of each remaining intact.

If we concede then, as we must, the power of the court of chancery to restrain the execution of a judgment at law upon equitable grounds, how much more then does a judgment from which no appeal lies, invite such intervention? The fact that damages in an action of trespass may be recoverable by the tenant from the lessor if the judgment is wrong, is not a bar to relief in equity. The relief the tenant needs is not damages but protection in its possession.[28]

It must further be added here that an interpretation of sections 108 and 111 of the District Court Act as far back as 1898[29] held that the tenant had the right to pay the arrearages of rent on or before

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26. *Supra*, note 19. "We feel that the view expressed by Chief Justice Beasley in the cast last mentioned is the more logical. In landlord and tenant proceedings, the procedure is summary. It is designed to determine speedily who is entitled to immediate possession of property. The proceedings cannot be reviewed by appeal or certiorari. It would be unjust to make the decision final and conclusive where no right of review is given."

27. 34 N.J.L. 220 (Sup. Ct. 1870).

28. "If the landlord fails, he still has his legal remedies to recover possession; and if he succeeds, the tenant has also left to him his action for damages, and the right to regain possession, if the term has not expired, upon disproving the facts upon which his removal is based." See also TAYLOR'S LD. & TEN., sec. 713. ARCH. LD. & TEN., secs. 226, 230. McWilliams v. King & Phillips, *supra* note 19.

"The decision before the justice, so far as it touches the rights of landlord and tenant, is a decision *pro hac vice*, and nothing more. Either of them can in subsequent legal investigation, deny or disprove the facts upon which such decision is based."

29. Kitchel v. Raccepio, 21 N.J.L.J. 331.

the original or adjourned return day. But here the District Court held that by the deposit the tenant gained nothing and lost all,—an unwarranted incongruity. The court in the principal case by its ruling prevented the tenant from availing himself of the defense of waiver, and if its ruling was correct it is apparent that the strict rules of law prevented the interposition of such defense,[30] and one of the fundamental functions of the court of chancery is to relieve against injustice resulting from the application of the strict rules of law, and "equity will, in a proper case, relieve against a forfeiture and restrain summary proceedings to dispossess a tenant even though there are legal defenses available in the suit at law if the remedy in equity is more complete."[31]

If, then, the facts show that there existed grounds for equitable intervention and the subject matter, excepting the judgment, was admitted by the Court of Errors and Appeals to be a proper subject for equitable determination,[32] if the fact remains undisputed that upon the payment of the deposit into court prior to the return of the summons in the dispossess proceedings, as was done here, the lessor should have been obliged to accept it and the lessee would have been protected in his possession, and if we accept, as we must, that the court of chancery is a court of conscience, how can we justify a decision which, contrary to the acknowledged jurisdiction of the court, and prior interpretation of the statutes involved, that a mere judgment, ineffectual between parties except in a temporary manner, puts to an end the operation of the conscience of the court of chancery and forces the injured party to resort to his most inadequate and undesirable remedy of damages at law, if he should be fortunate enough to obtain them.

LANDLORD AND TENANT—IMPLIED COVENANT TO DELIVER POSSESSION AT COMMENCEMENT OF TERM—BREACH.—Defendant landlord leased a store to plaintiff tenant, the term to commence June 15, 1936. The first month's rent was paid upon delivery of the lease. The prior

30. Sparks v. Lorentowicz, 105 N.J.Eq. 18, 147 Atl. 377 (Ch. 1929). The defense of waiver "had its exception as a principle in equity and is still recognized as a ground of equitable jurisdiction."

31. Windholz & Son v. Burke, 98 N.J.Eq. 471, 131 Atl. 386 (Ch. 1925).

32. Red Oaks v. Dorez, 120 N.J.Eq. 282, 184 Atl. 746 (E. & A. 1936).

tenant wrongfully held over, and possession was not obtained until July 7, when the landlord executed a judgment of dispossess. The plaintiff tenant, having thereafter taken possession, now sues the landlord for damages sustained by reason of the delay, in the resale of seasonable merchandise. The lower court found an obligation to deliver to the tenant, a breach of that duty, and damages of $500. On appeal, *Held*: Defendant was liable for failure to put the plaintiff in possession at the time set, but a *venire de novo* was granted for insufficient proof of damages. *Adrian v. Rabinowitz,* 116 N.J.L. 586, 186 Atl. 29 (Sup. Ct. 1936).

In this decision, the New Jersey court has followed the weight of authority in applying the "English rule," rather than the minority or "American rule".

The latter view is best presented by a few decisions of those states which adhere to it. In *Rice v. Biltmore Apartments Co.*,[1] it was held that the tenant alone had the right to assert and establish title in cases where the prior tenant wrongfully held over, in the absence of an express covenant by the landlord to put the incoming tenant in possession.

In Virginia, the rule is that the lessor is bound only to have the premises open to entry without any obstacle in the form of a *superior* right to prevent the lessee from obtaining actual possession.[2]

In New York,[3] the disappointed lessee may derive whatever comfort he can from the decree that the tenant may pursue such legal remedies as are provided for gaining actual possession, "whether few or many".

Illinois goes so far as even to deny the landlord a right of action against the holdover, ruling that the lessee alone may bring such suit,

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1. 141 Md. 507, 119 Atl. 364. This ruling is in harmony with the theory that since the landlord has transferred all his interest in a portion of the fee to the tenant, the landlord has no interest to protect against trespass, and that it is the tenant's estate which is affected.

2. McGhee v. Cox, 116 Va. 723, 82 S.E. 701 (1914), deciding the contract question, as between landlord and tenant on the basis of the property viewpoint outlined in note 1, *supra.*

3. Gardner v. Keteltas, 3 Hill (N.Y.) 330, 38 Am. Dec. 637 (1842). This affords a scant consolation. Suppose, by reason of the delay, the tenant wishes to reject the lease, and seek quarters elsewhere. Must he, while the premises are still occupied by the wrongdoer, pay the landlord rent?

and that his remedy is against the holdover only, and not against the lessor.[4]

It is apparent from these decisions that in the jurisdictions applying the American rule, the question is approached solely from the property angle, and is answered by the question "who has title?" The answer given is: the lease grants the lessee title to the premises, and under the quiet enjoyment and possession clauses, guarantees only that no one may claim *superior* title to the premises, whether it be the landlord himself, his privies, or someone having paramount title.

Chief Justice Prentis, of the Circuit Court of the City of Norfolk, has ably examined and summarized this viewpoint, concluding that, as the right to possession became perfect *when the lease was delivered,* the landlord has transferred all right of seizin (*sic*) that he had, and the trespass or wrong done by the first tenant is to the lessee directly, rather than to the lessor.[5] The American view, therefore, likens the delivery of the lease to delivery of seizin, which, once accomplished, leaves nothing more to be done by the lessor, who gives in the present his rights to future possession, and when the future date arrives, has nothing then to give.

The contrasting theory, followed in the principal case, is expressed in these excellent sentences from *King v. Reynolds*:[6]

"Up to the time the lessee is entitled to possession under the lease, the lessor is the owner of the larger estate out of which the leasehold is carved, and ownership draws to it the possession, unless someone else is in actual possession. The moment the lessor's right of possession ceases by virtue of the lease, that moment the lessee's right of possession begins. If there be actual, tortious occupancy when the transition moment comes, then it is a trespass or wrong done to the lessor's posses-

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4. Gazzalo v. Chambers, 73 Ill. 75 (1874). This result is not startling if it is remembered that it is based on the reasoning outlined in note 1, *supra.*

5. Hannan v. Dusch, 153 S.E. 824 (Va. 1930). *Query,* whether the concept of seizin is pertinent to these cases, since there is no seizin in an estate for years, which is less than a freehold.

6. 67 Ala. 229 (1880). Note the basic difference of this view. Here, the landlord is not only regarded as transferring a part of his reversion at the time the lease is delivered, but is regarded as agreeing to deliver possession at the commencement of the term.

sion". And by this view, the owner is the proper party to give notice to quit and to sue in ejectment.[7]

Perhaps the ancient feudal rite of livery of seizin by actual entry upon the land of the grantor, and the giving of a clod of earth in symbolic delivery of the land may account for the adherence of the English courts to the theory applied in these analogous cases. During the moment when, the old tenant having departed, the grantor and grantee stepped on the soil together, the right of possession rested for a moment in the latter before investiture occurred. Today, the giving of the lease, performed in advance, obliterates even that one moment, for as the right of one tenant ceases, the other's right, which has been in abeyance, springs concurrently into being.

On this reasoning alone, it might well appear that the reasoning of the New Jersey court is erroneous, though we might agree with the result. Those rules applicable to contracts generally are also to be considered, and they furnish full basis for a natural, as well as desirable result, rather than the artificial result produced by the American rule.

The proponents of the American rule require that an express covenant to deliver possession be in existence before the tenant has a right against the landlord for inability to obtain it. The other view *implies* the promise, on the basis that actual physical possession, as well as title, is that for which the parties have bargained.

In the famous old case of *Coe v. Clay,* Baron Vaughan neatly and wittily summed up the whole theory in his now famous aphorism, "He who lets agrees to give possession and not merely to give a chance of a law suit."[8] Or, in the less vivid words of *American Law Reports,* "The lessor impliedly covenants that the premises shall be open both legally and actually, to the lessee on the day the term begins. Therefore, . . . it is the duty of the lessor, where the term is to begin *in futuro,* to oust anyone who may be in possession."[9]

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7. Dodd v. Hart, 30 Misc. (N.Y.) 459, 62 N.Y.S. 484 (1900).

8. Coe v. Clay, 5 Bing. 440, 130 Eng. Rep. 1131 (1829). Here we are treated to the interesting spectacle of Mother England, who fastened so many strange fossilized growths upon our modern law of property, abandoning the speculative joys of scholastic debate as to when title is not title, and disposing of the whole problem on the simple basis of implied covenant.

9. 70 A.L.R. 153, and see cases there cited.

A meeting of the minds is the basis of all agreement. Surely there can be no doubt that both lessor and lessee intend that unrestricted entrance and possession is that which is the very object of the agreement? How many lessees would not be surprised to find that while they were bargaining for a store, or a dwelling, their legally informed lessors were contracting merely that they would not lease to another, nor contest the lessee's right to the premises when, as and if, he could wrest possession of them from a wrongdoer! A tenant who imagines he is contracting for a market place for his wares or a home for his children, would be perhaps forgivably bewildered to learn from Mr. Freeman[10] that all he has really bargained for is a right to recover damages from trespassers; that he has assumed the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over; and that he may expect from the landlord, at the end of a successful suit, only gratitude, and a covenant not to disturb the tenant in his hardwon "enjoyment of possession."

So obvious does it appear to our simple lessee that what he wants is to be put in actual possession by the lessor that the idea of an express covenant will never occur to him. But if he fails to secure it, then, under the American rule, learns that "a lessor makes no covenant unless there is an express covenant against any such wrongdoer."[11]

Our familiar friend, the reasonable man, might indeed find, with the Nebraska courts, that "it is unreasonable to suppose a man would contract for a lawsuit."[12] It is even likely that the lessor himself believed that he was leasing possession of premises and not only title—until he consulted his lawyer. Such meeting of the minds in any other situation, would be considered essential to a contract, and there is no reason to consider leases any differently unless the clammy hand of long outlived property concepts are to prevail.

The New Jersey courts, in 1803, ruled that "it is no defense to an action for breach of a covenant to let a house to the plaintiff at a parti-

10. 70 A.L.R. 155.

11. Snider v. Debau, 249 Mass. 59, 144 N.E. 69 (1924).

12. Henpolsheimer v. Christopher, 76 Neb. 352, 9 L.R.A. 1127 (1906). Analogous to this view, the test of marketability of titles might be considered. See 2 NEW JERSEY LAW REVIEW 27.

cular day that the tenant in possession of the house had held over against the will of the defendant,"[18] and that view has properly followed in the principal case.

MORTGAGES — DEFICIENCY — RESALE OF PROPERTY — SET-OFF AGAINST DEFICIENCY JUDGMENT.*—Plaintiff was awarded a deficiency judgment in a law court after a deficiency was established by the sale of defendant's property in foreclosure proceedings. All of the statutory prerequisites to the entry of a judgment were satisfied in the sale and confirmation of the sale of the foreclosed premises. Subsequent to the entry of the judgment at law the Court of Chancery reopened the sale of the property. At the second sale the property commanded an appreciably higher sum. The defendant mortgagor then instituted proceedings to reopen and to vacate the judgment previously entered. *Held*: Deficiency judgments at law are entered only in accordance with statutory prerequisites. These statutory conditions must have a continued existence, and upon the non-existence of anyone of them, even at a subsequent time, the judgment previously entered is subject to attack. *West Jersey Trust Co. v. Bingham,* 14 N.J.Misc. 752, 187 Atl. 561 (Sup. Ct. 1936).

Deficiency judgments have been a fruitful source of controversey during recent years. The legislature passed numerous acts during the recent depression concerning their entry.[1] Considerable controversy has arisen lately concerning the problems raised by these enactments.[2] The problem of the principal case does not depend on any of the recent enactments, but arises out of the application of the statute regulating the entry of deficiency judgments to existing principles concerning the reopening of judgments. The question presented is whether or not the continuous presence of conditions, which by an applicable statute are conditions precedent to the entry of the judgment, is necessary for the continued validity of the judgment. The court in the principal case con-

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13. Kerr v. Whitaker, 3 N.J.L. 249 (Sup. Ct. 1810).

* Since the writing of this comment, the decision of the Supreme Court was reversed on appeal, 118 N.J.L. 160, 191 Atl. 743 (E.&A. 1937).

1. N.J.P.L. 1932, p. 247; N.J.P.L. 1933, p. 172; N.J.P.L. 1935, p. 260.

2. See note, 2 N. J. L. REV. 110 (1936).

cludes that the continuous existence of the conditions precedent is necessary to sustain the judgment.[3]

A civil judgment is a decision of a competent court of law on the legal rights, obligations or duties of the parties who have instituted proceedings therein and submitted their legal relationship to its determination.[4] The solemnity of the court's act and the gravity of the court's determination have been reiterated time and time again.[5] Whether this principle has grown out of convenience, whether it has grown out of the desire, either conscious or subliminal, of the court to give to its mode of expression a solemn effect, or whether it has grown out of any or all of the above reasons, or out of other plausible reasons, it is firmly established that, once a court speaks, the judgment is a finality. The judgment supposedly terminates for all time the legal controversy existing between the parties on the litigated set of facts. The judgment in the principal case was entered at a time when the court concededly was competent to enter the judgment.[6] The judgment, having been properly entered, should have all of the attributes of a regularly entered judgment. The judgment of the mortgagee, solemn as it is and commanding the respect it should, was, however, annulled by the court in this case.

Courts from common law times until the present have conceded that in certain rare instances the ends of justice will best be served by reopening or annulling a judgment that has been previously entered.[7] A court very reluctantly retracts the words it originally speaks. Some decisions seem to be permeated with a fetish for consistency, however

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3. N.J.P.L. 1933, p. 172.

4. Mr. Justice Perskie, who wrote the majority opinion in the principal case, defines a judgment in Dorman v. Usbe B. & L., 115 N.J.L. 337, 180 Atl. 413 (Sup. Ct. 1936): "A 'judgment' in its broadest sense is the decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein. . . A 'judgment' is the judicial act of the court; it is a solemn record. . . It must not be and is not lightly disturbed."

5. *Vide supra*, note 4.

6. West Jersey Trust Co. v. Bingham, 14 N.J.Misc. 752, 754, 187 Atl. 561, 563 (Sup. Ct. 1936), "and it is also true that in the case at bar the Court of Chancery had confirmed the sale of the premises for $100, and therefor this court at the *time of the entry of the judgment had jurisdiction* of the subject matter and of the parties.

7. Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755 (1900); Ladd v. Stevenson, 112 N.Y. 325, 19 N.E. 842 (1892).

illogical or frivolous the defended position may be. None the less, clearer minded courts use their reserve power of control over judgments, although their exercise of the power is with a reluctant and sparing hand. Since the court restricts the reopening of judgments to limited grounds, *a fortiori*, it will be stricter in annulling judgments. In both proceedings to vacate and annul judgments different bases have been used by the court in exercising its power. The difficult questions of the main case spring out of this aspect of the subject. The basis for setting aside the judgment here involved was *"res nova"* when decided. Heretofore, the recognized grounds for vacating or annulling a judgment consisted of matter which existed at the time the judgment was rendered, but which matter was subsequently discovered. The matter which the court used as a justification for setting aside or annulling the judgment consisted of activities on the part of the former judgment creditor for the purpose of restricting the court's examination into the facts or the inability of a party, because of extremely extenuating circumstances properly to present his case. Thus, heretofore, judgments have been set aside or annulled for fraud,[8] newly discovered evidence,[9] perjury, collusion or other misconduct, surprise or misfortune,[10] or want of jurisdiction.[11] These recognized grounds when treated commonly show the existence of matter at the time of the entry of the judgment which has either been kept from the court, forced upon it or which one of the parties could not offer to the court. The principal case, however, deals with a matter which had no possible existence at the time the suit was instituted, but which arose subsequently because of proceedings in another court. This case injects an entirely new concept into the question of the court's power to vacate or annul judgments.

The next question for consideration involves the desirability and

8. *In re* Seid, 38 N.J.L.J. 377 (Surr. Ct. 1915); Exton v. Zule, 14 N.J.Eq. 501 (Prer. Ct. 1861),

9. Kelley v. Bell, 17 N.J.L. 270 (Sup. Ct. 1839); Wilkins v. Budd, 6 N.J.L. 153 (Sup. Ct. 1822).

10. Binsse v. Barker, 13 N.J.L. 263 (Sup. Ct. 1832); Schivent v. DeMaio, 79 N.J.L. 189, 74 Atl. 267 (Sup. Ct. 1909).

11. *In re* Bradford's Estate, 43 N.J.L.J. 14 (Surr. Ct. 1919); Andersen v. Independent Order, 98 N.J.L. 648, 126 Atl. 631 (Sup. Ct. 1923); Fraley v. Feather, 46 N.J.L. 429 (Sup. Ct. 1884); *In re* Hawthorn's Will, 97 Atl. 262 (Prer. Ct. 1916).

legal wholesomeness of the result achieved. This in turn takes us into the dual relationship that exists in New Jersey between the coordinate courts of law and equity. Both courts determine litigation, on different principles, side by side. Often, proceedings on different aspects of the matter are taken in both courts. In the type of litigation involved here, the applicable statute involves such proceedings.[12] Where the competency of one of the courts to deal completely with the matter at hand is established, the other will not interfere. Thus, the Court of Chancery will not ordinarily interfere with proceedings which have been adjudicated in a court of law.[13] Here, the law court, concerned with the equities of the parties, yielded to permit the interposition of an equitable decree which was in substitution of a prior equitable decree on which prior decree the judgment in issue was based.[14] The court does not merely reopen the judgment and thus permit the setting off of one deficiency decree for the other judgment, but annuls it for all time. It is conceded, in the opinion, that the court had full jurisdiction at the time the judgment was entered. That being the postulated state of facts, it is difficult to justify by any logical process, the complete nullification of the judgment, since the power to adjudicate originally was properly exercised. It is submitted that if the court was truly to have administered the equities of the parties it would have simply reopened the judgment, and permitted the set off of the difference between the two deficiency decrees.

WILLS—LAPSE OF LEGACY—PREVENTION—ADOPTED CHILD OF LEGATEE.—The will of a testator contained a devise to a son who had predeceased the testator without leaving any children except an adopted son. *Held*: An adopted child is a "child" within the meaning of the Wills Act, and as such is entitled to take the devise to the testator's son, where

12. *Supra*, note 3.

13. Phillips v. Pullen, 45 N.J.Eq. 5, 16 Atl. 9 (Ch. 1888); Kirkhuff v. Kerr, 57 N.J.Eq. 623, 42 Atl. 734 (E.&A. 1899); Reeves v. Cooper, 12 N.J.Eq. 223 (Ch. 1859); Hayes v. United States Phonograph Co., 65 N.J.Eq. 5, 55 Atl. 84 (Ch. 1903).

14. Emmerglick, *The Legal Adoption of Equitable Principles*, 2 N. J. L. REV. 53 (1936).

the adopted child survived the testator's son who left no other child. *Smallwood v. Smallwood,* 121 N.J.Eq. 126, 186 Atl. 775 (Ch. 1936).

The question involved in this case is whether an adopted child is a "child" within the meaning of the Wills Act to such an extent that such child will prevent a testamentary gift to his adopting parent from lapsing when the adopting parent predeceases the testator.[1] It is well settled that at common law the word "children" meant only those born in lawful wedlock. Since that time, however, the legal meaning of the word has been greatly enlarged by statutory modification. The rule of the common law, however, is a fundamental part of the law of descent, and effect is given to statutory modifications of it only within the precise limits of the modifying statutes.[2]

In all such cases the basic question is one of intention,[3] and only in the absence of circumstances from which the testator's intent might be determined does it resolve itself into one of statutory interpretation. Where an adopting parent devises to his children, he is presumed to include an adopted child,[4] but there is no presumption in favor of the adopted child where the testator is a stranger to the adoption.[5] These decisions are based on the presence or absence of facts in the will of the testator, or in the surrounding circumstances, from which the intention of the testator may be implied. This mode of construction is almost universally accepted, although our courts have held that in the absence of evidence to the contrary, either in the will or in the surrounding cir-

1. 4 N. J. COMP. STAT. 1910, p. 5866, § 22: "An estate devised or bequeathed to the child of a testaor who should during the life of the testator die leaving a child or children surviving, shall not lapse, but shall vest in such child or children."

2. Dorset v. Vought, 89 N.J.L. 303, 98 Atl. 248 (E.&A. 1916); Elmer v. Wellbrook, 110 N.J.Eq. 15, 158 Atl. 760 (Ch. 1932), where the court says, "The right of the child by adoption to inherit is entirely of statutory origin and that right being in derogation of the common law, it must be strictly construed and will be denied unless the act of adoption shall have been consummated in strict accordance with the statute."

3. See cases cited, note, 27 L.R.A. (N.S.) 1138.

4. Dulfon v. Keasbey, 111 N.J.Eq. 223, 162 Atl. 102 (Ch. 1932). A testamentary gift by an adopting parent to his children is presumed to include an adopted child."

5. Dulfon v. Keasbey, *supra,* note 4; Ahlemeyer v. Miller, 102 N.J.L. 54, 131 Atl. 54 (Sup. Ct. 1925), *aff'd.,* 103 N.J.L. 617, 137 Atl. 543 (E.&A. 1927).

cumstances, the testator is to be deemed to have intended to include adopted children within the class designated by him as his "son's legal heirs".[6]

In New Jersey the Adoption Act fixes the status of an adopted child by investing him with all the rights of inheritance from the adopting parents as if born to them in lawful wedlock.[7] Under this statute a living adopted child has been held sufficient to save the will of the adopting parent from being nullified by the birth of a natural son after the testator's death.[8] It is worthy of note, however, that the courts of this state have limited the right of an adopted child to inherit from the adopting parents to those instances where the gift is to "the heirs" or to "the children" of the adopting parent. The adopted child will not take under a devise to "issue".[9]

The court in the principal case has recognized the legislative increase in the rights and privileges of adopted children, and, in the absence of facts in the will or in the surrounding circumstances, from which the testator's intent might be implied, has properly applied the accepted rules of statutory construction[10] by construing Sections 22 of the Wills Act and Section 4 of the Adoption Act together, and as explanatory of one another.[11]

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6. Haver v. Herder, 96 N.J.Eq. 554, 126 Atl. 661 (Ch. 1924).

7. N. J. COMP. STAT. SUPP. 1924, § 97-16, (P. L. 1902, ch. 92, p. 262, as amended by P. L. 1912, ch. 28, p. 53): "And the child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance, and the rights of inheritance to real estate, or to the distribution of the personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock."

8. *In re* Book' Will, 90 N.J.Eq. 549, 107 Atl. 435 (E.&A. 1919), "A last will and testament made when the testator has an adopted child living, is not void under Sec. 20 of the Wills Act, upon the birth of a natural son after the testator's death."

9. Frey v. Neilson, 99 N.J.Eq. 135, 132 Atl. 765 (Ch. 1926). Technical on the word "issue" in statute of descent of land, an adopted child not being included.

10. White v. Hunt, 6 N.J.L. 417 (Sup. Ct. 1798); Koch v. Vanderhoff, 49 N.J.L. 621, 9 Atl. 771 (Sup. Ct. 1887); Gartner v. Cohen, 51 N.J.L. 127, 16 Atl. 684 (Sup. Ct. 1888): "Where there are different statutes in *pari materia*, though made at different times, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of one another."

11. *Supra*, notes 1 and 7.

The rule of the principal case has been previously adopted in other jurisdictions,[12] and the few apparently contrary adjudications in this state are distinguishable upon their facts.[13] It is, therefore, submitted that the rule of the principal case is sound in reason and authority.

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12. Clark v. Clark, 76 N.H. 551, 85 Atl. 758 (1913); Warren v. Prescott, 84 Me. 483, 24 Atl. 948 (1892).

13. Stout v. Cook, 77 N.J.Eq. 153, 75 Atl. 583 (Ch. 1910), where the court said, "Section 4 of the Adoption Act investing an adopted child with the right of inheritance from the adopting parent does not create in such child capacity to take the share which the deceased adopting parent would have taken under such will, if living." According to 27 L.R.A. (N.S.) 1160, this case is distinguishable because no statute of adoption existed at the time the testator made his will and the child was adopted.

Dulfon v. Keasbey, *supra*, note 4, where the adopted child of the testator's deceased son was denied capacity to take a gift to his adopting parent, who predeceased the testator, is distinguishable because the child was adopted subsequent to the execution of the will. The court said that, therefore, the testator was a stranger to the adoption, and, consequently, no presumption to include the adopted child could be raised.