

GROWTH OF NEW JERSEY EQUITY—A SURVEY

Although the Court of Chancery of New Jersey dates from 1705,¹ any accurate history of its growth and development must commence with about 1830, (when the first volume of New Jersey Equity Reports appeared), because the Chancery records prior to that time were kept haphazardly, and are incomplete.²

The New Jersey of 1830 was very different from what it is now. The Country at large was still in the pioneering stage and fighting Indians.³ In 1830 the entire population of the State was about 320,000 souls,⁴—a little more than half of the present population of the City of Newark, and less than one-tenth of the present population of the whole State. The social and economic life was predominantly rural. The stage coach was still the principal mode of transportation. Men had not yet dreamt of the telegraph, telephone, automobile, radio, or motion pictures. Capital in those days consisted largely of land, farming implements and slaves. Large industries were relatively unknown. Most businesses were conducted by individuals or partnerships, corporations being practically unheard of, except in the field of canal or water companies; and even such corporations were created by special legislative franchises.⁵ Divorces were frequently granted by legislative fiat.⁶

THE COURT OF CHANCERY IN 1830

Under the First Constitution (July 2, 1776) the Governor, or in his absence, the Vice-President of the Council, was the

1. *In re* Vice Chancellors, 105 N.J.Eq. 759 (1930).

2. BIGELOW, A CHAPTER IN CHANCERY OF NEW JERSEY.

3. EMERSON, A HISTORY OF NINETEENTH CENTURY, YEAR BY YEAR, p. 865.

4. State Census.

5. See prohibition contained in NEW JERSEY CONSTITUTION 1844, Art. IV, Sec. 7, Par. 11.

6. See prohibition contained in NEW JERSEY CONSTITUTION 1844, Art. IV, Sec. 7, Par. 1.

Chancellor of the Colony, as well as the Ordinary or Surrogate General, and he so continued until the Constitution of 1844.⁷ Sect. 21 of the First Constitution provided that "all the laws of this province, contained in the edition lately published by Mr. Alison, shall be and remain in full force until altered by the legislature of this Colony," and Sect. 22 provided that "*the Common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future right of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter*".

The Constitution of 1844 brought about a separation of the Equity powers, this jurisdiction being vested in the Chancellor, with the proviso that "the legislature may vest in the Circuit Courts or Common Pleas * * * Chancery powers so far as relates to the foreclosure of mortgages and sale of mortgaged premises".⁸ It also provided that no divorce should be granted by the Legislature,⁹ and that the legislature shall pass no special act conferring corporate powers, but may pass general laws under which corporations may be organized.¹⁰ The effect of the Constitution of 1844 was to make the Court of Chancery a constitutional court, whose jurisdiction could not be impaired by the legislature.¹¹

GENERAL SURVEY OF NEW JERSEY EQUITY SINCE 1830

In 1830, Chancery litigation had, as might be expected, a definite agricultural tone,—foreclosure of mortgages on farm land, specific performance of contracts to convey real estate.

7. First Constitution of New Jersey (1776), Sec. 8, 1 C. S. XXX.

8. NEW JERSEY CONSTITUTION (1844), Art. IV, Sec. 7, Par. 10.

9. *Supra*, note 6.

10. *Supra*, note 5.

11. *Supra*, note 1.

injunctions to prevent trespasses, etc. There were few authoritative treatises on Chancery practice. Most of the citations were of English cases. *Daniels Chancery Precedents*, and, among American authorities, *Kent's Commentaries* were regarded as the gospels of equity. As for pleading and practice, that was taken over almost bodily from the English Chancery Practice, and that practice has continued as our model, except where otherwise changed by statute or rule of Court.¹² Until the Mortgage Act of 1880, deficiency decrees were usually entered in the foreclosure proceedings.¹³

The law of specific performance has been considerably liberalized. The old reluctance to grant specific relief where the contract required some degree of continuous performance by defendant is gradually disappearing.¹⁴ The defense of lack of mutuality of remedy, imported from an English textwriter, is being slowly whittled away.¹⁵ The doctrine of specific performance has been applied to chattels having a unique character,¹⁶ and choses in action.¹⁷ The old rule that equity will not specifically enforce a land contract at the suit of a purchaser who has contracted to resell the land, has been repudiated,¹⁸ and the right of a purchaser from a vendee to specific performance has been sustained.¹⁹ Then again the old rule that reformation and specific performance would not be granted in one suit,

12. *West v. Paige*, 9 N.J.Eq. 203 (1852); *Southern Nat. Bank v. Darling*, 49 N.J.Eq. 398 (1892); *Fraser v. Frazer*, 77 N.J.Eq. 205 (1910).

13. *Mershon v. Castree*, 57 N.J.Law 484 (1895); *Morris v. Carter*, 46 N.J.Law 260 (1884); *Pennsylvania Co. v. Marcus*, 89 N.J.Law 633 (1916).

14. *Zygmunt v. Avenue Realty Co.*, 108 N.J.Eq. 462 (1931).

15. *Kamens v. Anderson*, 99 N.J.Eq. 490 (1926); *Miller v. Headley*, 109 N.J.Eq. 436, 442 (1932).

16. *Burr v. Bloomsburg*, 101 N.J.Eq. 615 (1927).

17. *Cutting v. Dana*, 25 N.J.Eq. 265 (1874).

18. *B & B Investment Co. v. Kaufman*, 100 N.J.Eq. 411 (1927).

19. *McVoy v. Bauman*, 93 N.J.Eq. 360, *aff'd*, 93 N.J.Eq. 638 (1922).

has been overruled and the contrary made the established law.²⁰

The current economic depression has brought in its wake many actions for specific performance of separation agreements. Until 1932, the law was well settled that "a husband's financial inability to perform because of a change in his * * * circumstances would not avail him to defeat his promise to support his wife and children during separation";²¹ but in 1932 the case of *Apfelbaum v. Apfelbaum*²² appears to have started a train of contrary decisions holding that equity will not enforce such agreements, and that a husband may plead a change of circumstances.²³ These later decisions are clearly out of line with the established law on the subject,²⁴ and obviously arose out of a misapplication of the rule laid down in the *Apfelbaum* case, (which involved an agreement for *alimony* entered into *after* divorce,—in the face of a final decree for alimony), to situations involving *separation agreements* entered into by the parties *while married*, and providing for *support and maintenance* as distinguished from *alimony*. The distinction is clearly pointed out by Vice Chancellor Berry in the recent case of *Cohen v. Cohen*²⁵ (1936). The law on this subject is now in a state of confusion, and it is hoped that when the question is again presented to the Court of Appeals it will clarify the law.

Relief by way of injunction against ordinary torts, such as waste, nuisance, trespass, and disturbance of easements continue to be granted much as they were a hundred years ago. However, there appears to be less insistence that the complain-

20. *Segal v. Leshire Corp.*, 113 N.J.Eq. 198 (1933); *Mechanick v. Duschaneck*, 99 N.J.Eq. 86 (1926).

21. *Vandergrift v. Vandergrift*, 63 N.J.Eq. 124 (1901).

22. 111 N.J.Eq. 529 (1932).

23. *Phillips v. Phillips*, 119 N.J.Eq. 462 (1936); *Second National Bank of Paterson v. Curie*, 116 N.J.Eq. 101 (1934); *Aiosa v. Aiosa*, 119 N.J.Eq. 385 (1936).

24. See cases collected in *Cohen v. Cohen*, 121 N.J.Eq. 299 (1936).

25. *Supra*, note 24; see also *Moller v. Moller*, 121 N.J.Eq. 175 (1936).

ant's rights be first established at law; and even in cases where such rights are in dispute, the Court has granted preliminary relief to preserve the rights of the parties until the question is settled at law.²⁶

In nuisance cases several tendencies are noticeable,—first, a tendency on the part of the State under legislative authority to abate public nuisances, and second, an inclination on the part of the Court to allow the defendant time to abate or allay the nuisance²⁷ by scientific means, before granting a permanent injunction, especially where great financial loss will result to the defendant by immediate abatement.²⁸

Although adhering to the doctrine of convenience, on preliminary injunction, our Courts have refused to apply that principle on final hearing.²⁹ On the procedural side, there is less reluctance to grant relief by way of preliminary injunction in appropriate cases;³⁰ and in extreme cases even interlocutory *mandatory* injunctions have sometimes been granted.³¹ In doubtful cases the Court has frequently appointed a Master to make an inspection and report,³² and mechanical devices have been permitted to reproduce the nuisance complained of.³³

The equitable remedies of rescission and cancellation have been greatly expanded during the last hundred years, particu-

26. *Rockaway, etc., Corp. v. D. L. & W. R.R. Co.*, 101 N.J.Eq. 192 (1927), *aff'd* 103 N.J.Eq. 297 (1928).

27. *Hutchinson v. Board of Health*, 39 N.J.Eq. 569 (1885).

28. *Sayre v. Newark*, 58 N.J.Eq. 136 (1899), *Wallace & Tiernan Co. v. U. S. Cutlery Co.*, 97 N.J.Eq. 408 (1925).

29. *Hennessy v. Carmony*, 50 N.J.Eq. 616 (1892).

30. *Cronin v. Bloemcke, et al.*, 58 N.J.Eq. 313 (1899); *Seastream v. New Jersey Exhibition Co.*, 67 N.J.Eq. 178 (1904).

31. *Pennsylvania R.R. Co. v. Kelley*, 77 N.J.Eq. 129.

32. *Friedman v. Keil*, 113 N.J.Eq. 37 (1933); *Peragallo v. Luner*, 99 N.J.Eq. 726 (1926).

33. *Phonograph Records* admitted to prove noise nuisance in *Ledirk Amusement Co. v. Cooper* (Docket 105-513). But see *State v. Simon*, 113 N.J.Law 521 (1934) where court refused to permit use of such records for cross-examination.

larly in cases involving fraud. The late Vice Chancellor Backes in the *Commercial Casualty* case (1932)³⁴ restored the Court's lost ground in jurisdiction in such matters. Prior to the *Eggers* case (1901)³⁵ our Court of Chancery uniformly held that it had jurisdiction in all matters of fraud, except fraudulent wills, and that the mere fact that there was an adequate remedy at law was not an objection to the exercise of its jurisdiction. But in the *Eggers* case our Court of Appeals departed from prior decisions and held that although the Court of Chancery had general jurisdiction in such matters, yet, "When the remedy at law is plain, adequate and complete, the Court of Chancery is reluctant to exercise the jurisdiction, and will not do so unless the administration of justice would thereby evidently be facilitated". In the *Commercial Casualty* case³⁶ (1932) Vice Chancellor Backes held that even though the bill alleged *legal* fraud, "*complainant will not be put to the hazard at law when the requirements in equity are less exacting*". His opinion in that case was unanimously affirmed by the Court of Appeals, and later again expressly approved by the same Court in *Keuper v. Pyramid Bond & Mortgage Company*.³⁷ We are therefore back to where we were before the decision in the *Eggers* case.

There has also been an increasing liberality in granting relief in cases of mistake,³⁸ even in cases of unilateral mistake,³⁹ and in cases of breach of contract, or impossibility of performance due to mistake where an equitable lien was sought as ancillary to rescission.⁴⁰

34. *Commercial Casualty Ins. Co. v. Southern Surety Co. of Des Moines, Iowa*, 100 N.J.Eq. 92 (1926), *aff'd*, 101 N.J.Eq. 738 (1927).

35. *Anderson v. Eggers*, 63 N.J.Eq. 264 (1901).

36. *Supra*, note 34.

37. 117 N.J.Eq. 110 (1934).

38. *Bowen v. Pursel*, 109 N.J.Eq. 67 (1931).

39. *Chelsea National Bank v. Smith*, 74 N.J.Eq. 275 (1908).

40. *Richeimer v. Fischbein*, 107 N.J.Eq. 493 (1931).

The remedy of reformation, though broadly expanded in all classes of contracts has, paradoxically, been narrowly applied to insurance contracts. In *Sardo v. Fidelity, etc. Co. of Maryland*,⁴¹ our Court of Appeals, in reversing the Court of Chancery for granting reformation of an insurance policy, laid down the rule that the insured is under a duty to read the policy (and if necessary, "to call in a lawyer or insurance expert" to explain the meaning thereof), and to return it if it doesn't express the intention of the parties, and if he retains the policy, even though in ignorance of the fraud of the insurer's agent, he is not entitled to reformation. Why this exceptional rule should be applied to insurance contracts and not to other contracts is difficult to understand. In *Lloyd et al v. Hulick, et al* (1906),⁴² the same Court held that the failure of the complainants to read their deed, which contained covenants inconsistent with the contract of sale, would not disentitle them to reformation. There the Chief Justice remarked:

"Its (that is, the deed) delivery by the defendants to the complainants, without a disclosure of the fact that it contained these covenants, was equivalent, it seems to me, to a declaration on their part that the deed was drawn in conformity to the provisions of the contract. It is true that the complainants might readily have discovered, by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business, men ordi-

41. 100 N.J.Eq. 332 (1926); see also *Berkowitz v. Westchester Fire Insurance Co.*, 106 N.J.Eq. 238 (1930); *By-Fi B. & L. Assn. v. N. Y. Casualty Co.*, 116 N.J.Eq. 265 (1934).

42. 69 N.J.Eq. 784 (1906).

narily deal with one another in the belief that each is honest."

Since the Court recognizes that the ordinary person taking out insurance "is neither an insurance expert, nor a trained lawyer"⁴³ and since the insurance companies dictate the forms of their policies, it would seem that the principle of the *Hulick* case should be applied more liberally to an instrument as highly technical and legalistic as an insurance policy, than to an ordinary contract.

In denying relief in the *Sardo* case, the Court of Appeals relied upon its former decision in *Crescent Ring Co. v. Travelers Indemnity Co.*⁴⁴ in which it absolved the insurer from liability for the deceit of its agent committed in the course of his employment, because the misrepresentation was *not* "for the Master's benefit," but, on the contrary, was "detrimental to his principal". This reasoning appears to be in discord with the rule previously laid down by the same Court in *Mick v. Corporation of Royal Exchange, &c.*⁴⁵ that "the principal is liable for the fraud of his agent acting within the scope of his authority, *whether or not the principal would benefit by the success of the fraud* * * * ." The *ratio decidendi* of the *Crescent Ring* case appears to be out of harmony with modern notions of social policy. The tendency of modern legislation and of judicial decision has been to enlarge rather than curtail the liability of the principal for the acts of his agent.⁴⁶ On similar

43. *Radwanski v. Scottish Union National, etc., Co.*, 100 N.J.Law 192 (1924); *Giammares v. Allemania Ins. Co.*, 89 N.J.Eq. 460 (1918), *rev'd*, 91 N.J.Eq. 114 (1919).

44. 102 N.J.Law 85 (1925).

45. 87 N.J.Law 607 (1914); see also *Corona Kid Co. v. Lichtman*, 84 N.J.Law 363, 370 (1912).

46. POLLACK, *TORTS* (1887), Sec. 67, 68; SALMOND, *JURISPRUDENCE*, 2nd Ed. (1907), 381.

facts, the United States Supreme Court reached a contrary result.⁴⁷ The legalistic doctrine laid down in the *Crescent Ring* case is traceable to the Court's literal construction of the language of Willes, J. in *Barwick v. English Joint Stock Bank*, wherein he said:⁴⁸

"The general rule is that the master is answerable for every such wrong of the servant or agent, as is committed in the course of the service and 'for the master's benefit,' though no express command or privity of the master is proved."

For many years it was generally believed that this statement of the law was correct. But in 1912, the House of Lords in *Lloyd v. Grace, Smith & Co.*⁴⁹ held that it was too narrow, that the words "*and for the master's benefit*," merely described the facts in the *Barwick* case, but did not constitute an essential element of the principle involved. In reinterpreting the quoted language of the *Barwick* case the House of Lords pointed out that "It is * * * a mistake to qualify it by saying that it only applies when the principal has profited by the fraud".

Then again, there has been much improvement in the administration of miscellaneous equitable remedies. For instance, in strict interpleader actions, the doctrine of privity, and the requirement that the complainant shall have no interest in the subject matter of the interpleader action is being worn away.⁵⁰ In recent years, the strict bill of interpleader has been somewhat eclipsed by its offspring,—the bill in the nature of interpleader, which has become a popular remedy in litigation

47. *Gleason v. Seaboard Air Line Co.*, 278 U. S. 349, 73 L. Ed. 415 (1928).

48. L. R. 2 Ex. 259, 12 Eng. Pul. Cas. 298.

49. A. C. 716 (1928); 5 B. R. C. 498.

50. *Camden Safe Deposit Co. v. Barbour*, 117 N.J.Eq. 401 (1935).

arising under the Mechanic's Lien Act,⁵¹ in conflicts over decedent's bank deposits,⁵² and in suits over insurance money.⁵³

The practice of filing Bills of Peace against numerous defendants under the old practice has fallen into disuse, probably because the Practice Act and rules of the law court allow greater liberality in joinder and consolidation of actions at law.⁵⁴

The old practice of purchasing real estate at judicial sale and then removing the cloud on the title has given way to the more practical method of removing the cloud on the title before the sale.⁵⁵ The remedy of quieting title has been extended by legislation to testamentary trust funds.⁵⁶

The ancient equitable remedy of "account" has also fallen into disuse, having been superseded by the statutory provisions for compulsory reference in actions at law.⁵⁷ Likewise bills for discovery are less common, their importance having lessened because of the statutory procedure for discovery at law.⁵⁸ In matters of accounting, the Court of Chancery is reluctant to take jurisdiction unless they involve mutual accounts, or complicated accounts, or where the defendant is under a fiduciary duty to account, or where some special equity is involved.⁵⁹

Our constitutional prohibition against imprisonment for debt has had the tendency to reconcile our legal and equitable

51. MacDonnell v. Vitelli, 111 N.J.Eq. 502 (1932); Brunetti v. Grandi, 89

N.J.Eq. 116 (1912).

52. Morristown Trust v. Capstick, 90 N.J.Eq. 22 (1919).

53. Metropolitan Life Ins. Co. v. Hamilton, 70 Atl. 677 (1908).

54. Rev. St. 2:27-24, 2:27-37; Beatty v. Lincoln Bus Co., 11 N.J.Misc. 938 (1933).

55. Kinmonth v. White, 61 N.J.Eq. 358, 360 (1901).

56. *An Act Relating to Testamentary Trusts*; R. S. 3:43-1; *In re Emery*, 108 N.J.Eq. 601 (1931).

57. . . . R. S. 2:27-178-181.

58. Supreme Court Rules 94, 95, 97; R. S. 2:27-169, 170.

59. Pine Building Co. v. Grossman, 102 N.J.Eq. 189 (1928).

processes. The old doctrine that equity acts only in *personam* has been considerably departed from. Today it is a common thing to bring an action at law on an equity decree for payment of money.⁶⁰ Execution on money decrees were first allowed by the old Chancery Act.⁶¹ By statute, money decrees may now be given the status of judgments at law.⁶² By statute also the Court may issue a writ of sequestration against a non-resident's property in an equitable action for a money decree;⁶³ and, in the absence of a money decree founded on a breach of trust or misappropriation of trust fund, the method of execution is by writ of *fi fa* or sequestration, and not by contempt.⁶⁴

Under the doctrine in *Pennoyer v. Neff*,⁶⁵ it has been held that a decree for maintenance will not lie in the absence of personal service upon the husband;⁶⁶ and it has likewise been held that an action for maintenance based on a separation agreement, though partaking in the nature of alimony, is an action on a debt within the meaning of Art. 1, Sect. 17 of the State Constitution and collectible by ordinary execution, and not by contempt.⁶⁷ Even a bill for specific performance of land located in this State is so far regarded as an action in *rem* under Sect. 45 of the Chancery Act, that a decree for conveyance thereof is self-executory.⁶⁸ These cases illustrate that for all practical purposes, the distinction between money judgments and money decrees has virtually disappeared.

Space does not permit an extensive study into equitable

60. Bolton v. Bolton, 86 N.J.Law 622 (1914).

61. R. S. 2:29-63.

62. R. S. 2:29-57.

63. R. S. 2:29-89.

64. *Infra*, note 67.

65. 95 U. S. 714 (1877).

66. McGuiness v. McGuiness, 72 N.J.Eq. 381 (1906).

67. Gault v. Gault, 112 N.J.Eq. 41 (1932); Aspinwall v. Aspinwall, 53 N.J.Eq. 684 (1895).

68. McVoy v. Baumann, 93 N.J.Eq. 360, 368 (1922).

procedural changes which have been effected within the past hundred years, but a few are worthy of mention. The Chancery Act of 1915 brought about a simplification in pleading and greater liberality in joinder of parties and causes of action. The objection of multifariousness has been substantially done away with.⁶⁹ Another important departure is the legislative and judicial tendency to substitute summary proceedings in place of plenary suits. Such summary hearings now exist by Statute in suits for the appointment of receivers for insolvent corporations,⁷⁰ dissolution of partnerships,⁷¹ injunctions under the "Blue Sky Act,"⁷² and injunctions under public health laws to restrain pollution of streams and reservoirs at the instance of the State;⁷³ and by judicial authority, in assessment proceedings against stockholders,⁷⁴ proceedings to open decrees in lieu of the old-fashioned bill of review,⁷⁵ and applications to forfeit bail given under writs of *ne exeat*.⁷⁶

Under the *Uniform Fraudulent Conveyance Act*, a creditor at large whose claim is undisputed may now maintain a bill in Chancery without first obtaining judgment and having execution returned *nulla bona*, and equity will grant temporary relief until the creditor establishes his judgment at law.⁷⁷ And under the *Uniform Stock Transfer Act* (R. S. 14:8-23) Equity, may, by injunction, assist a creditor to attach or levy upon his debtor's corporate shares of stock.

69. *Gierth v. Fidelity Trust Co.*, 93 N.J.Eq. 163 (1921).

70. *Pierce v. Old Dominion, etc., Co.*, 67 N.J.Eq. 399 (1904); *Bull v. International Power Co.*, 84 N.J.Eq. 6 (1914).

71. R. S. 42:4-2.

72. R. S. 49:1-11.

73. *Infra*, note 159.

74. *Holcombe v. Trenton White City Co.*, 80 N.J.Eq. 122 (1912); *Lincoln Bus Co. v. Jersey Mutual Casualty Ins. Co.*, 112 N.J.Eq. 538 (1933).

75. *Jones v. Smith*, 101 N.J.Eq. 753 (1927).

76. *Schreiber v. Schreiber*, 85 N.J.Eq. 303 (1915).

77. *Harder v. Harder*, 113 N.J.Eq. 540 (1933); R. S. 25.2-16.

Prior to 1915, Chancery was without jurisdiction to construe a will in the absence of a prayer for equitable relief, the rule being that the Court would not give an advisory opinion but would only interpret the provisions of a will as an incident to the granting of relief. The Chancery Act of 1915, however, conferred upon the Court the power to construe a will, and to declare the rights of the persons interested.⁷⁸ This power has opened a vast new source of equity litigation.⁷⁹ This was followed in 1924 by the Uniform Declaratory Judgment Act,⁸⁰ under the authority of which numerous questions have been decided before one party or the other has risked loss or damage by acting upon his own interpretation of his rights.⁸¹ Although New Jersey gave birth to the modern movement for declaratory judgments, our courts have, by judicial interpretation, restricted the relief remedial under this statute.⁸² This is primarily due to the fact that we have retained a separation between our courts of law and equity, and that the latter Court has been restricted by constitutional limitation to granting relief in causes of an equitable nature, and declining relief in matters of legal cognizance,—although the English Court of Chancery has not hesitated to grant declarations in similar cases.⁸³

Before taking leave of this subject, it is important to make mention of the *Transfer of Causes Act*,⁸⁴ under the provisions whereof causes may be transferred from equity to law and *vice*

78. *In re Ungaro's Will*, 88 N.J.Eq. 25, 102 Atl. 244 (1917).

79. *Snyder v. Taylor*, 88 N.J.Eq. 513 (1918).

80. R. S. 2:26-68.

81. BORCHARD & MORRISON, *Declaratory Judgments in New Jersey* (1932),

1 MERCER BEASLEY LAW REVIEW, No. 2, p. 1.

82. *Supra*, note 81.

83. *Supra*, note 81.

84. R. S. 2:26-60 *et seq.*

versa, and thus save the cause from being spent by the Statute of Limitations and burdened with duplicating costs.

EQUITY AND BUSINESS

With the industrial expansion following the Civil War, new fields of equity jurisprudence were opened. With the improvement in transportation and communication, and the growth of national advertising, the protection of trade-marks and trade-names and prevention of so-called "unfair competition" became of increasing importance to business men. The law in this field is relatively new and has been evolved mainly in the equity courts and is still in the state of active growth.⁸⁶ The effort of our Court of Equity has been to enforce ethical standards of fair dealing in the competitive struggle.⁸⁷ The same tendency has been exhibited in suits to restrain disclosure of trade secrets.⁸⁸

The current economic depression has awakened the public conscience to the danger of "cut-throat" competition and has given impetus to legislation to curb unfair methods of competition, such as price cutting of trade-marked merchandise, which formerly was not remedial in the State Courts. The decision of the Court of Appeals in the *Weissbard* case,⁸⁹ sustaining the constitutionality of the *Fair Trade Act* upon the authority of the *Old Dearborn Distributing Co.* case⁹⁰ has opened up a vast

85. *Dunham v. Adams*, 82 N.J.Eq. 265 (1913); *Smith v. Morrow*, 84 N.J. Eq. 395 (1915); *Thropp v. Public Service Electric Co.*, 84 N.J.Eq. 144 (1915); *Hermann v. Mexican Pet. Co.*, 85 N.J.Eq. 367 (1915); *Watt v. Atlantic Safe Deposit & Trust Co.*, 92 N.J.Eq. 224 (1920).

86. SIMPSON, *Fifty Years of American Equity* (1936), 50 HARVARD LAW REV. 171, 184.

87. *Supra*, note 86.

88. *Stone v. Grasselli Chemical Co.*, 65 N.J.Eq. 756 (1903); *Taylor Iron & Steel Co. v. Nichols*, 73 N.J.Eq. 684 (1908).

89. *Johnson & Johnson v. Weissbard*, 121 N.J.Eq. 585 (1937).

90. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S.

new field of equity litigation. Competition of a similar character designed to injure a competitor has long been considered in violation of the business standards fixed by the Sherman Anti-Trust Act.⁹¹

Although equity will restrain a combination of conspiracy to injure a man's business by threats or intimidations or violence, we still adhere to the old view that equity will not grant relief against such irreparable damage arising from libel and slander.⁹²

The internal management of corporations has become increasingly a concern of equity during the past hundred years. The ultimate remedy of a minority stockholder against ultra vires Acts,⁹³ corporate mismanagement,⁹⁴ and of an unjustifiable starvation policy as to dividends,⁹⁵ is by a bill in equity. In recent years such suits have increased in numbers, because of vast growth of corporate enterprises, interlocking self-perpetuating control by minority groups, and stock pyramiding. Equity has also intervened to prevent irreparable damage resulting from internal dissension and deadlock in the directorate.⁹⁶ Jurisdiction to dissolve a corporation because of deadlock amongst its directors or stockholders was recently conferred upon Chancery by *P. L. 1938 Chap. 303*.

183, 57 Sup. Ct. 139 (1936).

91. *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 73 L. Ed. 311 (1929).

92. *A. Hollander & Son, Inc. v. Joseph Hollander & Son, Inc.*, 117 N.J.Eq. 578 (1935); but *Cf.* remarks of Dill, J., in *Vanderbilt v. Mitchell*, 72 N.J.Eq. 910, 919 (1907), and language of Berry, V.C., in *Mitnick v. Furniture Workers & No. 66, CIO*, 124 N.J.Eq. 147 (1938); see also Pound, *Equitable Relief Against Defamation* (1916), 29 HARVARD LAW REVIEW, 640, and STAFFORD, A HANDBOOK OF EQUITY, 316, 317.

93. *Colgate v. U. S. Leather Co.*, 75 N.J.Eq. 229 (1909).

94. *Morse v. Metropolitan Steamship Co.*, 88 N.J.Eq. 325 (1917).

95. *Murray v. Beatty Mfg. Co.*, 79 N.J.Eq. 322, *rev'd*, 79 N.J.Eq. 648 (1911).

96. *In re New Jersey Refrigerating Co.*, 95 N.J.Eq. 215 (1923).

Just as great strides have been made in preventative medicine, so, in law, progress has also been made in preventative relief. This is particularly true in Chancery's use of the equitable *quo warranto* to prevent frauds by corporations and individuals upon the Public in the name of business promotion. Our corporate insolvency act, originally enacted in 1829, was modeled upon the New York statute passed in 1925, entitled "*An Act to Prevent Fraudulent Bankruptcies by Incorporated companies, to facilitate proceedings against them and for other purposes*".⁹⁷ The chief object of this suit is to declare a forfeiture of the franchise of the corporation granted by the State.⁹⁸ The appointment of a receiver in such a suit is merely ancillary to such main relief. The stockholder or creditor who invokes the jurisdiction of the Court in such case is merely an informant,—a conduit by which the State obtains the information of the corporation's insolvency.⁹⁹ The informant performs a public duty, which prior to the enactment of this remedy, was performed exclusively by the Attorney General in the name of the State, and which even now may be invoked by him.¹⁰⁰ Hence the State is, in fact, the real party complainant, and the informant, the stockholder or creditor, is merely the relator. The theory underlying the statute is that an insolvent corporation is a business menace and public nuisance and unless put to corporate death may become an instrument of fraud upon an innocent Public.¹⁰¹ Under this statute, thousands of corporations, some of the largest in the country, have been wound up or re-

97. See *Gallagher v. Asphalt Co. of America*, 65 N.J.Eq. 258 (1903); *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N.J.Eq. 399 (1904); *Michel v. William Necker, Inc.*, 90 N.J.Eq. 171 (1919); *McMullin v. McArthur Electric Co.*, 73 N.J.Eq. 527 (1907).

98. *Supra*, note 97.

99. *Supra*, note 93.

100. *Supra*, note 93.

101. *Supra*, note 93.

organized with substantial benefits to the creditors and stockholders; and from 1896 down to recently, the proceedings under this Statute constituted a substantial part of the business of the Court of Chancery. The cumulative effect of the criticism administered by the Court of Appeals in the *Tachna* case,¹⁰² the new statutory requirement that a stockholder own at least 10% of the capital stock of the corporation to qualify him as a suitor,¹⁰³ the drastic summary power conferred upon the Commissioner of Banking and Insurance with respect to the seizure and winding up of banks,¹⁰⁴ insurance companies,¹⁰⁵ and Building & Loans,¹⁰⁶ the *Mortgage Guaranty Corporations Rehabilitation Act*,¹⁰⁷ and the recent amendments to the *Federal Bankruptcy Act*, more particularly Sect. 77B, has discouraged resort to the remedy afforded by Sections 65 and 66 of our *Corporation Act*, and has thus substantially reduced the volume of business of the Court of Chancery.

It is strange that our Court of Chancery should have considered itself without jurisdiction to wind up the affairs of an insolvent corporation, in the absence of legislation,¹⁰⁸ when the United States Supreme Court has held that an insolvent corporation is so far civilly dead that a Court of Equity has inherent power to wind up its affairs through a receivership.¹⁰⁹

Our *Fraudulent Securities Act*,¹¹⁰ commonly known as the "Blue Sky Law" has expanded Chancery's jurisdiction to prevent fraud upon the Public. Under its authority, the Court has rid the State of many financial crooks who preyed upon the

102. *Tachna v. Pressed Steel Car Co.*, 112 N.J.Eq. 411 (1933).

103. R. S. 14:14-3.

104. R. S. 17:4-102, *et seq.*

105. R. S. 17:30-1.

106. R. S. App. A: 7-3.

107. R. S. 17:46-1.

108. *Supra*, note 93.

109. *Graham v. Railroad Company*, 102 U.S. 148 (1880).

110. R. S. 49:1, *et seq.*

gullible public, and has obtained restitution of hundreds of thousands of dollars filched from the victims.¹¹¹ The constitutionality of that Act having been sustained,¹¹² it is safe to say that this Statute will henceforth afford a substantial source of litigation.

EQUITY AND LABOR

In 1830 New Jersey was still in the pioneering stage and consequently had no labor problems. Organized labor was yet unborn. The labor union movement in this Country began to assert itself with the industrial revolution,—following the Civil War. As late as 1887, the labor injunction was practically unheard of.¹¹³ Illegal activities by labor groups in industrial disputes were generally dealt with by the criminal courts as common law conspiracies in restraint of trade.¹¹⁴ The decision of the United States Supreme Court in the *Debs* case (1894),¹¹⁵ upholding the Government's injunction in the *Pullman* strike, gave impetus to the use of the injunction in labor cases.

111. *Katzenbach v. Tomadelli Electronic Corp.*, 104 N.J.Eq. 217 (1929); *Stevens v. Wallace*, 106 N.J.Eq. 352 (1930); *Do. v. Adelphia Finance Service*, 107 N.J.Eq. 222 (1930); *Do. v. Washington Loan*, 107 N.J.Eq. 94 (1930), *aff'd*, 109 N.J.Eq. 128 (1931); *Do. v. Associated Mortgage Co.*, 107 N.J.Eq. 297 (1930), *aff'd*, 110 N.J.Eq. 70 (1932); *Do. v. Liberty Packing Corp.*, 111 N.J.Eq. 61 (1932); *Do. v. Television, Inc.*, 111 N.J.Eq. 306 (1932); *Do. v. Wallace*, 111 N.J.Eq. 406 (1932); *Do. v. Home Brewery, Inc.*, 112 N.J.Eq. 513 (1933).

112. *Stevens v. Home Brewery, Inc.*, 112 N.J.Eq. 513 (1933).

113. In 1896, Field, C. J., in the *Ginter* case, 167 Mass. 92, observed that the "practice of issuing injunctions in cases of this kind is of very recent origin." See also remarks of Vice Chancellor Stevenson in *Jersey City Printing Co. v. Cassidy*, 63 N.J.Eq. 759 (1902).

114. *State v. Donaldson*, 32 N.J.Law 151 (1867).

115. *In re Debs*, 64 Fed. 724 (1894), *aff'd*, 158 U.S. 564 (1895). For an example of this tendency see *Barr v. Essex Trades Council*, 53 N.J.Eq. 101 (1894).

In 1883, our Legislature passed an Act,¹¹⁶ which provided as follows:

“That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporations.”

This statute was obviously intended to legalize that which prior to that time had been unlawful. In 1890, Vice Chancellor Green in the *Mayer* case,¹¹⁷ and in 1889 Vice Chancellor Reed in the *Cumberland Glass Case*,¹¹⁸ construed this statute liberally, holding that so long as workers confined themselves to peaceable means to effect the control of the work connected with their trade, they were within the letter and spirit of that statute and were not subject to interference by the Courts. But these liberal decisions were short-lived. In the *Frank & Dugan* case¹¹⁹ (1902) Vice Chancellor Pitney held that the Act of 1883, merely rendered the combination no longer indictable as a crime, but did not give civil immunity from injunction or damage. Indeed, he doubted the constitutionality of such legislation, if intended to give such immunity. In the *Jonas Glass* case¹²⁰ (1910) the Court of Appeals adopted Vice Chancellor Pitney's construction of the Act of 1883; and from that time and down to quite

116. R. S. 34:12-1.

117. *Mayer v. Journeyman Stone Cutters Ass'n.*, 47 N.J.Eq. 519 (1890).

118. 59 N.J.Eq. 49, 53; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Ass'n. of U. S. and Canada*, 59 N.J.Eq. 49 (1899).

119. *Frank & Dugan v. Herold*, 63 N.J.Eq. 443 (1902).

120. *George Jonas Glass Co. v. Glass Bottle Blowers Ass'n. of U. S. and Canada*, 77 N.J.Eq. 219 (1908).

recently, it must be conceded, that our Court of Chancery took a rather dogmatic attitude towards labor controversies, and granted sweeping injunctions restraining peaceful picketing and other peaceful means directed towards ends considered by labor to be legitimate for its own economic protection.¹²¹ It was not until 1925 that labor won its first victory in the *New Jersey Painting Co.* case.¹²² In that case the Court of Appeals overruled and repudiated as "*dicta*" its language in the *Jonas Glass Co.* case which approved Vice Chancellor Pitney's construction of the Act of 1883, and it expressly approved the liberal construction of that Act given by Vice Chancellor Green in the *Mayer* case,¹²³ and Vice Chancellor Reed in the *Cumberland Glass Company* case.¹²⁴ In the *New Jersey Painting Co.* case the Appellate Court held that a combination of workers to accomplish an end was not illegal per se; that to render such concerted act unlawful, the object or the means used must be unlawful or exercised for the malicious purpose of injuring another; that employees had a perfect legal right to fix a price upon their labor and to refuse to work unless that price is obtained; that they had a right to stop work unless non-members are discharged, where their acts are for the good of the organization and not malicious or intended to injure others; and that a strike to enforce such demands will not be interfered with. This decision was followed by another liberal decision of the Court of Appeals in the *Bayer* case¹²⁵ (1931), in which it reversed the Court of Chancery for restraining a strike, arising over the conduct of the complainant in encouraging the use of spraying machines in painting instead of manual labor, which

121. See KONVITZ, *Labor and the New Jersey Courts* (1935), 4 MERCER BEASLEY LAW REVIEW, No. 1, p. 1.

122. *New Jersey Painting Co. v. Local No. 26, etc.*, 96 N.J.Eq. 632 (1924).

123. *Supra*, note 117.

124. *Supra*, note 118.

125. *Bayer v. Brotherhood of Painters, etc.*, 108 N.J.Eq. 257 (1931).

practice the defendants regarded as inimical to their economic welfare. In that case the Court of Appeals held that the defendants were within their legal rights to strike as long as they conducted themselves peaceably and without threats or intimidations. In its opinion, the Court referred to the 1926 Statute,¹²⁶ which clarified and broadened the Act of 1883,—but it did not pass upon the validity of that statute. But notwithstanding the two liberal decisions last mentioned, our Court of Chancery continued to grant injunctions against peaceful picketing as theretofore until 1934, when labor won its supreme victory in the *Bayonne Textile* case.¹²⁷ In that case the Court of Appeals *squarely* held that picketing is not unlawful per se and should not be enjoined if peaceably carried on for lawful purposes; that the right of employees to strike included the right to use peaceable means to persuade expected employees to join the ranks; that the 1926 statute gave recognition to the modern trend of thought in relation to the use of the injunctive process in labor disputes, and was a *valid enactment* and did not deprive the employer of due process of law; and that the members of

126. R. S. 2:29-27, which provides:—

“No restraining order or writ of injunction shall be granted or issued out of any court of this State in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation or employment, or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street or highway or thoroughfare for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or abstain from working, or to employ or to cease to employ any party to a labor dispute, or to peaceably and without threats or intimidation recommend, advise or persuade others so to do, provided said persons remain separated one from the other at intervals of ten paces or more.”

127. *Bayonne Textile Corporation v. American Federation of Silk Workers*, 116 N.J.Eq. 146 (1934).

the defendant unions were not "intermeddlers," and had a common interest with complainant's employees in the controversy to maintain a proper standard of living. The decision in the *Bayonne Textile* case was hailed by labor leaders as settling for all times the law with respect to peaceful picketing and other peaceful activities in labor disputes; but their hopes were quickly dashed by the decision of the Court of Appeals in the *Feller* case¹²⁸ (1937), in which it outlawed picketing in the absence of a strike, and limited and confined the liberal views expressed in the *Bayonne* case to a situation where a dispute and a strike exist.¹²⁹ The *Feller* case is a serious setback for labor and encouraged the later decision of the Court of Chancery in *Mode Novelty Co. v. Taylor*,¹³⁰ in which it held that when a strike ends, the controversy ends and hence there is no longer any excuse for picketing. In that case 18 out of 25 employees went out on strike as a result of complainant's refusal to sign a closed shop agreement. Upon replacing the strikers with other workers, the complainant applied for and obtained an injunction against the strikers upon the theory that the strike ended when the strikers were replaced by other employees. The *Mode Novelty* case contains serious implications so far as

128. *Feller v. Local 144, International Ladies Garment Workers Union*, 121 N.J.Eq. 452 (1936).

129. The Court relied on its former decision in *Snead & Co. v. Local No. 7, International Moulders Union*, 103 N.J.Eq. 332 (1928); but *Cf. Restful Slipper Co. v. United Shoe & Leather Union*, 116 N.J.Eq. 521 (1934); *Exchange Bakery v. Rifkin (N.Y.)*, 157 N.E. 130 (1929); *People v. Phillips (N.Y.)*, 157 N.E. 508 (1927); *Bomes v. Provident Local (R.I.)*, 155 Atl. 581 (1931); *Scofes v. Helmar (Ind.)*, 187 N.E. 662 (1933); *Blamauer v. Portland M. P. M. O. P. Union*, 141 Ore 399, 17 Pac. (2d) 1115 (1933); *Music Hall Theatre v. Moving Picture M. O. Local*, 249 Ky. 635, 61 S.W. (2d) 283 (1933); *Steffes v. Motion Picture M. O. U.*, 135 Minn. 200; *Dehan v. Hotel and Restaurant Employees, etc. (La.)*, 159 So. 637 (1935).

130. 122 N.J.Eq. 593 (1937). The writer was informed by the complainant's solicitor that no decree was entered in accordance with the opinion and that thereafter the suit was dismissed by consent. (See docket 120-435.)

labor is concerned. If a strike ends when the strikers are replaced, then all an employer has to do to be entitled to an injunction restraining picketing is to hire "strike breakers" in the place of the strikers. A strike is a quitting of work by laborers to exact some advantage from an employer, such as an increase in wages, reduction in hours or better working conditions. A strike usually flows from and is a concomitant of a labor dispute. The existence of such a dispute affords justification for the strike and strike activities. It would therefore seem that the right to strike exists so long as the dispute prevails. A mere replacing of the strikers does not settle the labor dispute. If anything, it aggravates it. The decision in the *Mode Novelty* case has not as yet received the approval of our court of last resort. The reasoning of the United States Supreme Court in the recent case of *Lauf v. Shinner & Co.*¹³¹ would seem to be the contrary.

It is interesting to note that in recent years labor has exhibited a faint, yet perceptible tendency to appeal to Chancery for relief against employers to enforce collective bargaining agreements.¹³² This is a healthy sign and should be encouraged. The law with respect to collective bargaining agreements is in its formative stage, and is bound to occupy an important niche in equity jurisprudence. As early as 1921 Vice Chancellor Backes invited labor into the Chancery forum to redress wrongs of their employers. In *Currier & Sons v. International Moulders Union*,¹³³ he sounded a warning to capital not to resort to "Yellow dog" contracts for the purpose of destroying organized

131. 82 L. Ed. 515 (1938); see also *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 81 L. Ed. 1229 (1937).

132. *Knee v. Suit Case, Bag & Portfolio Union*, 142 Atl. 184 (1928); *Upholsterers C. & L. N. I. Union v. Essex R. & F. Co.*, 12 N.J.Misc. 637 (1934); *Moving Picture Machine Operators of Essex Co. v. Ledirk Amusement Co.* (opinion unreported, Dockets 98-25 and 99-485).

133. 93 N.J.Eq. 61 (1921).

labor, and pointed out to labor that the Equity Courts were open to it to prevent such threatend wrong. He said, "Labor has not as yet appealed to the courts, but if the present employers' 'closed shop' movement has for its ultimate object, the overthrow and destruction of organized labor,—an ulterior and unlawful object,—and by means as unworthy as those here reprehended, capital is certainly extending the invitation".

Our judicial attitude towards the "closed shop"¹³⁴ is an obstacle in the way of friendlier relations between Chancery and labor. A more liberal view was recently expressed by Vice Chancellor Bigelow in *Harris v. Geier*,¹³⁵ in which he observed:

"I think the policy of New Jersey approves of the organization of employees in trade unions which are governed on democratic principles and membership in which is open, on reasonable and equal terms, to all persons of good character, and of skill in the trade; that the monopolistic tendencies or purposes or contracts of such unions are not contrary to the policy of the State."

The same principle was reaffirmed by the same Vice Chancellor in *The Four Plating Co., Inc. v. Mako*,¹³⁶ (1937) where he drew a distinction between a closed shop in a single factory or group of factories and a closed shop in substantially an entire industry throughout a considerable area. In the latter case he pointed out that there is a further distinction between a closed shop sought by a union as a protective measure and

134. *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, 92 N.J.Eq. 131 (1920); *Upholsterers' C. & I. M. I. Union, etc. v. Essex R. & F. Co.*, 12 N.J.Misc. 637 (1934); *International Ticket Co. v. Wendrich*, 122 N.J.Eq. 222 (1937); *Canter, etc., Inc. v. Retail Furniture, etc.*, 122 N.J.Eq. 575 (1937).

135. 112 N.J.Eq. 99 (1932).

136. 122 N.J.Eq. 298 (1937).

one sought in order to create a monopoly of labor. In the *Mako* case the Vice Chancellor held that a contract between a single employer and a labor union providing for exclusive employment of its members, is not in itself unlawful as an unreasonable restraint of trade or tending to create a monopoly. The decision in the *Mako* case is undoubtedly sound and represents the prevailing view of the leading courts in the land.

Before concluding this Chapter, it is interesting to note that side by side with Chancery's conservative views towards labor, there has been an inclination on its part to protect the workmen against fraud and oppression on the part of their labor leaders.¹³⁷

NEW JERSEY EQUITY AND CIVIL RIGHTS

During recent years, equity has intervened for the protection of the individual citizen as a home-dweller. The old jurisdiction to enjoin nuisances has been effectively exercised to meet new conditions. During the current economic depression, the Court was quick to assert its inherent jurisdiction to protect mortgagors against unconscionable mortgage deficiencies arising from the absence of a buyers' market.¹³⁸ Although the Court's attempts have been impeded by procedural difficulties,¹³⁹ and although it may be doubted that the Court's solicitude has been of as much benefit as anticipated,¹⁴⁰ there can be

137. *Walsche v. Sherlock*, 110 N.J.Eq. 223 (1932); *LoBianco v. Cushing*, 115 N.J.Eq. 558 (1934).

138. *Federal Title & Mortgage Guaranty Co. v. Lowenstein*, 113 N.J.Eq. 200 (1933).

139. *Fruzynski v. Jablonski*, 117 N.J.Eq. 117 (1934); *Broadman v. Colonial B. & L. Ass'n.*, 118 N.J.Eq. 275 (1935); *Meranus v. Lawyers and Home-Makers B. & L. Ass'n.*, 118 N.J.Eq. 586 (1935).

140. *Cf. Maher v. Usbe B. & L. Ass'n.*, 116 N.J.Eq. 475 (1934), in which the doctrine in the *Lowenstein* case was confined to distressed mortgagors.

no doubt that in individual cases the Court has been of material help to embarrassed mortgagors.

Although we still adhere to the view that equity will not enjoin a continued course of libel and slander,¹⁴¹ yet, paradoxically, our Court of Chancery has recognized and enforced the right of privacy against illegal intrusion under the fiction that it was protecting a property right. Thus in *Vanderbilt v. Mitchell*,¹⁴² it was held that the Court of Chancery had jurisdiction to cancel a false birth certificate, which, by statute, was evidential to prove the paternity of the child, in proceedings to compel the putative father to support the child, or in an action for necessities furnished to the child. Again in *Edison v. Edison Poliform Mfg. Co.*,¹⁴³ the Court of Chancery restrained the defendant from using complainant's name without his authority as part of its corporate title or in connection with its business and advertising, even though complainant was not a competitor. And in *Brew v. Smith*,¹⁴⁴ the Court restrained the Prosecutor of Essex County from inspecting the bank accounts of policemen, in the absence of a grand jury inquisition,—on the ground that it was an invasion of their property rights. But in *Bartletta v. McFeeley*,¹⁴⁵ the Court held that a person who was arrested was not entitled to have the police records changed so as to expunge therefrom an alias opposite his name, where there was no actual proof of injury.

In recent years Equity has revived and invoked its ancient common law writ of *habeas corpus* to inquire into the lawfulness of arrest of persons under criminal process.¹⁴⁶ This remedy

141. *A. Hollander & Son v. Joseph Hollander, Inc.*, 117 N.J.Eq. 578 (1935); but see STAFFORD, HANDBOOK OF EQUITY, 319, and *supra*, note 92.

142. 72 N.J.Eq. 910 (1907).

143. 73 N.J.Eq. 136 (1907).

144. 104 N.J.Eq. 386 (1929).

145. *Bartletta v. McFeeley*, 113 N.J.Eq. 67 (1933).

146. *Gehrmann v. Osborne*, 79 N.J.Eq. 430 (1911).

became popularized by Chancellor Walker's memorable and scholarly opinion *In re Thompson*,¹⁴⁷ in which he upheld the Court's jurisdiction to grant the writ. Under this writ the Court has many times inquired into the lawfulness of arrests of (a) fugitives from justice in extradition proceedings,¹⁴⁸ (b) recalcitrant witnesses held in contempt of the legislature,¹⁴⁹ and the Supreme Court,¹⁵⁰ and (c) persons in custody under criminal indictment,¹⁵¹ and under this writ the Court has protected the constitutional rights of defendants in criminal cases by fixing reasonable bail.¹⁵²

The popularity of this remedy was discouraged by the later decision of the same Chancellor in the *Davis* case,¹⁵³ in which he held that a writ of *habeas corpus* could not be used as a substitute for a writ of error or to attack the validity of indictment of a criminal court having proper jurisdiction.

In recent years also the Court of Chancery has assumed a new role as protector of the constitutional rights of citizens. It has restrained police censorship of motion pictures,¹⁵⁴ and periodicals.^{154a} In another case, it extended its injunctive arm to protect the citizens' right of free assembly and restrained un-

147. 85 N.J.Eq. 221 (1915).

148. *In re Thompson*, *supra*, note 147; *In re Hall*, 94 N.J.Eq. 108 (1922); *In re Rigg*, 95 N.J.Eq. 341 (1924); *In re Paramore*, 95 N.J.Eq. 386 (1924); *In re Cohen*, 104 N.J.Eq. 560, 563 (1929).

149. *In re Hague*, 103 N.J.Eq. 505 (1928); 104 N.J.Eq. 31 (1929).

150. *In re Chandless*, 110 N.J.Eq. 527 (1930).

151. *In re Weinberger*, 105 N.J.Eq. 125 (1929); *In re Marcus*, 104 N.J.Eq. 513 (1929); *In re Davis*, 107 N.J.Eq. 160, 178 (1930); *In re Stegman*, 112 N.J.Eq. 72 (1932).

152. *In re Stegman*, *supra*, note 151; *In re Weinberger*, *supra*, note 151; *In re Hague*, *supra*, note 151.

153. *Ex-Parte Davis*, *supra*, note 151; to the same effect see *In re Villano*, 102 N.J.Eq. 187 (1928).

154. *Public Welfare Pictures v. Brennan*, 100 N.J.Eq. 132 (1926).

154A. *Dell Publishing Co. v. Beggins*, 110 N.J.Eq. 72 (1932).

lawful police interference therewith,¹⁵⁵ and in a third case,—a labor strike—the Court on application of the strikers, restrained unlawful arrests and other police interference with their meetings.¹⁵⁶ And in *Story v. Jersey City, et als*,¹⁵⁷ the court denied an injunction preventing a citizen from petitioning either branch of the legislature on the subject of legislation in which he was interested, because such restraint would be an unauthorized abridgement of his political rights.

EQUITY AND STATE GOVERNMENT

The extensive growth of administrative law has created a need for carrying into effect the decisions of administrative agencies, and has fostered the development of equitable remedies in aid of administrative government, sometimes referred to as "criminal equity" or "law enforcement by injunction". A recent and outstanding example of such a remedy in this State is found in the *Milk Control Act*¹⁵⁸ which empowers the Court of Chancery to restrain any habitual violation of the Act or orders, rules, or regulations of the Milk Control Board. Similar statutory jurisdiction¹⁵⁹ exists to restrain the pollution of streams and water reservoirs, at the suit of the State Board of Health, or any local board, or the State Sewerage Commission.

In *Hedden v. Hand*¹⁶⁰ (1919) our Court of Appeals held unconstitutional a statute conferring jurisdiction upon the Court of Chancery to abate as a public nuisance, the mainten-

155. American League of the Friends of New Germany of Hudson County v. Eastmead, *et al* (unreported, Dock. 102-650); Hudson County Committee of Communist Party v. Hague (unreported) (Dock. 117-203).

156. Belmont Park Magyar Ladies' and Gentlemen's Assoc., Inc. v. Nimmo *et al*, N.J.Chancery, April 30, 1926, Bentley, V.C. (unreported).

157. 16 N.J.Eq. 13 (1863).

158. P. L. 1933, p. 1139.

159. R. S. 58:10-4, 58:11-6, 58:12-4, 26:3-56.

160. 90 N.J.Eq. 583 (1919).

ance of places where acts of lewdness, assignation or prostitution are habitually practiced. The conclusion of the Court was principally rested on the ground that the nuisance in question was a criminal offense, which under our constitutional scheme was triable in the criminal courts, and that such jurisdiction could not be impaired by the Court of Chancery. For many years this decision was construed to limit the State's right to resort to the injunctive process to prevent statutory infractions of a criminal character; but the recent decision of the same court in the *Milk Control* case¹⁶¹ (1935) interpreted the decision in the *Hedden* case to apply only to such nuisances as were criminal acts and indictable and triable in the criminal courts, at common law. This latter decision has opened the door wide to legislation in aid of administrative tribunals.

It is interesting to note however that Equity has consistently refused to enforce criminal statutes and municipal ordinances by injunction unless the act sought to be restrained was a nuisance.¹⁶²

Law enforcement by injunction without express statutory authorization has been considerably extended in the past hundred years through the revival of the Chancellor's ancient *legal* jurisdiction to entertain civil informations. In *Wilson, Attorney General v. State Power Supply Commission*,¹⁶³ our Court of Appeals unequivocally affirmed the right of the State, as a sovereign, in the exercise of its police powers, to apply to Chancery by civil information to protect the interests of the Public. And it is upon the same principle that the injunctive processes

161. *State Board of Milk Control v. Newark Milk Co.*, 118 N.J.Eq. 504 (1935).

162. *Strager v. Mintz*, 109 N.J.Eq. 544 (1932); *Baird v. Board of Recreation, etc.*, 110 N.J.Eq. 603 (1932).

163. 84 N.J.Eq. 150 (1915).

have been extended to abate public nuisances at the suit of the State.¹⁶⁴

In a number of instances restraint of governmental action by Chancery has been expressly provided for by statute. Thus the actions of the Commissioner of Banking and Insurance in taking possession of banks, building and loan associations, and insurance companies may be reviewed by bill in equity.¹⁶⁵

The most significant development in the field of restraints against governmental action which evolved from equity's inherent jurisdiction, without statutory aid, has been equity's intervention to protect the civil rights of citizens.¹⁶⁶ This subject has been previously treated in this paper.

A century of judicial experience with applications to equity to enjoin prosecutions under, or enforcement of, invalid or unconstitutional statutes and municipal ordinances has had little or no influence in expanding that remedy. It is the settled law of this State that equity will not restrain prosecutions under a statute, merely because it is unconstitutional or invalid, where there is an adequate remedy at law.¹⁶⁷ And in a recent case,¹⁶⁸ the Court of Appeals held that not only was equity without jurisdiction to restrain a threatened criminal prosecution under a statute merely because it was challenged as unconstitutional, but that the validity of the statute could not be tested under the Declaratory Judgment Act. On the other hand, equity has interfered to restrain enforcement of a statute alleged to be invalid where property rights and irreparable damage were involved.¹⁶⁹

Although in many jurisdictions a taxpayer has long been

164. *Stevens v. Home-Brewery*, 112 N.J.Eq. 513 (1933).

165. R. S. 17:4-102; R. S. 17:12-76; R. S. 17:30-3.

166. *Supra*, notes 138-157.

167. *Brunetto v. Town of Montclair*, 87 N.J.Eq. 338 (1917).

168. *Moresch v. O'Regan*, 122 N.J.Eq. 388 (1937).

169. *N. Y. Staats-Zeitung v. Nolan*, 89 N.J.Eq. 387 (1918).

able to sue in equity to restrain unlawful expenditures of public funds, or the creation of municipal indebtedness,—in this State, such relief must generally be sought in the courts of law.¹⁷⁰ But where special equities exist or where there is danger of fraudulent wasting of municipal assets by public officers,¹⁷¹ equity will intervene. In *Franklin Township v. Crane*,¹⁷² the Court of Appeals held that equity is without jurisdiction to compel a public officer to account for moneys fraudulently appropriated by him, because equity enforces and administers *private trusts* arising from contracts express or implied in law, and that a public office does not rest upon contract but upon *duty* enforceable in a court of law by mandamus, or by an action at law on the common counts.

Because of the constitutional restrictions previously mentioned, our Courts have also held that equity will not review errors, mistakes, or indiscretions of municipal bodies so long as their acts are not *ultra vires*.¹⁷³ In a few exceptional instances however, equity has intervened to restrain municipalities from illegal and excessive use of authority destructive to the property rights of others.¹⁷⁴ Although equity will not intervene to compel the performance of a public duty, because the appropriate remedy for that purpose is a writ of mandamus,¹⁷⁵ yet it may grant a mandatory preliminary injunction to compel performance of such duty to preserve the status quo pending and

170. *Soper v. Conly*, 108 N.J.Eq. 370 (1929), *aff'd*, 107 N.J.Eq. 537 (1931).

171. *Tucker v. Board of Freeholders*, 1 N.J.Eq. 282 (1831); *McKinley v. Freeholders*, 29 N.J.Eq. 164 (1878); *Watters v. City of Bayonne*, 89 N.J.Eq. 384 (1918).

172. 80 N.J.Eq. 509 (1912).

173. *Jersey City v. Lembeck*, 31 N.J.Eq. 255 (1879).

174. *Rosenberg v. Sheen*, 77 N.J.Eq. 476 (1910); *Drive to Department Stores v. City of Newark*, 115 N.J.Eq. 222 (1934).

175. *New York and G. & L. Ry. Co. v. Inhabitants of Montclair*, 47 N.J.Eq. 591 (1890).

in aid of an action at law to compel such performance.¹⁷⁶

With respect to erroneous or illegal assessments, the law in New Jersey is that equity will not interfere, except in one of three cases, e. g. ; where the enforcement of an assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or where the assessment is valid on its face and extrinsic evidence is required to show its invalidity. Whenever a case is made falling within one of these exceptions, equity will arrest the litigation, prevent the irreparable injury or remove the cloud on the title.¹⁷⁷

THE FUTURE OF NEW JERSEY EQUITY

Whatever may be the fate of Equity Courts in other jurisdictions, it may be safely asserted that in the absence of a radical political change in our form of Government, our Court of Chancery, as a separate institution, will last as long as our Constitution protects it against legislative impairment.

So far as what may be called the traditional jurisdiction of equity, it is reasonable to believe that the main lines of evolution of the past hundred years will continue in the future. The outstanding features of this development have been the elastic adaptation of the equitable process to changing conditions, the erosion of obsolete remedies, and the progressive filling in of the "void spaces of the law".

Generally speaking and judging from present tendencies, the equitable process will, in the future, extend and expand into four main directions. In the first place, injunctions are likely to issue increasingly in aid of administrative action, as a means of controlling corporations, associations and indivi-

176. *McCran, Attorney General v. Public Service R. R. Co.*, 95 N.J.Eq. 22 (1923).

177. *Liebstein v. Mayor, etc.*, 24 N.J.Eq. 200 (1873).

duals in the public interest. In the second place, the injunction will be commonly used to enforce fair trade practices as between business men under Fair Trade Acts. In the third place the Declaratory Judgment Act is bound to play a more prominent role in future equity litigation, because of the preventative character of the relief which it affords. And lastly, the equitable process will occupy a more important, though perhaps different role in labor disputes. In the past, employers frequently resorted to equity in labor disputes. Now, there is a detectable tendency to appeal to the Courts for relief to enforce collective bargaining agreements against employers.¹⁷⁸ This is a healthy sign and should be encouraged. The use of the injunction in labor disputes will probably be circumscribed. The public interest is presently focused upon the activities of the National Labor Relations Board. Federal social legislation of this character is contagious, and is likely to spread to the States. Indeed, five states,—New York, Massachusetts, Pennsylvania, Utah and Wisconsin have already adopted the so-called *Baby Wagner Act*¹⁷⁹ and there is at present agitation for the passage of a similar act in this State. The fundamental problems underlying labor strife are economic rather than legal and call for expertness in technology rather than in law. The recent experience of equity courts throughout the land with “sit down” and other strikes which convulsed the country has proven that judicial tribunals are not adapted to control or solve labor disputes. Much labor strife can be avoided by negotiation and conciliation,—functions which are *extra judicial*. The successful operation of the Wagner Act is bound to have important repercussions in the States. If successful, the legislative tendencies will be to gradually enlarge the jurisdiction of these agencies by

178. *Supra*, note 132; Hudson Bus Transportation Drivers Ass'n. v. Hill Bus Co., 121 N.J.Eq. 582 (1937).

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conferring upon them judicial or quasi-judicial functions. The vesting of judicial functions in the National Labor Relations Board, with respect to labor disputes affecting interstate commerce, would meet no Federal constitutional barriers, but in this State the conferring of such powers upon a State administrative agency might run afoul as impairing the jurisdiction of our Court of Chancery.¹⁸⁰ Such a situation might be obviated by constitutional amendment or perhaps by enforcing the decrees of such agencies in the Court of Chancery.

The history of our Court of Chancery for the past hundred years shows that it has had a strong influence in moralizing the law courts,¹⁸¹ but in this Messianic mission there lurks a danger. There is evidence that as the law courts have taken upon themselves equitable remedies, there has been a corresponding tendency on the part of Equity to let go.¹⁸² Equity jurisdiction has suffered much from such erosion; and this wearing away process has built up a large twilight zone of concurrent jurisdiction, in which equity remains passive. The late Vice Chancellor Backes deplored this tendency of equity to passively abandon its inherent power to the law courts merely because the latter adopted certain equitable principles. To him, equity was a passion,—a religion,—a living and growing jurisprudence, and not a mere bundle of antiquated remedies to be discarded in favor of newer forms of redress.¹⁸³ For this reason he was jealous of

180. *Supra*, note 1.

181. EMMERGLICK, *The Legal Adoption of Equitable Principles* (1935), 2 N. J. LAW REV. 53.

182. *Kronson v. Lipschitz*, 68 N.J.Eq. 367; *Pine Building Co. v. Grossman*, 182 N.J.Eq. 189; *Anderson v. Eggers*, 63 N.J.Eq. 264; *Sweeney v. Williams*, 36 N.J.Eq. 627. Compare *Eyre v. Everitt*, 2 Russ. 381, 382, where Lord Eldon said:—"This court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to fall in love with the same or a similar jurisdiction."

183. This view is concurred in by Professor Pomeroy who says, "I am convinced that the practical surrender by the Equity Courts of this country of

maintaining and extending the jurisdiction and influence of the Court of Chancery; and although faithful to constitutional limitations, he was ever ready to grasp at an equity to displace the law courts in any case where there was imminent danger that they, (to use his own language), "might spill the bucket". While a constitutional guaranty against legislative impairment is essential to guard the jurisdiction of the Court of Chancery, such guaranty will prove theoretical and ineffectual if the Court does not vigilantly protect its heritage.

The Court of Chancery has had a long and honorable career. Though established in New Jersey in 1705, its roots are deeply imbedded in several hundred years of English tradition. Its past and present we know. Its future rests in the hands of the bench and bar.

NEWARK, N. J.

ISRAEL B. GREENE.

so large a portion of the original and most certain jurisdiction was both unfortunate and unnecessary." 2 POM. EQ. JURIS., p. 1904 (note 914 [d]).