under general equitable principles. The *ratio decidendi* of *Theismeier v. Theismeier, supra,* deals only with this question; nothing can be inferred from the decision that the concept of germane pleadings should be written out of the law. The court must have a limit within which to confine pleadings and amendments thereto, even though the limit of germaneness appears to be very vague, and at times indefinable.

It is submitted that the value of the decision in *Theismeier v. Theismeier*[24] lies not in the holding that a limited type of amendment will be hereafter allowed, but that it is a foreshadowing of a more liberalized procedure in the Court of Chancery,[25] and perhaps the ultimate discarding of the concept of "germaneness." The ends of justice should never be sacrificed to mere form or by rigid adherence to technical rules of practice.[26] Amendments should be allowed in the discretion of the court subject to the well-settled limitation of "new case"[27] defined as a variance from the relief sought in the original bill, not as a change of theory seeking the same relief.

THE NEW JERSEY GANGSTER ACT—A CRITICISM.—The appeal pending in the United States Supreme Court assailing the New Jersey statute commonly known as the "Gangster Act"[1] makes timely a

24. *Supra,* note 3.

25. In connection with the liberalizing of procedure *Cf.* new Federal Rules of Civil Procedure.

26. *Supra,* note 21.

27. Coddington v. Mott, *supra* note 15; Seymour v. Long Dock Company, 17 N.J.Eq. 169 (Ch. 1869).

1. 1 Rev. Stat. 1937, 2:136-4 Chap. 155, Pamph. L. 1934, p. 794. "any person, not engaged in any lawful occupation known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other state, is declared to be a gangster, but nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." Section 5 of the act provides that "any person convicted of being a gangster under the provisions of this chapter shall be guilty of a high misdemeanor and shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding twenty years, or both."

review of the general principles upon which the act is founded and in particular the exception embodied therein.[2]

By virtue of the police power, the state can create and define criminal offenses subject to constitutional restraints.[3] Such power is subject to the due process clause. Due Process requires a law creating and defining the offense charged and accusation in due form to sustain convictions.[4] The State must frame criminal statutes so that the standard of conduct may be known.[5]

In *State v. Gaynor*[6] the facts show that the plaintiffs in error and their associates possessed in their hideout a variety of weapons. Included among the weapons were revolvers, rifles, a shot gun, a gas riot gun, a gas container and projectiles, a pocket grenade, a gas cartridge, an electric blast cap and a bottle of tear gas crystals. Some of the weapons and automobile registration plates were identified as stolen property. All plaintiffs in error had been convicted of crime and were unable to give an explanation of their possession of firearms consistent with lawful purposes. They were not then engaged in any lawful occupation. Upon being convicted they appealed to the Supreme Court of New Jersey, which upheld the conviction in an opinion printed *sub nom. State v. Bell.*[7] There plaintiffs in error claimed the statute was violative of the "due process" clause of the Fifth Amendment to the United States Constitution, and of the "equal protection of the laws" clause embodied in the Fourteenth Amendment to the United States Constitution. In upholding the conviction the court said

2. The case to be reviewed is State v. Pius, 118 N.J.L. 212, *aff'd* 120 N.J.L. 189 (E. & A. 1938) unanimously affirmed by the Court of Errors and Appeals. The court said "we are in full accord with the reasoning and result reached by the Supreme Court but we merely desire to mark the fact that the case of State v. Bell, 15 N.J.Misc. R. 109, 188 Atl. Rep. 737 (Sup. Ct. 1937); relied upon by the court below as dispositive of the contentions that our "Gangster Act" trenches upon both federal and state, constitutional inhibitions, has recently been affirmed by this court *sub nom.* State v. Gaynor, 119 N.J.L. 582, 197 Atl. Rep. 360 (E. & A. 1938).

3. People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (Sup. Ct. 1934).

4. Levine v. State, 110 N.J.L. 467, 166 Atl. Rep. 300 (E. & A. 1933).

5. Cline v. Frink Dairy Co., 274 U.S. 445, 47 Sup. Ct. 681 (1927).

6. *Supra*, note 2.

7. *Supra*, note 2.

"to hold otherwise would be to unreasonably hamper the enforcement of law and the protection of society." The court cited with approval *Levine v. State*[8] wherein the Court of Errors and Appeals reviewed the Disorderly Persons Act. The section of this Act questioned provides for the arrest and punishment of "all runaway servants or apprentices, and all vagrants or vagabonds, common drunkards, common thieves, burglars or pickpockets, common night walkers, and common prostitutes. * * *" The Act was held valid. The court was of the opinion that "The manifest purpose of this legislation is to check evil in its beginning and thus to insure the public safety. The statute is not arbitrary or unreasonable. It provides for the apprehension and punishment of a class that menaces the security of persons and property." And further "It is the undoubted function of the state to apprehend those who would violate laws ordained to protect the person and property of citizens, and who are seeking the opportunity to do so. Such persons are determined and ever active foes of society. They are potential actors in crimes of the first magnitude. To challenge the power of the state to prevent the commission of such crimes by legislation of this character, is to challenge its power to denounce and punish the crime itself." The Supreme Court decision was appealed to the Court of Errors and Appeals and the question to be determined was whether or not the text of the statute is adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. The court in affirming the decision held that the prohibitory language of section four of the act is not vague, indefinite or uncertain and said, "The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises, and it is therefore a valid exercise of the legislative power." The U. S. Supreme Court having held that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, denies due process of law, the question naturally arises here would it be unreasonable for intelligent men to differ as to the meaning of the word "association" as it us used by our court in construing this statute? And is the statute therefore

8. *Supra*, note 4.

invalid? Does the application of this word "association" require an ex-convict to wear a "Scarlet Letter" so that other ex-convicts who are unfortunately unemployed might readily recognize danger and cross to the other side of the street? Does it mean that an ex-convict upon his release from prison may not return to his home because another member of the family is likewise an ex-convict? Such questions might well beget conflicting answers from men of common intelligence and they serve to emphasize the necessity of definite limitations for the application of such a statute.

In the principal case all the essential ingredients for the commission of a crime were present. A bungalow in an isolated part of the state was rented as a hideout for the exclusive use of a considerable number of gangsters. The said bungalow had been turned into a veritable arsenal. Certainly no one of the gang could claim successfully that he was there making a social call and that he was ignorant of what was being planned. It is evident therefore, that it is not impossible to prove criminal intent in association such as this, yet it must be obvious that in the case of a person who is forced by circumstances to live and associate with relatives or friends who have criminal records, that the mere evidence of such association is far from sufficient in justice to return such a person to prison. While the court in *State v. Gaynor*[9] was careful to point out that "in the application of such statutes there must be a scrupulous adherence to all principles designed to safeguard the liberty of the accused against arbitrary invasion"; the point that ought to be brought out is that the legislature should be most scrupulous in the first instance as to the terminology of the statute itself so that the liberty and the rights of an ex-convict, who has paid his debt to society, shall be safeguarded against arbitrary invasion. At this point it is important to note the opinion of the Supreme Court of Missouri in the case of *Ex Parte Smith*[10] in which an ordinance forbidding anyone knowingly to associate with persons having the reputation of being thieves, burglars, etc., with the intent to commit any offense, was declared unconstitutional and invalid on the ground that the ordinance invaded the right of personal liberty.

9. *Supra*, note 2.
10. 135 Mo. 223, 36 S.W. 628 (Sup. Ct. 1896).

The court said, "Certainly it stands to reason that if the legislature, either state or municipal, may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of anyone may be. What becomes of the Constitutional protections to personal liberty, which Blackstone[11] says "consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." Obviously there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations, and one which commands certain associations. We deny the power of any legislative body in this country to choose for any citizen whom their associates shall be."

It is conceivable that the words "known to be a member of any gang" may cause men of reasonable intelligence to guess at their meaning and differ as to their application. If the courts will hold that the state must have proof of an individual's membership in the gang then there can be no cause for complaint. But if by the word "known" the courts will look to reputation alone then the issue of constitutionality will be pertinent. An amendment to the Vagabond Act of Illinois declaring all persons reputed to be habitual violators of criminal laws, or reputed to act as associated or companions of such persons, or reputed to carry concealed weapons, to be vagabonds, was held invalid as arbitrary, unreasonable legislation, depriving citizens of liberty without due process and clothing administrative officers with arbitrary and discriminatory powers. In the opinion, the court said "The Amendment is unconstitutional as it seeks to punish an individual for what he is reputed to be regardless of what he actually is. The word "repute" is synonymous with the words "opinion" and "reputation." The legislature has left this important question of reputation to be arbitrarily decided by individuals without describing any rules, basis or limitations to the Act as a guide in forming judgment."[12]

However, it can not be gainsaid that the views of the Missouri and Illinois courts above cited are in the minority. The weight of

11. BLACKSTONE'S COMMENTARIES, p. 134.
12. People v. Belcastro, *supra*, note 3.

authority in the United States favors the constitutionality of such statutes. The power given to state legislatures under the police power is so broad that it is extremely difficult to have the United States Supreme Court declare such statutes invalid where they are not clearly arbitrary on their face. To cite only a few of the instances wherein the courts have upheld analogous statutes mention can be made of the case of *State v. Maxcy*[13] in which the court with reference to the state vagrancy statutes said, "It is not the main purpose of those Acts, to proceed by way of punishing them for an offense, for vagrancy in itself, can hardly be deemed a distinct offense. The Acts seem rather intended to afford some adequate security to the public, against the danger to be apprehended from the several classes of persons enumerated, all of whom from their vicious pursuits may well be considered as dangerous to society." The United States Supreme Court upheld a similar statute of the State of California, in the case of *Whitney v. People of the State of California* where the Supreme Court said the California Criminal Syndicalism Act was not so vague or uncertain as to deny due process.[14] New York held a similar act did not deny due process in *People v. Berman*.[15] The statute in question penalizes for disorderly conduct one who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts, and creates a presumption against defendants proven to have evil reputations and to have consorted with criminals or with individuals of like reputations.[16] In *Ex parte Cutler* the court held a statute making it a crime to roam about from place to place without any lawful business in not unconstitutional as being too broad or indefinite to state a public offense.[17] A tendency to support legislative enactments if at all possible is seen in *State v. Le Blond,* where the court said, "The courts will not declare a statute void on the ground that it is unintelligible and meaningless in a doubtful case. A

13. State v. Maxcy, 26 S.C.L. 501.

14. Whitney v. People of State of California, 47 Sup. Ct. 641, 274 U. S. 357 (1927).

15. People v. Berman, 282 N.Y.S. 484, 156 Misc. 463 (Sp. Sessions 1935).

16. Penal Law, Sec. 722, Subd. 11.

17. *Ex parte* Cutler, 36 Pac. (2d) 441; 1 Cal. App. (2d) 273 (Dist. Ct. App. 1934).

proper deference to the legislative plans of the government requires that such questions should be approached with cautions circumspection."[18] Also we have the Iowa court holding that legislation cannot be set aside for indefiniteness, if it is open to any reasonable construction which will support it.[19] Further, the language of a statute defining offenses is sufficient if it conveys the intended meaning with reasonable certainty.[20]

In the principal case under the New Jersey statute, namely, that of *State v. Gaynor,*[21] the significant words of the court are, "and the constitutional requirements of 'due process' and 'equal protection of the laws' would be otherwise met if the statute creating and defining the offense lay down a definite, ascertainable standard of guilt, require an accusation in due form, and operate without descrimination on all persons and classes of persons similarly situated."

But, does this statute contain the essential ingredients of constitutionality as set forth above? While the statute may lay down a definite ascertainable standard of guilt it definitely provides an explicit method whereby it may operate with discrimination on persons similarly situated. It poses the question: "When is the known member of a gang a gangster and when is he not a gangster under the statute?" Obviously the unemployed person convicted of disorderly conduct three or more times, known to be a member of a gang is definitely a gangster and "in danger of the judgment." Yet another known member of the same gang, having a criminal record a mile long, may not be a gangster under the statute, if apprehended and accused in due form, while participating in any labor dispute.

On the one hand, the statute provides, upon conviction, for the extreme penalty of $10,000 fine or 20 years in prison, or both, for the high grade moron, three times convicted of being disorderly, who as was pointed out in *State v. Gaynor,* is unable to reject the allurement of association with ex-convicts because of his moral instability

18. State *ex rel* Forchheimer v. LeBlond, 108 Ohio St. 41; 140 N.E. 491 (Sup. Ct. 1923).

19. State v. Dvoracek, 140 Iowa 266, 118 N.W. 399 (Sup. Ct. 1908).

20. People v. Thompson, 259 Mich. 109, 242 N.W. 857.

21. *Supra,* note 2

or sheer depravity, and on the other hand the statute explicity excepts the hardened criminal regardless of the number and gravity of crimes for which he may have been previously convicted, and regardless of the number and degree of depravity of his gangster associates, if he is a participant in any labor dispute. There can be no misunderstanding of the wording of the statute as to the exception, for nothing can be more explicit than "nothing in this section contained shall in anywise be construed to include any participant or sympathizer in any labor dispute." The statute deals exclusively with gangsters and we must conclude that this exception is for the purpose of definitely providing for an armistice between the law enforcement body and the gangster; a free time, so to speak, when a gangster is not a gangster under this statute. The known member of a gang, who does not participate in labor disputes, or at least sympathize with the disputants, cannot claim to come under the exception, such exception is made exclusively for the gangster who specializes in labor disputes. Thus the statute provides for two distinct classes of gangsterism based on participation and non-participation in labor disputes. The punishment on conviction for the non-participating gangster is $10,000 fine and 20 years in prison, for the participating gangster who specialized in the gentle art of wielding a wrapped crank handle in labor disputes, the maximum penalty on conviction is $2,000 fine and seven years in prison.

When considering the exception it is questionable whether the constitutional requirements of the "due process" and "equal protection of the laws" are met in this statute.

Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.[22] It would appear that this law is so explicit in its exception that all gangsters may know what acts to participate in to avoid the penalties that they would otherwise be subject to. It might be argued that all gangsters have the same right and privilege of participation in labor disputes and therefore there is no discrimination or class distinction, but no good purpose would be served in an attempt to minimize the importance of the work of the Legislature in its evident desire to

22. United States v. Sharp, Pet. C. C. 118; Case No. 16,264 (Cir. Ct. 1815).

accurately define the status of a gangster, when as an individual or as a member of a gang he participates in any labor dispute.

Our Court of Errors and Appeals also quoted Webster's *New International Dictionary* as defining the word "gang" to be, "any company of persons who go about together or act in concert (in modern use mainly for criminal purposes)." The statute likewise refers to a gang as consisting of two or more persons, and therefore if an entire gang is rounded up while carrying deadly weapons, without a permit, the members of such a gang may not be tried under the statute if they happen to be participants in any labor dispute.

No one will deny that the terms of this statute are explicit insofar as it excepts a person (with full statutory qualifications as a gangster) from its penalties if such gangster is apprehended while participating in any labor dispute, but certainly men cannot be fairly charged with a lack of common intelligence if they differ on the proposition that thereby this statute operataes without discrimination on all persons and classes of persons similarly situated.

NEGLIGENCE—ATTRACTIVE NUISANCE DOCTRINE—EFFECT THEREON OF *Erie RR. v. Tompkins.*—In *Swift v. Tyson*[1] the United States Supreme Court ruled that the federal courts are not bound by decisions of state courts on matters of general or commercial law. The court, in determining whether the Judiciary Act of 1789[2] compelled them to follow the laws of the several states, expressed a doubt that the decisions of local tribunals constituted "laws" within the meaning of the act in view of the fact that such decisions were constantly being reviewed, modified and reversed and held that the language of the act

1. 16 Pet. 1, 10 L. Ed. 865 (1842).

2. "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (Act Sept. 24, 1789, c. 20, sec. 34; Rev. St., sec. 721; 28 U. S. C. A., sec. 725.)