RECENT CASES

EQUITABLE MORTGAGE—RESULTING TRUST.—Complainant lived with defendant for thirty years under the mistaken belief that she was his wife. During this time she advanced certain sums of her own money, which, together with funds of the defendant were used to purchase the property in question. The property was taken in defendant's name, although it was understood that she was to have a half interest in it. Complainant now seeks to impress a trust on these lands. *Held*: Complainant is entitled to an equitable mortgage. *Conkling v. Conkling*, 126 N.J.Eq. 142, 8A2d 298 (Ch. 1939).

This is indeed a rather unusual application of the doctrine of equitable mortgage. There was no agreement here that complainant was to receive a mortgage for the monies she had advanced. There was no loan made or debt outstanding which was to be secured by a mortgage on these premises. There is present here none of the pre-requisites that give rise to such relief. An equitable mortgage may arise from nonpayment of purchase money, a deposit of title deeds, an unsuccessful attempt to make a valid mortgage deed, or to appropriate specific property to the discharge of a particular debt.[1]

It is the intent to create a mortgage which is the controlling point. If this intent is clear, but the parties have been unable to accomplish it, equity will often give relief. But, there must be clear and unequivocal proof of the intention to create a mortgage.[2] There must be a specific agreement between the parties in interest.[3] This agreement is in the large an endeavor to create security for a debt. Whenever a transaction resolves itself into a security or offer or attempt to pledge land as security for a debt or liability, equity will treat it as a mortgage without regard to the form it may assume.[4] There are many kinds of equitable mortgages; as many as there are varieties of ways that parties may contract for security by pledging some interest

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1. *Gale v. Morris*, 29 N.J.Eq. 222, (Ch. 1878).
2. 41 C.J. 294.
3. *Neola v. Ciccone* 102 A 1055, (Ch. 1917).
4. 41 C.J. 293.

in land. Whatever the form of the contract may be if it is intended thereby to create a security it is an equitable mortgage.[5]

In the principal case it is impossible to find the necessary elements to create an equitable mortgage. Complainant's money was turned over to defendant not with the understanding that she was to have a mortgage, but rather that she was to be a half owner. We agree with the court in this case that she is entitled to some relief,[6] but the question is, what form should this relief properly take.

There seems to be no reason why a trust should not be impressed as complainant requested. This should be a resulting trust as distinguished from a constructive trust which is more clearly associated with fraud. The fact that defendant was not her husband does not make this agreement with her fraudulent one. This is a typical case of a resulting trust which is raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.[7]

The commonest type of resulting trust arises in a case as this where one party advances the whole or part of the purchase price, and title is taken in the name of another. A trust is held to result by operation of law where one purchases land with his own money and takes the conveyance in the name of another; in such case the title is deemed to be in trust for him who advanced the money for the presumption is that he intended to purchase for his own benefit.[8] There must be an agreement between the parties to effectuate their intent, although this need not be in writing.[9]

It must always be shown that the money advanced was not intended to be a gift, but was given to purchase an interest in the land. When money is advanced by a husband, and title is taken in his wife's name there is always a presumption that a gift is intended. This pre-

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5. *Cummings v. Jackson,* 38 A 763, 55 N.J.Eq. 805 (E and A, 1897).

6. "Equity and justice require that the defendant account to the complainant for the moneys paid by her to him."

7. 65 CJ 222.

8. *Wheeler & Green v. Kirkland,* 23 NJEq 13, (Ch. 1872).

9. *Cutler v. Tuttle,* 19 N.J.Eq. 549, (Ch. 1868).

sumption, however, is rebuttable by evidence evincing a contrary intent. This presumption is relaxed when the wife advances money and title is taken in her husband's name, for she owes him no duty of support. Once having shown that the money advanced was the wife's money or separate estate, a trust results in the land the title of which is in the husband's name. This is a well settled principle of law.[10]

The principal case presents a stronger reason for the declaration of a trust since the parties were not, in fact, married. When a marriage is void, there is no presumption that money was intended as an advancement or gift to preclude a resulting trust.[11] Where a couple live together as man and wife without being lawfully married, and property purchased with the woman's money is in the man's name, they are strangers within the meaning of the rule that property paid for with the money or assets of one person, title thereto being taken in the name of a stranger or person for whom he is under no legal or moral obligation to provide, is held by resulting trust in favor of the person furnishing the consideration so that a trust results in favor of the woman.[12]

That complainant has not furnished the whole consideration, but merely half of it does not prevent her from impressing a trust in the land in proportion to the sum she has advanced.[13] Where title to real estate is taken in the name of one of two persons, both of whom contribute to the purchase price a resulting trust takes effect for the benefit of the person not named, when their agreement was that each should have an interest in the premises.[14]

It is submitted therefore, that the proper relief here is that of a resulting trust rather than an equitable mortgage.

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10. Condit v. Bigelow, 54 A 160, 64 NJEq 504, (Ch. 1903); Irish v. Clement, 27 A 434, 49 NJEq 590, (E & A, 1892).

11. 65 CJ 409.

12. Morin v. Kirkland, 115 NE 414, 226 Mass. 345 (1917). McDonald v. Carr, 37 NE 225, 150 Ill. 204 (1894).

13. Cutler v. Tuttle, 19 NJEq 549, (Ch. 1868); Skarupkie v. Sielinski, 158 A 177, (Pa. 1931).

14. Lykles v. Lykles, 158 A 105, 109 NJEq 490, (Ch. 1932); Tynan v. Warren, 34 A 1065, 54 NJEq 402, (E & A 1896) "Complainant had a resulting trust on the land arising out of the payment of half the price." Bergstrasser v. Sayre, 10 A 710, 42 NJEq 488, (Ch. 1887) "She is by a resulting trust entitled to ⅛ of the property."

FEDERAL JURISDICTION — NORRIS-LAGUARDIA ACT — LACK OF POWER TO GRANT RELIEF AS JURISDICTIONAL DEFECT.—Plaintiff filed a bill seeking an injunction in Chancery alleging its employees were not on strike but that defendant union was picketing plaintiff's store, causing loss of business. Defendants did not dispute the existance of a labor dispute but they petitioned for removal to the Federal District Court on the ground of diversity of citizenship. *Held*: petition denied. A suit in a state court to enjoin picketing in a case growing out of a labor dispute may not be removed to the federal courts, as the Norris-LaGuardia Act[1] has deprived them of jurisdiction to issue injunctions in cases of this type. *Wucker Furniture Co., Inc. v. Furniture Salesmen's Union, C. I. O. Local 853 et al.* 126 N.J.Eq. 145, 8A 2nd 275 (Ch. 1939).

The framers of the federal anti-injunction act formulated the bill for the purpose of taking the federal courts out of the business of granting injunctions in labor disputes, except where violence and fraud are present.[2] The haven afforded by the act indicates increased struggles between employers and labor unions, the former striving to remain in the state courts if a labor dispute is involved[3] and the latter to remove to the federal courts. However, the motive with which a party invokes the jurisdiction of a federal court is immaterial, provided no fraud or collusion be present;[4] nor can the fact that a plaintiff is given a different remedy in the state court, affect

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1. 47 STAT. 70 (1932), 29 U.S.C.A. Secs. 101-115 (1939), *held*, constitutional, Cinderella Theatre Co. v. Sign Writers Local Union, 6 F. Supp. 164 (E.D. Mich. 1934). For general discussions, see 14 ORE. L. REV. 242 (1934); 2 MO. L. REV. 1 (1937); 50 HARV. L. REV. 1295 (1937); 35 MICH. L. REV. 1320 (1937); 46 YALE L. J. 1064 (1937). For the relation between the Norris-LaGuardia Act and the National Labor Relations Act, see Oberman and Co. v. U. S. Garment Workers of America, 21 F.Supp. 20, 120 A.L.R. 321n. (W.D. Mo. 1937).

2. Wilson and Co. v. Birl 105 F (2d) 948 (C.C.A. 3d 1939).

3. Plaintiff in principal case fights removal because of New Jersey's conservative view toward labor. See IV NEWARK L. REV. 54 (1938). New Jersey's anti-injunction statute of 1926 (R.S. 2:29-77) has been declared unconstitutional in Eastwood-Neally Corp. v. International Assoc. of Machinists, 124 N.J.Eq. 274, 1A (2d) 477 (1938).

4. Smithers v. Smith, 204 U.S. 632, 27 S. Ct. 297, 51 L.Ed. 656 (1906); Chicago v. Mills, 204 U.S. 321, 275 S.Ct. 286, 51 L. Ed. 504 (1906).

the jurisdiction of a federal court to entertain his action where he has the right to sue in that court by reason of his citizenship and the amount involved.[6]

Plaintiff's bill states a cause of action in New Jersey,[6] but defendant alleges diversity of citizenship. In the absence of other circumstances, therefore, defendant seems entitled to remove,[7] regardless of the nature of the controversy.[8] It remains to be seen if he is powerless to remove on the ground that jurisdiction of the federal courts has been taken away.

Prior statutes restricting federal equity powers have either prohibited maintenance of the suit,[9] thus limiting the court's general jurisdiction,[10] or required denial of specific relief,[11] and were held to affect the equity in the particular bill.[12] The Johnson Act[13] was the first statute confining powers to use the word "jurisdiction," but it is important to note the wording is vastly different from that em-

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5. Herring v. Modesto Irr. District, 95 F. 705 (N.D. Cal. 1899).

6. Mitnick v. Furniture Workers Union, C.I.O., 124 N.J.Eq. 147, 200 A 513 (Ch. 1938); Mode Novelty Co., v. Taylor, 122N.J. Eq. 593, 195 A 819 (Ch. 1937); Gevas v. Greek Restaurant Workers' Club, 99 N.J. Eq. 770, 134 A 309 (Ch. 1926).

7 U.S. CONST. Art. III, Secs. 1, 2; 28 U.S.C.A. Sec. 41 (1927).

8. Eastman Kodak Co. v. National Park Bank, 231 F. 320 (S.D. N.Y. 1916); Howard v. National Telephone Co. 182 F. 215 (N.D. W. Va. 1910).

9. 14 STAT. 152 (1866), 26 U.S.C.A. Sec. 1672-1673 (1934)—"No suit . . . shall be maintained . . . for the recovery of any internal-revenue tax. . .";

14 STAT. 475 (1867), 26 U.S.C.A. Sec. 1543 (1935)— "No suit for the purpose of restraining the assessment . . . of any tax shall be maintained . . . ";

36 STAT.1163(1911), 28 U.S.C.A. Sec. 384 (1928)—"Suits in equity shall not be sustained. . . where a plain, adequate, and complete remedy may be had at law.";

49 STAT. 1648 (1936), 7 U.S.C.A. Sec. 623 (1939)—"No suit . . . shall be brought . . . for the purpose of preventing the assessment . . . of any tax. . ."

10. Dodge v. Osborn, 240 U.S. 118, 36 S. Ct. 275, 60 L.Ed. 557 (1916).

11. 36 STAT. 1162 (1911), 28 U.S.C.A. Sec. 379 (1928)—"The writ of injunction shall not be granted. . . to stay proceedings in any court of a State. . ."

12. Smith v. Apple, 264 U.S. 274, 44 S. Ct. 311, 68 L.Ed. 678 (1924).

13. 48 STAT. 775 (1934), amended by 50 STAT. 738 (1937), 28 U.S.C.A. Sec. 41 (1, 1a) (1939)—"No district court shall have jurisdiction of any suit to enjoin. . ." *Cf.* 18 STAT. 470 (1875), 28 U.S.C.A. Sec. 41(1) (1927)—"No district court shall have cognizance of any suit to recover. . ." *Held,* to go to the power to hear, Kolze v. Hoadley, 200 U.S. 76, 26 S.Ct. 220, 50 L.Ed. 377 (1906).

ployed in the Norris-LaGuardia Act.[14] This latter act is the first to use the term in conjunction with a remedy. Whether done for a certain purpose,[15] or inserted merely as a general term, its inclusion is unfortunate. The word has various meanings and is used loosely even by men learned in the law.[16] There is a clear distinction between "jurisdiction" in its strict meaning and in its general use in equity jurisprudence. In its strict sense it means the power to hear and determine an action.[17] Any adjudication of a court lacking "jurisdiction" as thus interpreted, would be a nullity, and could be disregarded with impunity, as well as be subject to collateral attack.[18] As applied to the power of a court of equity, however, it means the propriety of granting equitable relief.[19] Used in this sense, an adjudication, though erroneous, would be valid, and violation of the decree could be punished by contempt, and could be attacked only directly.[20] Stated more concisely, is Congress depriving federal courts of power to hear certain cases, or declaring that henceforth no equity court may exercise its discretion in certain cases but is duty-bound to refrain from issuing injunctive relief?

Whether a given statute is intended to limit the power of a court or simply to establish a rule of substantive law and thus define the duty of a court is a question of construction and common sense.[21] It may be noted that the framers, in giving the rule for the inter-

14. "No court of the United States shall have jurisdiction to issue any restraining order . . . or injunction in any case involving or growing out of any labor dispute . . ." 29 U.S.C.A. Sec. 104 (1939).

15. See Fauntleroy v. Lum 210 U.S. 230, 28 S. Ct. 641, 52 L.Ed. 1039 (1908).

16. Watson v. Jones, 13 Wall. (U.S.) 679, 20 L.Ed. 666 (1871); 14 AM. JUR., Courts, Secs. 159-161; 2 BOUVIER'S LAW DICT. (8th ed. 1914); 1 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) Secs. 129-132.

17. Reynolds v. Stockton, 140 U.S. 254, 11 S. Ct. 773, 35 L. Ed. 464 (1891); Tube City Min. and Mill. Co. v. Otterson, 16 Ariz. 305, 146 P. 203, L.R.A. 1916E 303 (1914).

18. Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841, 42 L.Ed. 215, (1897); Rich v. Town of Mentz, 134 U.S. 632, 10 S.Ct. 610, 33 L.Ed. 1074 (1890).

19. POMEROY, EQUITY JURISPRUDENCE, *supra*, note 16.

20. Ex Parte Harding, 120 U.S. 782, 7 S. Ct. 780, 30 L. Ed. 824 (1887); Reid v. Independent Union of All Workers, 200 Minn. 599, 275 N.W. 300 (1937).

21. Fauntleroy v. Lum, *supra*, note 15.

pretation of the act, link "jurisdiction" with "authority."[22] Since the latter word appears nowhere else in the Act, it is apparent the two words were meant to be synonymous. Insertion of "authority" in the place of "jurisdiction" in Section 104[23] casts a new light on its construction. If the confusing words "have jurisdiction to" are omitted entirely,[24] the remaining sentence now reads strangely like the Mississippi statute which Mr. Justice Holmes held[25] defined a duty: "shall not be enforced by any court." These words, he said, "are simply another, possibly less emphatic, way of saying, 'An action shall not be brought to enforce such contracts.'" Comparison of the simplified section with the wording of the statutes in footnotes 9 and 13 will indicate their dissimilarity.

The interpretation of "jurisdiction" as the declaration of a duty would seem to be in harmony with the traditional view that jurisdiction (the power to hear and determine a case) is determinable from the pleadings.[26] It is manifestly impossible to decide from the allegations alone whether the court has power to hear the case, for the Act requires no less than six findings of facts before the injunction will issue: existence of a labor dispute,[27] threat of unlawful

22. "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States. . ." 29 U.S.C.A. Sec. 102 (1939).

23. See note 14.

24. It is interesting to note that Circuit Court Judge Manton, in Levering and Garrigues Co. v. Morrin, 71 F(2d) 284 (C.C.A. 2d 1934), cert den. 293 U.S. 595, 55 S.Ct. 110, 79 L.Ed. 688 (1934), paraphrases the section thus: "No court of the United States may grant a restraining order, temporary or permanent, in a labor dispute because of doing in concert the acts enumerated in Section 104."

25. Fauntleroy v. Lum, *supra,* note 15.

26. U.S. v. Arredondo, 6 Pet. (U.S.) 691, 8 L. Ed. 547 (1832); Hunt v. Hunt 72 N.Y. 217 (1878).

27. This is alone the most controversial point of the entire statute. See Lauf v. Shinner and Co., 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872 (1938); New Negro Alliance v. Sanitary Grocery Co. 303 U.S. 552, 58 S.Ct. 703 82 L.Ed. 1012 (1938); Levering and Garrigues Co. v. Morrin, *supra,* note 24; Cinderella Theatre Co. v. Sign Writers Local Union *supra,* note 1; Dean v. Mao, 8 F. Supp. 73 (W.D. La. 1934); Lund v. Woodenware Workers Union, 19 F.Supp 607 (D. Minn. 1934); Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937); Riddlesbarger, *The Federal Anti-Injunction Act,* 14 ORE. L. REV. 242 (1935); Monkemeyer, *Five Years of the Norris-LaGuardia Act,* 2 MO. L. REV. 1. (1937); 36 MICH. L. REV. 1146 (1938); 120 A.L.R. 316 (1939).

acts, irreparable harm, greater injury inflicted upon complainant by the denial of relief than will be inflicted upon defendant by granting of relief, inadequate remedy at law, and inability or unwillingness of public officers to furnish protection to property. Each finding necessitates the hearing of considerable evidence. To allow the court to decide the existence of these facts solely from the pleadings would put the defendant at the mercy of the complainant, for the latter could so word his bill that no labor dispute or existence of other necessary facts would appear. It is conceded defendant may reply and set the facts in issue, but because of the temporary nature of labor controversies, the effect of a wrongfully-issued injunction would be enough to destroy the workers' one weapon. Their legal victory would indeed be Pyrrhic. It would prove more equitable to hold that although these requirements are "jurisdictional," they go only to the propriety of the exercise of the power, and jurisdiction to hear must be alleged on the familiar grounds of diversity of citizenship, federal question, etc. If now the court decides it may not give the relief desired, it still has jurisdiction of the action.

Although if the Act denied all remedy in a particular case, it might violate the due process clause of the Constitution,[28] the power to grant an injunction is not an inherent attribute of jurisdiction so as to render void a statute withdrawing such power.[29] Remedies other than injunction are still available if complainant desires to proceed. The objection that a specific case is not within the equitable jurisdiction does not go to the court's power to hear the case but merely concerns the merits of the case.[30]

Further insight as to the correct interpretation of the act is provided by a scrutiny of how courts regard erroneous decrees. The Supreme Court of Minnesota in construing the state anti-injunction

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28. See Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66L.Ed. 254 (1921).

29. Smith v. Apple, *supra*, note 12; Levering and Garrigues Co. v. Morrin, *supra*, note 24.

30. Di Giovanni v. Camden Fire Ins. Ass'n., 296 U.S. 64, 56 S.Ct. 1, 80 L.Ed. 47 (1935); Twist v. Prairie Oil and Gas Co., 274 U.S. 684, 47 S.Ct. 755, 71 L.Ed. 1297 (1927); Bien v. Robinson, 208 U.S. 423, 28 S.Ct. 385, 52 L.Ed. 559 (1908); Mutual Life Insur. Co. of New York v. Markowitz, 78 F(2d) 396 (C.C.A. 9th 1935), cert. den. 296 U.S. 625, 56 S. Ct. 148, 80 L.Ed. 444 (1935).

statute[31] substantially similar[32] to the Norris-LaGuardia Act refused to allow an injunction issued in violation of the statute to be attacked collaterally.[33] The United States District Court of New Jersey indicated the federal view three years earlier by refusing an employer's petition to remand the case to the state court, his contention being that the district court had been deprived of jurisdiction.[34]

It is submitted that the holding of the principal case is of questionable soundness. The increasing clashes between labor and capital prove the wisdom of allowing a non-resident of a state to have his cause with a resident thereof determined in the more nearly impartial atmosphere of the federal courts. To preclude such removal would defeat the purpose of Congress in recognizing diversity of citizenship as a ground for removal to the federal courts.[35] While undeniably the legislature may prevent removal by depriving the federal judiciary of jurisdiction to hear certain cases,[36] withdrawal of a single remedy is hardly the equivalent of taking away the power to adjudicate.

INJUNCTION — PROCESS — PERSONS CONCLUDED BY DECREE.— Complainant conducted baseball games in New Jersey. Some of its ticket sellers, members of the defendant union, went on strike, and on game days the strikers picketed complainant's ball park. Complainant filed its bill to restrain such picketing and the defend-

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31. Minn. Stat. (Mason Supp. 1936) Secs. 4260-1 to 15.

32. The above statute, in addition to conforming in all other respects, contains the word "jurisdiction."

33. Reid v. Independent Union of All Workers, *supra*, note 20. This case is noted in 36 MICH. L. REV. 1208 (1938) and a position taken in harmony with the present comment.

34. Miller Parlor Furniture Co. v. Furniture Workers I. U., 8 F. Supp. 209 (D. N. J. 1934) This case is noted in 34 COL. L. REV. 1553 (1934) and a position taken contra the present comment.

35. Pease v. Peck, 18 How. (U.S.) 595; Sias v. Johnson, 86 F (2d) 766 (C.C.A. 6th 1936).

36. Leather Mfrs. National Bank v. Cooper, 120 U.S. 778, 7 S. Ct. 777, 30 L. Ed. 816 (1887).

ants, the union, an officer of the union, and six pickets, were ordered to show cause why they should not be restrained. The order directed that service be made upon the union "by serving the same on one of its officers." The union is an unincorporated association with headquarters in New York and has no office in New Jersey. Service of a copy of the order was made at the New York office of the union on one of its officers. Service on the picket-defendants was made in New Jersey. The union appeared specially and moved to set aside the service of the order. *Held,* service on the union quashed. *Newark International Baseball Club, Inc., v. Theatrical Managers, Agents and Treasurers Union et al.,* 125 N. J. Eq. 575, 7 A. 2d 170 (Ch. 1939).

By the statute relating to suits against unincorporated associations, "all process may be served on the president or any other officer for the time being, or the agent, manager, or the person in charge of the business of such organization."[1] However a labor union is within the exception applied to suits in chancery against a "fraternal charitable or other organization not organized for pecuniary profit."[2] The statute is not governing in the instant case because profit earned by a member himself is not obtained by the association collectively. In New Jersey chancery assumes jurisdiction of suits instituted against labor unions by their common names[3] and is guided by general principles in the absence of a statute prescribing upon whom service of process should be made.

A prerequisite to the exercise of jurisdiction in an action in personam is service of process within the state[4] which not only confers jurisdiction on the court but also gives the association reasonable opportunity to appear and defend. The agent within the state in charge of the business which gives rise to the controversy is considered so to represent the association that suit against the association may be instituted by service upon him.[5] The activity of the defendant union

1. R. S. 1937, 2:78-1.

2. Ibid, 2:78-6.

3. Harris v. Geier, 112 N. J. Eq. 99, 164 A. 50 (Ch., 1932); Unkovich v. New York C. R. R., 114 N. J. Eq. 448, 168 A. 867 (Ch., 1933).

4. Elgart v. Mintz, 123 N. J. Eq. 404, 197 A. 747 (Ch., 1938).

5. Norton v. Berlin Iron Bridge Co., 51 N. J. L. 442, 17 A. 1079 (S. Ct., 1889).

giving rise to this litigation is picketing. The order to show cause required service on the union to be made by serving one of its officers. The only person served who was an officer, was served in New York. That service was ineffectual, therefore the direction of the order was not fulfilled.

The implication of such a decision is that a labor union may engage in unlawful acts in New Jersey, so long as its officers remain in New York, and thereby prevent the courts of New Jersey from assuming jurisdiction. While the holding is drastically limited, one can sympathize with the result as a practical method of handling the situation. If the phrase "by serving the same on one of its officers" had not been put into the order, service would have been effective if only made on the New Jersey pickets, acting as agents of the union for the purpose of receiving such service.

The individual pickets had supervision over the strike activity for the defendant union and the pickets are agents of the union for the purpose of service of process. Service of process upon one whose ostensible relationship or connection with a corporation is such as to bind the corporation as to third persons, under the doctrine of agency by estoppel, is a sufficient service to give jurisdiction over the principal for whom the person served acts.[6] The appointment of an agent may be established by implication of law arising out of conduct of the parties.[7] An agency relation may even arise as a legal result from facts, although contrary to the avowed intention of the parties.[8] However, the agent must be one whose connection with the principal is such that it would be implied that he had authority to receive service of process, and would be likely to inform the party, against whom the writ is directed, of the service.

At common law, service was required on all the members of an association in order to bring them into court. But where in accordance with the equitable doctrine of representation, a part of the mem-

6. Bass v. American Products Export & Import Corporation, 117 S. E. 594 (So. Car., 1923).

7. Italian-Swiss Agricultural Colony v. Pease, 194 Ill. 98, 62 N. E. 317 (1901).

8. United States v. American Bell Telephone Co., 29 F. 17 (1886).

bers of an unincorporated society defend for the benefit of all, service on a part, acting for all as well as for themselves, is sufficient.[9] These pickets are members of the union and may be considered as representatives of the union. Where the circumstances justify an injunction against picketing, the writ may issue against the persons who are committing the acts complained of and this may include the members of the union, or their agents, or persons who aid them in their unlawful conduct.[10] It is no objection to a suit against an unincorporated trade union that it is a foreign association. Service on an agent of a foreign unincorporated union in the state in the interest of the union and its members, is a valid service on such union.[11] The court may issue an injunction against the members of a voluntary association although all are not served with process, or brought before the court, where the memberhip is large and sufficient members are brought before the court to represent the various interests.[12] Service upon an unincorporated association may be made upon any officer or agent whose relation to the association is such as to give the officer or agent a representative character respecting the litigation contemplated.[13]

It is unnecessary for a mode of making service to be pointed out in the order, or for a restriction to be imposed that service be made on an officer. Any preliminary injunction that may be advised can be so framed that it will restrain not only the defendant organization, but also the individual defendants and all others associated with them in committing the acts enjoined.[14] When associations send their of-

9. West v. Baltimore & O. R. Co., et al., 103 W. Va. 417, 137 S. E. 654 (1927); Johnson v Albritton, 101 Fla. 1285, 134 So. 563 (1931).

10. Jones v. Maher, 62 N. Y. Misc. 388 (1909); St. Germain v. Bakery and Confectionery Workers' Union No. 9 of Seattle, et al., 97 Wash. 252, 166 Pac. 665 (1917).

11. Pacific Typesetting Co. v. International Typographical Union, et al., 125 Wash. 273, 216 Pac. 358 (1923).

12. Evenson et al., v. Spaulding et al., 150 F. 517 (1907).

13. Saunders v. Adams Ex. Co., 71 N. J. L. 520, 58 A. 1101 (S. Ct., 1904).

14. Baldwin Lumber Co. v. Brotherhood, 91 N. J. Eq. 240, 109 A. 147 (Ch., 1920).

ficers and agents into another state, and there establish a business, the associations are liable to be brought into the courts of such state by service of process upon their officers and agents therein.[15]

It is submitted that service on defendant labor union can be accomplished by service of process upon its pickets. Defendant union is an association that may be considered somewhere between a corporation and a partnership. If akin to a corporation, any ability to proceed against and to exercise jurisdiction is effective over the body. If described as a partnership, jurisdiction over the picket-defendants served in New Jersey should bind all the members of their union in an action brought in New Jersey against the union. No distinction should be drawn as did the Vice Chancellor between important "partners" who direct the picketing, and unimportant "partners" who do the picketing.

WILLS—LAPSED LEGACIES AND DEVISES—EFFECT OF RESIDUARY PROVISIONS.—Testatrix by will devised and bequeathed particular legacies and devised to various beneficiaries and then gave all the rest, residue, and remainder of her estate to eleven named legatees.[1] One of the eleven legatees named in the residuary clause, who was also given specific legacies earlier in the will predeceased the testatrix; and after the death of the residuary legatee, the surviving testatrix executed a codicil, which revoked the particular legacies given the deceased legatee, and ratified and confirmed the will previously exe-

15. Moulin v. Insurance Co., 24 N. J. L. 222 (S. Ct., 1853).

1. The seventh paragraph of the will reads as follows: "All the rest, residue, and remainder of my Estate of every kind and nature and wheresoever situate I give, devise and bequeath to the above named----(named are three individuals and eight institutions)---to be equally divided between them the shares or portions of the various corporations and institutions above named to be added to the endowment funds of said institutions the income only to be applied to the uses and purposes of said institutions."

cuted, but made no mention of the residuary bequest.[2] The executors of the will bring suit to obtain a direction of the Court for distribution of the estate. *Held:* The gift to the residuary legatee lapsed and the one-eleventh part of the residue devolved upon the only heir and next to kin of the testatrix. *Rippel v. King*, 126 N . J. Eq. 297, 8 At. 2nd, 777 (Ch. 1939).

The decision is a present expression of the law of New Jersey and a majority of the states on lapsed testamentary gifts. Where a legatee or devisee predeceases the testator or testatrix the bequest or devise lapses if not prevented by a lapse statute.[3] The question arises as to what disposition is to be made of the property and who is entitled to the subject matter of the gift; the persons named in the residuary clause or the heirs at law or the next of kin of the testator. The answer to this question depends upon whether the lapsed legacy or devise involved is a particular devise or legacy or whether it is a share of the residue, whether the gifts are joint or to named individuals severally, as tenants in common, whether the gift is to a class, and whether the testator by the will shows an intent to have the lapsed legacy or devise go to certain named individuals or group of individuals.

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2. The following is the codicil to the will:

"First. I cancel and revoke the legacy of Fifteen Thousand Dollars given to—(the deceased legatee)—in the fourth paragraph of my said Will and I give and bequeath the sum of fifteen thousand dollars to ..... (a person named); and I cancel and revoke the legacy of all the balance of my clothing, jewelry, household goods, linens, furniture, rugs, silver and glassware and purely personal belongings to ..... (the deceased legatee) ..... in said fourth paragraph and I give and bequeath said balance of my clothing jewelry, household goods, linens, furniture, rugs, silver and glassware and purely personal belongings to said ..... (the person named above).

"Second. In all other respects I do ratify and confirm my aforesaid will, and the codicil thereto dated April 28, 1925."

3. The lapse statute in New Jersey is found in R. S. 1937 3:2-18. In our discussion we are not concerned with this statute because the deceased legatee was only a friend of the surviving testatrix and is not within the statute.

A lapsed or void legacy or devise in a will containing no residuary gift, will go to the heirs or next of kin of the testator as in the cases of intestacy, unless there be a clause in the will covering the lapse.[4]

A lapsed or void legacy or devise will be included in the residue of the will if the will contains a general residuary clause, unless it appears from the will that it was the intention of the testator that under such circumstances the next of kin should take as in the case of intestacy.[5]

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4. 69 C. J. 1067 Sec. 2301; Dildine v. Dildine, 32 N. J. Eq. 78, (Ch. 1880). Shellenger's Ex'r. v. Shellenger's Ex'r. 32 N. J. Eq. 659 (Ch. 1880). Mulford v. Mulford, 42 N. J. Eq. 68, 6 Atl. 609 (Ch., 1886). Voorhees v. Singer, 73 N. J. Eq. 532, 68 A 217 (Ch., 1907). McCran v. Kay, 93 Eq. 352, 115 A 649 (Ch., 1921). Waltzinger, *New Jersey Probate Practice in New Jersey* (1931), Vol. 1, P. 255.

5. Allen v. Moore, 86 N. J. Eq. 357, 98 Atl. 420, 87 N. J. Eq. 176 (Ch., 1916); aff'd. 87 N. J. Eq. 365, 99 Atl. 860 (E & A 1917). Molineaux v. Raynolds, 55 N. J. Eq. 1870, 30 Atl. 276 (Ch. 1896); Sandford v. Blake, 45 N. J. Eq. 247, 17 Atl. 812 (E & A, 1889); Barnet v. Barnet, 40 N. J. Eq. 380, 3 Atl. 401, (Ch., 1885); Huston v. Read, 32 N. J. Eq. 591, (Ch., 1880); Garthwaite v. Lewis, 25 N. J. Eq. 351, (Ch., 1874); Macknet v. Macknet, 24 N. J. Eq. 277, (Ch., 1873); Shreve v. Shreve, 17 N. J. Eq. 487, (E & A, 1864). In Tindall's Executors v. Tindall, 24 N. J. Eq. 512, (E & A, 1873), it was held that a residuary legatee was entitled as well to a residue caused by a lapsed legacy, or an invalid or illegal disposition, as to what remains after the payments of debts and legacies. 69 C. J. 1072, Sec. 2310. Lodge, Kocher's Decedent's Estates in New Jersey, (2nd Edition, 1939), Sec. 100.

At Common Law there was a distinction between lapsed legacies and lapsed devises. A lapsed devise was held to have descended to the heirs at law, unless there was a provision that it be included in the residue; personal property was held to pass to the residue without a provision in the will. The reason assigned for this difference is that personal property was a bequest which operated at the time of death, while a devise operated only on the land of which the testator was seized, and there was no presumption that he intended to devise by a residuary clause. Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58, (Conn., 1826). Clapp, Wills and Administration in New Jersey (1937) Sec. 137. In most states today the law respecting the devolution of lapsed legacies and lapsed devises is the same. Moffett v. Elmendorf, 152 N. Y. 475, 40 N. E. 845, 57 Am St. Rep. 529 (1897). Smith v. Curtis, 29 N. J. L. 345, (Sup. Ct., 1862) abolished in New Jersey the distinction

Where the lapsed legacies are shares of the residue, in the absence of an intention to the contrary, the residue will not include the lapsed legacy of one of the legatees but such lapsed legacy is distributed among the heirs or next of kin of the testator as intestate property.[6]

Where it is the intention of the testator to distribute the residue to members of a class, the testator is presumed to intend that the persons who constitute the class shall take, and hence a lapsed legacy of one who predeceases the testator, passes into the residue and intestacy is avoided. This is due to the fact that the members of the class are determined at the death of the testator or whenever the gift vests.[7] The will in the principal case did not create a gift to a class because the gifts in severalty were to named individuals who were not uncertain in number at the time of the making of the

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between lapsed legacies and lapsed devises. It was in this case held that a lapsed devise passed into the residue.

Real property acquired by the testator after the execution of the will also passes to the residuary estate, unless a contrary intention appears on the face of the will. R. S. 1937 3:2-14; Molineaux v. Raynolds, supra.

A residuary legatee to be entitled to the lapsed legacy or lapsed devise must be a general legatee or devisee under the residuary clause. Any legatee or devisee limited to a particular estate in the residue, is excluded from taking a lapsed legacy or devise. Smith v. Curtis, supra; Tindall's Executors v. Tindall, supra.

6. Earthwaite's Ex'r. v. Lewis, note 5, supra; Ward v. Dodd, 41 N. J. Eq. 414, 5 Atl. 650 (Ch., 1886); Canfield v. Canfield, 62 N. J. Eq. 578, 50 Atl. 471 (Ch., 1901); Langstroth v. Golding, 41 N. J. Eq. 49, 73 Atl. 151 (Ch., 1886); Collins v. Bergen, 42 N. J. Eq. 57, 6 Atl. 284 (Ch., 1886); Aiken v. Sharp, 93 N. J. Eq. 336, 115 A 912 (Ch., 1922); O'Donnell v. Jackson, 102 N. J. Eq. 470, 141 A 450 (Ch., 1928); Stenneck v. Kolb, 91 N. J. Eq. 382, 111 Atl. 277 (Ch., 1920).

In some jurisdictions where a legatee's share of the residuary lapses, it passes into the residue, and the whole of it is divided among the remaining residuary legatees. This is the view urged by the residuary legatees in the principal case, but it is the minority view. 69 C J 1075, Sec. 2310; Corbett v. Skaggs, 111 Kan 380, 207 Pac. 28, A L R 1230, (Kansas Sup. Ct., 1922); Allen v. Moore, supra, note 5.

7. Gordon v. Jackson, 58 N. J. Eq. 166, 43 Atl. 98 (Ch., 1899). Trenton Trust and Safe Deposit Co. v. Sibbits, 62 N. J. Eq. 131, 49 Atl. 530 (Ch., 1901). Rowley v. Currie, 94 N. J. Eq. 606, 120 Atl. 653 (Ch., 1923). Forshee v. Dowdney, 101 N. J. Eq. 446, 139 Atl. 321 (Ch., 1927), aff'd 103 N. J. Eq. 374, 143 Atl. 917, (E. & A., 1928).

will.[8] For this reason the remaining residuary legatees cannot sustain their contention that the lapsed legacy devolved upon them because of the rule of class gifts or because a joint tenancy was intended by the gift.[9] The policy of disfavoring intestacy is not sufficient to transform a gift to named individuals certain in number to a class gift.[10]

In the principal case the remaining residuary legatees claim the one eleventh share of the legatee who predeceased the testator and

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8. Conant v. Bassett 52 N. J. Eq. 12 28, Atl. 1047, (Ch., 1893); Dildine v. Dildine, supra note 4; Gordon v. Jackson ,supra note 7; Security Trust Co. v. Lovett, 78 N. J. Eq. 445, 79 Atl. 616, (Ch., 1911); Pennsylvania Co. v. Riley, 89 N. J. Eq. 252, 104 Atl. 225, (Ch., 1918); Stetson v. Kinch, 92 N. J. Eq. 362, 112 Atl. 847, (Sup. Ct., 1921); Redmond v. Gummere, 94 N. J. Eq. 216, 119 Atl. 631 (E. & A., 1922); Traverse v. Traverso, 99 N. J. Eq. 514, 133 Atl. 705 (Ch., 1926); Traverso v. McMillin, 101 N. J. Eq. 308, 137 Atl. 919 (E. & A., 1927). United States Trust Co. v. Jamison, 105 N. J. Eq. 418, 148 Atl. 398, (Ch., 1929). See Cooley—*What Constitutes a Gift to a Class,* 49 Harv. L. Rev. 924.

A class gift as defined by Jarman is "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift (referring to the time the will was made) to be ascertained at a future time who are to take in equal or some other definite proportion, the share of each being dependant for its amount upon the actual number." This definition of a class gift was adopted in Supp v. Second National Bank & Trust Co., 98 N. J. Eq. 242, 130 Atl. 549 (Ch., 1925). In re Helme's Estate, 95 N. J. Eq. 197, 123 Atl. 43, (Prerog. Ct., 1923). Clark v. Morehouse, 74 N. J. Eq. 658, 70 Atl. 307, (Ch., 1908).

A class gift is determined by the testator's intention, and the courts have indulged in certain presumption to determine the testator's intent. Gifts to persons named individually as by name or description, even though they constitute a class, indicate the testator's intention to give them only as individuals, and if the persons named are to take in equal shares, a tenancy in common is created, unless by the will it is clear that the testator intended that it should be a joint tenancy. Elizabeth Trust Co. v. Clark, 96 N. J. Eq. 550, 126 Atl. 604, (Ch., 1924). In re Cella's Estate, 108 N. J. Eq. 496, 155 Atl. 263, (Prerog. Ct., 1931), aff'd, 111 N. J. Eq. 356, 162 Atl. 593 (E. & A., 1932). Woods v. Woods, 105 N. J. Eq. 205, 147 Atl. 506 (E. & A., 1929). New Jersey Title Guarantee & Trust Co. v. Elsworth, 108 N. J. Eq. 229, 154 Atl. 602, (Ch., 1931).

9. A legacy to two or more persons by name without indicating an intention to confer distinct interest, creates a joint tenancy with rights of survivorship. Noe's Adm'r. v. Miller's Ex'r., 31 N. J. Eq. 234; Gordon v. Jackson, 58 N. J. Eq. 166.

There is a difference between a joint tenancy and a class gift. See: Clapp, Wills and Administration in New Jersey (1937) Par. 114. There can be a gift to

argue that the testatrix by the use of the residuary clause in the will intended that they should take and divide the whole residue and that the execution of the codicil to the will manifested an intent to prevent intestacy. This contention while superficially appearing sound is not legally tenable.

Where there is a residuary clause and the testator or testatrix survives one of the legatees other than the residuary legatees the share is included in the residue because of the presumption that the testator did not intend to die intestate and it was his intention to have the share go to the residuary beneficiaries if the gift could not go to the stated legatees or devisees.[11] If the will does not contain a residuary clause or if the lapse is in the residuary clause there is no such intent and the testator must declare such intent because the rules of construction do not permit a presumption of such intention unless the will contains a provision for substitution.

The will contains no provision for substitution or succession. The testatrix if she desired could have prevented the testamentary

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a class as tenants in common. Gordon v. Jackson, supra. Potter v. Nixon, 81 N. J. Eq. 338, 86 Atl. 444.

The court favors a tenancy in common in preference to a joint tenancy and seeks to rebut the presumption that a gift to persons individually or as a class creates a joint tenancy. Noe's Adm'r. v. Miller's Ex'r., supra; Capp, Wills and Administration in New Jersey, (1937) Par. 157.

In Damson v. Mast, 121 N. J. Eq. 489, 1911 A. 467, (Ch., 1939) it was that a gift of a portion of the residuary estate to the husband and wife, is a gift severally as tenants in common and if the wife predeceases the husband, the gift lapses. If a joint estate or an estate by entirety were created the gift would have lapsed. Hence, this is one situation where property if personality would lapse, yet if the property were real property the share would not lapse because where there is an estate by the entirety the survivor takes. Compare this result with note 5, supra.

10. See Dildine v. Dildine, note 4, supra.

11. Sanford v. Blake, supra note 5.

In Allen v. Moore, supra note 5, it was held that a testator evidences his intention not to die intestate as to any of his personal property, by incorporating in his will a general residuary clause, and it is presumed that he took the particular legacy from the residuary legateee only for the benefit of that particular legatee. The reason only a bequest goes to the residuary clause is that it will speak at the death of the testator when he is presumed to know of the death of the legatee and he is presumed to have intended to include the subject of the legacy in the residue.

gift from lapsing by expressing such intent by a provision substituting another legatee or devisee in case of the death of the first donee prior to testatrix.[12]

Where there is no residuary clause contained in a will or if the lapse is in the residuary clause, there is no such intent to have the residuary legatees take, because of the rules of construction do not permit a presumption of such an intention unless the will provides for distribution of the lapsed share among the remaining residuary legatees.[13] A general residuary clause in a will is no expression of an intent on the part of the testator or testatrix to have a lapsed share of the residue go to the remaining legatees in the clause; nor is a codicil executed after the death of one of the legatees sufficient to prevent intestacy where there is no provision for any unwilled estate.[14]

HABEAS CORPUS—DETERMINATION WHERE SENTENCING COURT LACKED JURISDICTION. — Defendants applied for a writ of habeas corpus after four and a half years had elapsed from the date of the conviction on a murder charge. The defendants maintain that the sentencing court did not have jurisdiction to pronounce sentence because the verdict finding the applicants guilty was rendered by an eleven man jury instead of the usual twelve. *Held*: Petition denied. The defendants had not shown that they were entitled to the issuance of the writ by merely stating the fact of an irregular jury. *Ex parte Tremper et al.* 126 N. J. Eq. 276, 8 A 2d 279 (Ch. 1939).

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12. 69 C. J. 1059, Par. 2276. In Varick v. Smith, 69 N. J. Eq. 505, 61 Atl. 151 (Ch., 1905) it was held that a provision that the issue of the legatee should take the share which his parent would have been entitled to if living, the issue was entitled to the share because this was a proper substitution.

13. See cases cited, note 6 supra.

14. Security Trust Co. v. Lovett, note 8 supra.

Allen v. Moore, note 5, supra.

In Dildine v. Dildine note 4, supra, the will was executed after the death of several legatees and it was held that the gifts lapsed; no words of substitution being found in the will.

Habeas corpus is a high prerogative writ, issued not as an ordinary writ of strict right, but at the discretion of the court, and becomes one of right only when the applicant shows himself entitled to it.[1] The writ of habeas corpus lies where the imprisonment is illegal[2] and no other remedy is available to secure a release therefrom.[3]

The court in the main case, used its discretion in deciding that the defendants were no longer entitled to consideration after so many years had elapsed from the date of the conviction. Since the defendants could have appealed the verdict if they had acted within the statutory requirement of one year,[4] a doctrine of laches could be applied.

While it is indeed true that habeas corpus is not a corrective remedy[5] and that the defendants can not use the writ for a review of the case,[5] the court, it is submitted, overlooked the nature of the error made in the trial court, namely the jury composed only of 11 jurors.

The Constitution of New Jersey[6] states that the right of trial by jury shall remain inviolate. This means, obviously, the common law jury. The essentials of a jury at common law are that it should be composed of twelve men.[7] In a review of a long line of cases under early common law it can clearly be seen that the only recognized procedure for the trial of the guilt of the accused under an indictment of felony and a plea of not guilty was before a jury of twelve men.[8]

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1. In re Davis, 107 N. J. Eq. 160, 152 Atl. 188 (Ch., 1930); Ex parte Thompson, 85 N. J. Eq. 221, 96 Atl. 102 (Ch., 1905).

2. Henry v. Henkel, 235 U. S. 219, 35 S. Ct. 54, 59 L. ed. 203 (1914).

3. People v. City Prison, 202 N. Y. 138, 95 N. E. 729 (1911).

4. R. S. 1937, 2:195-5, N. J. S. A. 2:195-5.

5. In re Kelly, 123 N. J. Eq. 489, 198 Atl. 203 (Ch., 1938).

6. Article 1, Section 7.

7. Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 A. S. R. 153 (1889); People v. Cosmo, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. 967 (1912).

8. 4 Bl. Comm. 349; 1 Chit. Crim. Law, 505; 2 Hale, P. C. 161; 5 Boc. Abs. tit. "Junis", A; 2 Benn & H. Lead. Crim. Cas. 327.

The defendants, then, in the case under review, had a right to be tried by twelve men. The question arises now as to whether or not this right could be waived. It is clear that the defendants acted with the advice of counsel and allowed a lesser number of men in the jury than prescribed by law. Is such a waiver a bar to later objections by the convicted defendants? The court held in the affirmative.

In civil cases it is well recognized that the number of jurors can be waived by both parties.[9] Such an opinion as to criminal cases is not shared universally. A defendant, indicted for a felony cannot be tried even by his own consent by a jury of less than twelve men.[10] Following this rule it has been held that where it was agreed in open court by the parties in a homicide trial that one of the jurors be excused, a verdict thereafter returned by the eleven remaining jurors could not be upheld.[11] Where this is the rule, it is obvious that in a trial for a capital felony the prisoner is not bound by his consent to be tried by less than twelve jurors.[12] A contrary opinion is expressed in other jurisdictions.[13]

The rationale in the defense of the first position, namely that there should be no waiver of the formality of the jury, is that the constitution contemplates a jury of twelve men and that a waiver would

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9. Young v. Otto, 57 Minn. 307, 59 N. W. 199 (1894); Woodruff v. Barr, 121 Ark. 266, 180 S. W. 976 (1915).

10. State v. Mansfield, 41 Mo. 470 (1867); Territory v. Ortiz, 8 N. M. 154, 42 Pac. 87 (1895); Thomson v. Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061 (1898); Harris v. People, supra note 7; State v. Ned., 30 So. 126, 54 L. R. A. 933 (1901); Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116 (1839); State v. Rogers, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38 (1913) (holding that one who pleads "not guilty" to an accusation of murder is entitled to be tried by a jury of twelve men, which he cannot waive even by consenting to proceed with eleven in the jury box when one of the jurors is found to be mentally unfit).

11. Jones v. State, 52 Tex. Crim. 303, 106 S. W. 345, 124 A. S. R. 1097 (1907).

12. Territory v. Ah Wah, 4 Mont. 149, 1 Pac. 732, 47 Am. Rep. 341 (1881).

13. State v. Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148 (1879). Here it was held that conviction with sentence of life imprisonment was not erroneous because one of the jurors becoming ill, prisoner waived a jury of twelve men, and agreed that the case be submitted to the remaining eleven, by whom the verdict was returned.

allow the parties to create a new tribunal unknown to the law. This would constitute a dangerous process, for if one man on the jury could be excused, why not ten, or the whole twelve?[14]

Granting that the defendants were not bound by their waiver, it still remains an open question as to whether this error effects their right to a writ of habeas corpus. It is now generally conceded that in order to render a judgment immune from attack, the court must have had not only jurisdiction of the subject matter and person of the defendant, but also authority to render the particular judgment in question, and if any of these elements are wanting the judgment is fatally defective and open to collateral attack. Jurisdiction to render the particular sentence imposed is deemed as essential to its validity as jurisdiction of the person or subject matter.[15] A judgment or sentence of an entirely different character from that authorized by law is considered void and one restrained of his liberty thereunder will be discharged on habeas corpus.[16]

There are many decisions which clearly hold that the competency of the accused to waive a jury trial and the legality of his conviction in case of such waiver may be tested in habeas corpus proceedings, and that if it found that the prisoner could not legally waive a trial by jury and that the court had no jurisdiction to try him, the judgment would be void and the prisoner entitled to his discharge.[17]

It might well be noted that all decisions bearing on the above-mentioned point use the word *void* in referring to the result of such conviction. The courts have gone so far as to hold that in a situation of improper jury treatment, the court giving sentence, gave it without jurisdiction.[18]

The court, in the main case, gave little regard to this phase, a highly important factor, it might be noted, in the allowance or disal-

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14. See 35 Corpus Juris 200.

15. Neilsen, Petitioner, 131 U. S. 176 9 S. Ct. 672, 33 L. ed. 118 (1889); in re Mills, 135 U. S. 263, 10 S. Ct. 762, 34 L. ed. 107 (1890); in re Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149 (1894);

16. Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831 (1899).

17. In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285, 87 A. S. R. 188 (1885).

18. State v. Bottey, 32 R. I. 475 80 Atl. 10, (Ch., 1911).

lowance of the writ. In the final analysis the jurisdiction of a court or judge to render a judgment is always a proper subject of inquiry on habeas corpus.[19]

There is no law which authorizes the court to sit as the substitute of a jury, if the court attempts to do so, the action is nugatory A defendant cannot confer jurisdiction on a court by waiver; jurisdiction is derived from law and not from consent of parties.[20] By a fair analogy, a trial by a less number of men than twelve acting as a jury is void and the verdict and judgment founded on it are void, and the prisoner is in the same position as if he had not been tried.[21]

MORTGAGES—FORECLOSURE OF EASEMENT LIENS—JURISDICTION. —In a recent case[1] the court was presented with essentially this problem: Upon the successive mortgaging of parcels of property contiguous with each other and having common ownership can there be created an implied-in-law easement? The court apparently did not intend to decide this question, but inasmuch as it refused to strike the bill, we believe that it has inadvertently held that an easement can be created under such circumstances.

We have reached contrary conclusions to those of the court upon three different grounds: (1.) We agree with the defendant's contention that, as a matter of law, the mere giving of a mortgage is not sufficient separation of title to permit creation of an easement on the mortgaged property, in New Jersey. (2) Even if the mortgage were sufficient to separate title, the easement so created would have

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19. Ex parte Lange, 18 Wall. 163, 21 L. ed. 872 (1874); Ex parte Parks, 93 U. S. 18, 23 L. ed. 787 (1876); Ex parte Bigelow, 113 U. S. 328, 5 S. Ct. 542, 28 L. ed. 1005 (1885).

20. Harris v. People, supra.

21. Ex parte Scott, 70 Miss. 247, 11 So. 657 (1892).

1. Provident Mutual Life Insurance Co. of Philadelphia v. Somers L. Doughty 126 N.J.E. 262. 8 At 2d 722 (Ch. 1939). The property in question is situated at the southwesterly line of Atlantic and Indiana Aves. Atlantic City, N. J. Doughty is the owner and mortgagor. Prior to the mortgages he erected an outside stairway on

had to arise by implied reservation and, as a matter of law, such type of easement could not have arisen under the allegations of the bill. (This point was apparently not raised during the hearing). (3) The court stated that under the authority of Hart v. Leonard[2] it had no jurisdiction. Our examination of the issue leads us to believe Hart v. Leonard has no application to the situation presented by this case. (This point was apparently not raised either).

Can the giving of a mortgage create a severance of title? The answer is yes and no. Yes, under the rule of a self-confessed "title" theory state such as Massachusetts.[3] No, under the rule of the "lien" theory state of New York[4] where mortgages are considered merely debt securities.

In the Massachusetts case[5] the suit was to enjoin the use of a passageway and stairs in one building for the beneft of an adjacent building. The common owner of both parcels of real estate executed what were in effect simultaneous mortgages. Prior to that time he had been using openly and continuously, and as a matter of necessity, doorways between the partition walls of the two buildings. There was apparently no other means of access. It was held that an easement arose immediately upon the execution of the mortgages. The court stated:

> "In Massachusetts, a mortgage in real estate conveys a title in fee, which title continues in the mortgagee until the stated condition has been fulfilled. After giving a mortgage deed, the

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a building on property #1. Thereafter he mortgaged property #2 (in 1935) which is directly south and is contiguous with property #1 stairway of #1 projects over #2. In 1936 he mortgaged #1. The mortgagee of #1 in foreclosing his mortgage, joined mortgagee of #2 apparently on the theory that property #2 is burdened with an easement in favor of property #1. Mortgagee of #2 moved to strike the bill on the grounds of (1) common ownership of both lands in the mortgagor making the creation of an easement impossible; and (2) that complainant was seeking to establish a legal easement not cognizable in Equity. Motion to strike denied.

2. Hart v. Leonard, 42 N.J.Eq. 416, 7 At 865 (E & A 1886)

3. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp. 284 Mass. 100, 187 N.E. 227 (1933).

4. Mc Cash v. Hildansid Realty Corp. 257 N. Y. S. 750. (1931).

5. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp. supra. note 3.

> mortgagor cannot create any easement in the land conveyed and thus diminish the estate granted but at the time of the grant by the mortgage deed, an easement by implication may be created, and foreclosure of such mortgage passes a right of easement so created to those deriving title to the premises through foreclosure. . . . The mere fact that a severance of title is made by simultaneous instruments of grant does not prevent the implication of any easement. . . . When a mortgage is foreclosed what was originally a defeasible estate becomes absolute and any easement or privilege annexed to the defeasible estate passes as if the original conveyance had been absolute."

In the New York case[6] the action was to foreclose a mortgage. The complainant originally owned three contiguous parcels of land, "A" "B" and "C". He erected two dwellings on parcel "A". He then erected a six family apartment with a ground floor store on parcel "C" in such fashion as to block egreses from the dwellings on parcel "A" except over parcel "B" which all during the time of common ownership was used continuously for that purpose. Mortgages were thereafter created and part of the defense was that there was an easement over land "B" in favor of property "A". It was held on an appeal from a refusal of a motion to strike the defense that property "B" was not burdened with an easement in favor of property "A". The lower court had stated:[7]

> "The giving of the mortgage did not change the title. The mortagee had no legal estate in parcel "B" by reason of the mortgage."

The court then proceeded to hold that, as under the New York rulings the purchaser took all the rights, titles and interests of both mortgagor and mortgagee as of the time of the creation of the mortgage the effect that was to be given to the transaction was the same as if there had been a conveyance as of that date and that therefore the purchaser under the foreclosure would be entitled to take an easement by way of necessity in favor of property "A" over property "B". The upper court[8] reversed the legal conclusion of the lower court as

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6. Mc Cash v. Hildansid Realty Corp. supra. note 4.
7. Mc Cash v. Hildansid Realty Corp. 252 N. Y. S. 383.

to the effect to be given and held that there could be no easement. The court stated:

> "While title to the mortgaged premises remain in the mortgagor, a foreclosure and sale in practical effect operates to extinguish the defeasance and the purchaser takes title as of the time the mortgage lien was created. At that time no such easement existed." (A motion for a rehearing was later denied).[9]

We have presented in detail the Massachusetts and New York holdings so as to give a background for the legal issue to be decided by the New Jersey court. The problem outlines in sharp distinction the exactly opposite results derived from practically analogous situations by two jurisdictions applying contrasting rules of law. What rule should New Jersey apply?

The judicial philosophy underlying the decided cases in New Jersey in the field of mortgage law, and the expressions of opinion of eminent judges in deciding these cases during the past 100 years seems to the writer to admit of but one answer. It is true that in the totality of this phase of New Jersey law, the cases indicate a tincture of hybridism, as for example in the cases of the statute of frauds[10] and in strict foreclosure.[11] One cannot help but be impressed, however, when reviewing New Jersey case law, with the holdings on the "title"

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8. Mc Cash v. Hildansid Realty Corp. supra. note 4.

9. Mc Cash v. Hildansid Realty Corp. 258 N. Y. S. 1040.

10. Rutherford Nat'l. Bank v. Bogle 114 N. J. Eq. 371 169 AT180 (1933 ch.) A provision in a will charging lands with the payment of certain bequestsor legacies imposes an equitable lien thereon. An agreement to give a mortgage on one's share of his estate under his father's will creates an equitable mortgage thereon. A mortgage is a conveyance of interest within the N. J. Statute of Frauds. An agreement to give a mortgage is likewise within the statute and is unenforceable if not in writing unless there has been sufficient part performance as to take it out of the statute. But the Statute of Frauds is a personal defense and is available only to him sought to be charged. Agreement for a mortgage on lands is not a mere personal contract but effects the realty and is subject to specific performance.

11. Champion v. Hinkle, 45 Eq. 162 16 Atl 701, (E & A 1888). In a strict foreclosure at common law, the decree simply cut off the equity of redemption and foreclosed the mortgagor from redeeming his estate by payment of the mortgage debt; and the estate of the mortgagee which in its inception was conditional and defeasable became thereby absolute. Mortgagee thereafter held as if the original estate

theory being to a large percentage procedural while substantive law has been overwhelmingly "lien" theory. It is to be noted, too, that this "hybrid" feature permits of more flexible treatment of difficult problems without requiring those tenuous distinctions that give an impression of unreality to the law. This flexibility we believe to be distinctly superior to the more rigid formulas of our sister states of Massachusetts and New York.

There has been no attempt in this article to give a complete and comparative resume of the New Jersey judicial decisions in the field of mortgage law. The opinions and citations hereinafter to be given are intended primarily to indicate the trend of the judicial approach as to what constitutes a mortgage, the rights relinquished by the mortgagor, and those gained by the mortgagee in various types of situations.

The New Jersey courts have had this to say about the nature of a mortgage:

(1) 1832. Whenever it can be clearly shown to be the intentions of the parties that real estate, when conveyed, shall be the subject of redemption, it is considered as a mere security and the right of redemption cannot be confined to a limited time or to a limited class of persons. And once a mortgage always a mortgage.[12]

(2) 1846. A mortgagee has but a lien for his security at the present day in N. J. The freehold is in the mortgagor who may even maintain trespass or ejectment against the mortgagee.[13]

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had never been subject to defeasance. . . In a suit by a mortgagee to enforce his mortgage, whether by scire facias or by a bill for foreclosure and sale, a purchaser at the sale of the mortgaged premises takes the place of the mortgagee in proceedings in strict foreclosure at common law. His title relates back to the time of the execution of the mortgage. He succeeds as well to the title and estate acquired by the mortgagee by delivery of the mortgage deed as to the estate that the mortgagor had at the time of the execution of the mortgage.

12. Yule et ux v. Richards et al, 1 N. J. Eq. 534 (Ch. 1832). Holding: Mortgagee in possession cannot commit waste.

13. Sanderson v. Price, 21 N. J. L 637 (E & A 1846). As a mortgagee has but a lien for the security of his money, he cannot recover possession by

(3) 1858. The mortgagee of one holding an executory contract to purchase may redeem if the mortgagor (grantor) refuses to fulfill the agreement of purchase.[14]

(4) 1861. A deed of conveyance, absolute in terms, given to secure a loan is a mortgage, and the right of redemption exists although the money is not paid at the time agreed upon.[15]

(5) 1869. The prevailing doctrine in the courts of law as well as in the courts of equity is to consider a mortgage merely ancillary to the debt and to hold that the estate of the mortgagee is annihilated by the extinguishment of the debt.[16]

(6) 1883. A grantee holding under a provision that his grant was not to be alienated within lifetime of a named party gave a valid mortgage lien on his interest.[17]

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ejectment until the day of payment is past. . . The existance of a mortgage is no breach of a covenant of seisin. . . The mortgagee cannot maintain an action for nuisance nor recover damages but from the time he takes actual possession of the mortgaged premises. . . A tenant subsequent to the mortgage has no privity with the mortgagee and may be treated as a trespasser and removed by ejectment. . . He may, however, attorn to the mortgagee and thereby become his tenant. Payment of rent to the mortgagee will then become agood defense to an action by the mortgagor.

14. Sinclair & Rose, v. Armitage et al, 12 N. J. Eq. 174 (Ch. 1858). A person who has gone into real estate under a parole agreement to purchase has such interest in the property as is capable of being mortgaged. The mortgagee has the right if his mortgagor refuses to fulfill the agreement of purchase, himself to assume his position and redeem the property.

15. Panderhaze v. Hugues, 13 N. J. Eq. 244, see also 13 N. J. Eq. 410 (same case) (Ch. 1861).

16. Shields v. Lozear, 34 N. J. L. 496 (E & A 1869).

17. Snyder v. Ackerman, 37 N. J. Eq. 442, (Ch. 1883). The land was conveyed in fee with the provision that the grantee did not have the right to sell or dispose of the land during the lifetime of named parties. The grantee mortgaged the land during the lifetime of named parties. HELD: the mortgage was a valid lien; that the grantee neither sold or disposed of property, but mortgaged it, pledged his interest for payment of the debt. Though unable to sell or dispose of the land in the lifetime of the parties named he yet had such interest as he might thus pledge.

(7) 1893. The underlying principle is that the mortgage is a mere incident to the debt which it is intended to secure and a defense to the debt is a defense to the mortgage.[18]

(8) 1891. The mortgage cannot be conveyed without the debt; if done so by deed; the deed would be a nullity.[19]

(9) 1919. The common law rule that a mortgage created a defeasible estate in fee was not adopted by the N. J. courts.[20]

(10) 1933. The continued existence of the debt secured is the birthmark of the mortgage.[21]

(11) 1934. A bond and mortgage being a mere chose in action can be assigned by mere delivery without writing and still be good in Equity.[22]

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18. Magie v. Reynolds, 51 N. J. Eq. 113 26 AT 150 (Ch. 1893). Well settled rule that an assignee of a bond and mortgage takes it subject to all the equitable defenses which the original obligors and mortgagors have thereto. (Note the exception however in the case of a B.F.P. for value without notice of a negotiable instrument with the mortgage as security).

19. Devlin v. Collier, 53 N. J. L. 422 22 AT 201 (E & A 1891). A mortgagee is not considered as a freeholder for any purposes of office, benefit, or burdens by virtue of the mortgage. He cannot thereby hold public office requiring an estate in lands.

20. Stewart v. Fairchild, Baldwin Co. 91 N. J. Eq. 86 108 AT 301 (1919 E & A)

21. Pierson Co. v. Freeman, 113 N. J. Eq. 268, 166 A 121 (E & A 1933). To prevent undue advantage being taken through inadequuncy of consideration courts of Equity are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt is neither an absolute conveyance nor a conditional sale but a mortgage and that the grantor and grantee have severally the rights and are subject to only the obligations of mortgagor and mortgagee. However if at the time of delivery the parties intended a conditional sale on subsequent change of intention can make it a mortgage.

22. Rose v. Rein, 116 N. J. Eq. 70, 172 At 510 (E & A 1934). While the assignee of a mortgagee has a right to foreclose the same in his own name such right is not an exclusive one, as it seems to be well settled that where the owner of a mortgage has pledged it as collateral security for a debt of less amount than the mortgage he still has such interest as entitles him to bring an action for the foreclosure of the mortgage making the assignee a party to such proceeding.

(12) 1938. A mortgage is essentially security for the payment of debt.[23]

(13) 1895. A proceeding to obtain the possession of the mortgaged premises is not a proceeding to collect the debt.[24]

(14) 1933. A mortgage is a conveyance of real property within the statute of frauds and the agreement to give the mortgage must be in writing or there must have been part performance.[25]

(15) 1938. A decree of strict foreclosure does not operate to extinguish the debt unless the mortgaged lands are of sufficient value to satisfy it. The value may be ascertained in the event of a suit of law upon the mortgage debt.[26]

These three items 14, 15, and 16 all involve procedural problems. In item 14 the court was faced with the claim that there was a deprivation of rights under the statute[27] requiring the mortgagee to first proceed on foreclosure before proceeding on the bond. In item #15 the point at issue dealt with the form of the mortgage. In item #16, the proceeding was one of strict foreclosure. This type of proceeding is the exception rather than the rule in foreclosures.

In this last mentioned case, listed under item #16, we believe is an excellent example of the value of the flexible New Jersey rule in promoting justice and relieving the parties of unduly burdensome procedure. The pronouncements of Mr. Justice Heher, speaking for the court of Errors and Appeals, we believe, epitomizes the progress of this phase of the law in New Jersey. Justice Heher after giving the

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23. Sears Roebuck v. Camp, 124 N. J. Eq. 403, 1 At 2n 425 (E & A 1938). (This was a 14 to 1 decision reversing the Ct. of Chancery.)

24. Mershon v. Castree, 57 N. J. L. 484, 31, At 602 (S. Ct. 1895).

25. Titus v. Wallick, 114 N. J. Eq. 171, 168 At 453 (1933). There are three criteria for determining whether an absolute conveyance is a mortgage:

(1) Was there a debt which was not satisfied by the conveyance but which survived so that the grantee might have sued on it?

(2) Was the price paid considerably less than the value of the property granted?

(3) What was the conduct of the parties with regard to the property after the date of the deed?

26. Sears Roebuck v. Camp, supra, note 23.

English viewpoint and a brief summary of the origin and purposes of strict foreclosure stated that some early cases in New Jersey subscribed to the English view but New Jersey courts ultimately laid down the principle that the mortgage did not vest in the mortgagee an immediate estate in the lands with immediate possession, defeasible upon payment, but merely gave him the right of entry upon breach, and the mortgagor is treated as owner of the lands for all purposes.

As to the relationship between mortgagor and mortgagee, the New Jersey courts have had this to say: (1)—The mortgagor pays the taxes and the cost of repairs necessary for the preservation of the mortgaged property.[28] (2)—The mortgagor is entitled to recover the entire damage done to the mortgaged buildings and land by a trespasser and this is a bar to a subsequent action by the mortgagee.[29] (3)—The mortgagor may maintain trespass or ejectment against the mortgagee, until the mortgagee obtains possession, and the mortgagee cannot do likewise against the mortgagor or his assignee until such time. The wife of the mortgagor is entitled to dower.[30] (4)—The mortgagee is possessed of no estate in the land except such as is necessary for the realization of the debt due him. His mortgage is personal assets in settling his estate, if he devises it, it will not pass by the words "land" or "real estate" nor is it necessary that his will be executed with the legal requirements to pass them. The mortgage is not sub-

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27. R. S. 1937, 2:65-2. Where both a bond and mortgage have been given for the same debt, all proceedings shall be: First a foreclosure of the mortgage; and Second an action on the bond for any deficiency, if at the foreclosure sale the mortgaged premises do not bring an amount sufficient to satisfy the debt, interest, and costs. See, also, Guardian Life Ins. Co. v. Lowenthal, 181 At. 897 (Sup. Ct. 1935).

28. Bluestone Bldg. & Loan Assn. v. Glasser, 117 N. J. Eq. 392, 176 At. 314 (Ch. 1934).

29. Garrow v. Brooks, 123 N. J. Eq. 138, 196 At. 460 (Ch. 1938). The mortgagee's recovery in a suit prior to the mortgagor's would be for such sum as would compensate him for injury done to the mortgage as a security and in a later suit by the mortgagor against the trespasser, the latter would be entitled to mitigate damages by evidence of a recovery in a former suit by the mortgagee . . . . The measure of damages in a suit by the mortgagee would not be the depreciation of the market value of the premises but dimunition of the market value of the security.

30. Sanderson v. Price supra, note 13.

ject to curtesy or dower, the necessary attendants upon legal estates in land. Also, a mortgagee whose debt is due cannot maintain an action of replevin for a specific chattel severed from the land by the mortgagor.[31] (5)—The holder of a bond, secured by a mortgage, both executed by one who subsequently files a petition in bankruptcy, stands in the position of a secured creditor of the bankrupt. It is immaterial that the value of the mortgage security was undetermined at the time of the filing of the petition.[32] (6)—It is only when the mortgagee acts upon default and takes possession that he puts an end to the rights of the mortgagor to the incidents arising out of possession, subject of course, to redemption by the mortgagor. It is not until he takes possession that the mortgagee can take rent or profit arising from the lands.... When a mortgagor does not expressly pledge the rents, issues, and profits of the mortgaged premises as further security for the payment of the debt, the rents accruing prior to foreclosure, or the appointment of a receiver in a foreclosure proceeding, belong to the mortgagor.[33]

The holdings and opinions of the New Jersey courts as to the rights of the mortgagor and mortgagee would appear to be unreconcilable with a viewpoint that upon conveyance of a mortgage there was a severance of title in favor of the mortgagee.

We come now to the question as to whether even if there were a sufficient separation of title to permit of an easement being raised, such easement could have occurred in this case in favor of the complainant mortgagee. As a matter of law we believe that it could not.

It is settled law under either the "title" or "lien" theory that no easement could have arisen by anything the common owner could have done before the giving of the mortgage. Acts that might otherwise have created an easement would be lost in merger; the lesser right of easement becoming absorbed in the greater right of total ownership.[34]

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31. Devlin v. Collier supra, note 14.

32. Vanderbilt v. Lauer, 112 N. J. L. 143, 169 At. 731 (1934 E & A).

33. Stewart v. Fairchild, supra, note 20.

34. Fetters v. Humphry, 18 N. J. Eq.260 (Ch. 1867). Kelly v. Dunning 43 N. J. Eq. 63, 10 A. 276 (Ch 1887); Stuyvesant v. Woodruff, 21 N. J. L. 133 (S. Ct. 1847); Fass v. Wallwork 96 N. J. Eq. 541, 126 Atl. 620 (Ch. 1924).

If there was severance of title, then it occurred in the first instance when the first mortgage was executed. This mortgage was executed in favor of the defendant mortgagee (to avoid confusion the first mortgage is designated as being in the defendant mortgagee, while the holder of the mortgage on the second piece of property to be mortgaged is designated as the complainant mortgagee inasmuch as the action was initiated by his foreclosure proceedings although it is the defendant mortgagee who has moved to strike the bill). As the easement then occurring would be one reserved to the mortgagor, it would necessarily be an implied-in-law reservation.

While there are some exceptions, the great weight of authority has been stated to be that there can be no easement by implied reservation excepting by strict necessity.[35] New Jersey has stated that the element of necessity is requisite for an implied-in-law reservation to arise.[36] Otherwise the alienator will not be allowed to derogate from his own grant. The allegations of complainant mortgagee are that the stairway constitutes a continuous, apparent easement, and that the easement is reasonably necessary for the beneficial enjoyment of the property covered by complainant's mortgage.[37] Reasonable beneficial enjoyment is not sufficient as a test for an easement by implied re-

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35. 9 R. C. L. 765. The weight of authority recognizes the distinction between an implied grant and an implied reservation and holds that where there is a grant of land without express reservation of an easement there can be no reservation by implication, unless the easement be strictly necessary, this necessity meaning that there can be no other reasonable mode of enjoying the dominant tenement without the easement. Reason: a grant is taken more strongly against the grantor and the law will imply more readily for the grantee.

36. Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182 (Ch. 1892). Established in N. J. that in cases of apparent and continuous easement, upon the severance of the tenements, a reservation in the servient estate of a quasi-easement will take place wherever it would pass by way of grant on the conveyance of the dominant part and that in each case the element of necessity is a requisite . . . . The value and importance of the element of necessity is determined by the true test of whether it is a grant or a reservation by implication.

37. Provident Mutual Life Insurance Co. v. Doughty and Mann & Co. supra, note 1.

servation.[38] (It is to be noted also that the outside stairway is stated in the bill of complaint to be on a building fronting on two different streets). If then there was a separation of title by the mortgages, to what title did the complainant mortgagee succeed? He could not have obtained a better title than his mortgagor had, and his mortgagor not having a title by implied reservation, he could not have succeeded to an easement in the property covered by the mortgage of the defendant mortgagee. Under this theory of the case, the complainant mortgagee would be a trespasser due to the stairway projecting over the land covered by defendant mortgagee's mortgage and therefore subject to an action of ejectment.

Under the allegations of the complaint itself, it would seem as a matter of decided law that the bill of complaint should have been struck.

The final question is one of jurisdiction. The court felt that under the authority of Hart v. Leonard[39] it had no jurisdiction. Hart v. Leonard, a New Jersey case famous for the nine exceptions laid down by Justice Dixon to the usual rule that Equity will not try title to property in land, would not seem to be applicable to the issues raised in this case. The issues are raised by a motion to strike due to legal insufficiency. All allegations of fact are admitted for the purpose of the bill. The questions are purely ones of law. The relief requested by the defendant mortgagee is that he be stricken out as a necessary party to a foreclosure suit to which as a pure matter of law he is not an interested party.

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38. Brasington v. Williams, 143 S. C. 223, 141 S. E. 375 (1928). The legal requirements of a right of way of necessity are unity severance, and necessity. Necessity to warrant the right of way of necessity must be actual, real, and reasonable as distinguished from inconvenience . . . . It is easier for a grantee to establish a right of way of necessity than for a grantor to establish such easement over the lands conveyed.

39. Hart v. Leonard supra. In this case the complainant, owner of a wood and pasture, claimed that he and his predecessor in title have by adverse use acquired a right of way over the defendant's land and that the defendant is obstructing the road. The relief sought for a mandatory injunction and a decree that he was entitled to the right of way. The court dismissed the case. (Defendant had denied the allegations) The court stated that with the exception of the nine ex-

If the legal sufficiency of complainant's allegations are not decided by the court of first instance, it would seem to be an unduly burdensome procedure to compel defendant to enter a general denial, have the issue remitted to a law court for trial have defendant again move to strike the complaint as being insufficient in law, and have the trial court decide the legal sufficiency of the allegations.

As the whole question is merely an incident in the foreclosure proceedings, proceedings which are most commonly had in Equity,[40]

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ceptions enumerated there was no jurisdiction in a court of Equity over the mere invasion of mere private legal rights in land. The appropriate remedy is a suit at law.

Nine exceptions where Equity will try title to land:

(1) Where legal title has been established by suit at law and the bill in Equity is merely to ascertain the extent of the right, and to enforce and protect it by a manner not attainable by legal procedure.

(2) Where the legal right is admitted and the object is the same as in #1.

(3) Where the legal right though formally disputed is yet clear, on facts which are not denied and the legal rules are well established and the object of the bill is the same as in #1.

(4) Cases where one attempts to appropriate land under the color of a statute without complying with the legal conditions precedent.

(5) Where the object of the bill is to stay waste.

(6) Where the object of the bill is to prevent injury which will be destructive of the inheritance or which Equity deems irreparable, i.e. one for which damages recoverable according to legal rules do not afford complete remedy.

(7) Where the object of the bill is to protect one's dwelling from injuries which render the occupancy insecure or uncomfortable.

(8) Where the right to be protected grows out of an expressed or implied contract, so that the court can entertain jurisdiction by virtue of its power to compel specific performance.

(9) Where the object of the bill is to prevent a multiplicity of suits otherwise rendered necessary by the fact that many persons are interested in the controversy.

40. R. S. 1937 2:65-35-36-37. The circuit courts have jurisdiction to foreclose mortgages covering land situated in their counties. The circuit court has all the chancery powers and may issue subpoenas in any county.

we respectfully submit that the legal sufficiency of the complaint should be settled in the first instance by the Court of Chancery.

Our conclusions, as previously stated are, that the bill of complaint should have been struck as requested by the defendant.

CONSTITUTIONAL LAW—FAIR SALES ACT.—D, was charged with violation of The New Jersey Fair Sales Act (P. L. 1938, C 394, p. 978, sec. 2, R. S. 1937 56:4-8) which reads "declared that the advertisement (offer for sale or sale of any merchandise at less than cost by retailers is prohibited" and he moved to strike the complaint on the ground that the statute was unconstitutional. *Held*: statute is unconstitutional because it is indefinite, and deprived respondent of its property without due process of law.[1] *Lief v. Packard-Bamberger & Co.*, 123 N. J. L. 180, 8 A 2d 291 (S. C., 1939).

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1. The Act defines cost to the retailer in the first section thereof (R. S. 56:4-7) as follows:

(a) "Cost to the retailer" shall mean the total consideration necessary for the replacement of the merchandise to the retailer at the retail outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the retailer prior to the sale of the said merchandise would have cost per unit if bought at the most favorable market price available to the retailer at any time within thirty (30) days prior to the said sale less any customary trade discounts but exclusive of discounts for cash, display allowances and unearned discounts for volume.

(c) "Cost to the retailer" and "cost to the wholesaler" must be bona fide costs and sales to consumers, retailers and wholesalers at prices which cannot be justified by existing market conditions within this state shall not be used as basis for computing costs with respect to sales by retailers and wholesalers.

(d) "Sell at retail" and "sales at retail" shall mean any transfer of title to tangible personal property for a valuable consideration where such property is to be used by the purchaser for purpose other than resale manufacture or further processing. The above terms shall also include any such transfer of property where title is retained by the sellers as security for the payment of the purchase price.

(f) "Retailer" shall mean and include every person firm corporation or association engaged in the business of transferring title within this state to tangible personal property for a valuable consideration where

Unlike government regulation of different phases of business e.g. as to hours[2] location[3] etc, the constitutionality of which obtained in the exercise of the police power, that regulation of business which attempted to fix prices or which restricted the liberty to contract is making of price needed for its constitutionality another condition, i.e. the business must be "affected with a public interest".[4] As to the exact meaning of the phrase there was no uniformity of opinion or definition.[5] The use of the phrase however, had been attacked[6] and then came Nebbia v. People of State of New York[7] which performed the invaluable legal operation of excising from the law that unpredictable criterion. Speaking for the court Justice Butler stated "the phrase" "affected with a public interest" can in the nature of things mean no

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such property is to be used by the purchaser and is not to be resold. or used for the purpose of manufacture or further processing.

R. S. 56:4-14 "The provisions of this Act [article] shall not apply to sales at retail or sales at wholesale, (a) where merchandise is sold in bona fide clearance sales and is advertised, marked and sold as such, (b) where merchandise is imperfect or damaged or is being discontinued and is advertised marked and sold as such, (c) where merchandise is sold upon the final liquidation of any business, (d) where merchandise is sold for charitable purpose, (e) where the price of merchandise is made to meet the legal price of a competitor for merchandise of the same grade, equality and quantity, and (f) where merchandise is sold by any officer acting under the direction of any court.

2. Churchill v. Albany, 65 Ore. 442, 133 Pac. 632, Ann. Cas. 1915 A 1094 (1913). Note 55 A. L. R. 242 et seq.

3. State v. Houghton, 134 Minn. 226, 158 N. W. 1017, L. R. A. 1917 F 1050 (1916); Winkler v. Anderson, 104 Kan. 1, 177 Pac. 521, 3 A. L. R. 268 and note (1919).

4. For a development and analysis of the doctrine see "Affection With Public Interest" by W. H. Hamilton in 39 Yale Law Journal, p. 1089 (1930). Tyson & Brother United Theatre Ticket Officers v. Banton, 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236 (1927).

5. In Tyson & Brother-United Theatre Ticket Officers v. Banton, 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236 (1927), the phrase was defined "A business or property, in order to be affected with a public interest, must be such or be so employed, as to justify the conclusion that it has been devoted to a public use, and its use thereby, in effect, granted to the public." In Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, 84 (1876), property became clothed with a public interest "When used in a manner to make it of public consequence and affect the community at large." In Chas. Wolff Packing Co. v. Court of In-

more than that an industry for adequate reason is subject to control for the public good" and again "these decisions (wherein expressions "affected with a public interest" and "clothed with a public use" have been brought forward as criteria of validity of price controls) must rest finally upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect[8] however even before this, other statutes which prohibited sales below cost and which were not restricted in their application to businesses "affected with a public interest," have been upheld as constitutional[9]. Other statutes which forbade discriminatory prices with

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dustrial Relations, 262 U. S. 522, 536, 43 Sup. Ct. 630, 67 L. Ed. 1103, 1108, 27 A. L. R. 1280 (1923). C. J. Taft said the "circumstances" which clothe a particular business with a public interest must be "such as to create a peculiarly close relation between the public and those engaged in it and raise an implication of an affirmative obligation on their part to be reasonable with the public."

6. Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327 (1928). A statute which required emplоment agencies to submit a schedule of fees to be charged, to the Commissioner of Labor for his approval, and once approved, could be changed only with the consent of the commissioner, was held unconstitutional. In the course of the dissent J. Stone said "The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation are elements to be considered in determining whether the public interest exists." Dissenting in Tyson and Brother-United Theatre Ticket Officers v. Banton, supra, note 4, J. Holmes said ". . . the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." See also New State Ice Co. v. Liebmann 285 U. S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1932).

7. 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1933). However, here the business involved, milk, certainly would seem to satisfy the requirement of being aff. with a pub. int.

8. Referring to Ribnik v. McBride, supra note 6; Tyson & Bro.-United Theatre Ticket Officers v. Banton, supra note 4, and Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596 (1929) in all of which cases, the statutes under review were held unconstitutional.

9. Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co., 11 Cal. (2nd) 634, 82 P. (2nd) 3, 118 A. L. R. 486 (1938); State v. Langley

intent to destroy or stifle competition have also been upheld[10]. The objection therefor on the part of the court that the statute isn't restricted in its application only to commodities "affected with a public interest" is weak.

The question then is whether this statute is a valid exercise of the police power of the state. According to the title of the Act, this is an act to "insure and protect fair trade practises". That the state in the exercise of its police power may make provisions for the economic welfare of the people generally and that it may regulate property and contract rights, the latter of which, of course, including the power to regulate the right of free bargaining has been decided many times and cannot be doubted;[11] that this statute is designed for just such purpose is obvious when considered with due regard to the conditions and circumstances existing at the time it was brought into life.[12]

A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adopted to its purposes; the courts are without authority either to declare such policy or when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied and judicial determination to that effect renders a court functus officio.[13]

(Wyo.), 84 P. (2nd) 767 (1938); Rust v. Griggs, 172 Tenn. 565, 113 S. W. (2nd) 733 (1938).

10. State v. Drayton 82 Neb. 254, 117 N. W. 768, 23 L. R. A. (N. S. 1287, 130 Am. S. R. 671 (1908); State v. Creamery Co., 153 Ia. 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821 (1911); Central Lumber Co. v. State of South Dakota, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164 (1912).

11. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876); Chicago, Burlington and Quincy Ry. Co. v. People of New York 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175 (1905); Nebbia v. New York, supra note 7; Wholesale Tobacco Dealers Bureau of Southern California v. National Candy and Tobacco Co., supra note 9.

12. State v. Scott, 86 N. J. L. 133, 90 Atl. 235 (Sup. Ct. 1914); Karnuth v. United States, 279 U. S. 231, 49 Sup. Ct. 274, 73 L. Ed. 677 (1928); Laughney v. Maybeery, 145 Wash. 146, 259 Pac. 17, 54 A. L. R. 393 (1927).

13. Nebbia v. New York, supra note 7.

"Whether free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question" which the court need not consider or determine[14] and it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise.

The evil which the legislature by the statute here in question sought to remedy was ruinous price cutting, which threatened to destroy competition. To do that it was necessary to fix some limit and the limit selected of not below cost was only one of a number of others which might have been selected. The one actually selected was thought most just under the circumstances. It was but a means to an end, not an end in itself.[15] Price control, like any other form of regulation is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty.[16]

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14. Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679 (1903).

15. State v. Langley (Wyo.), 84 Pac. (2nd) 767 (1938). Also Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164 (1912). A statute was passed which prohibited selling commodity at a lower rate in one section than such person charges for such commodity in another section after equalizing the distance from the point of production for the purpose of destroying competition. J. Holmes there wrote "All competition, it is added imports an attempt to destroy or prevent the competition of rivals and here is no difference in principal between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases it may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses and it may do so nonetheless that the forbidden act does not differ in kind from those that are allowed" citing Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369, 31 Sup. Ct. 337, Ann Cas. 1912 C. 160 (1910).

16. Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721 (1932).

The court in the present case states however, that the statute arbitrarily imposes restrictions upon trade when no injury is inflicted thereby and without resultant benefit to anybody. This statement is based upon the absence from the statute, as an element of the crime, in addition to selling below cost, the intent to injure and destroy competition, and it is on this ground that the court differentiates the New Jersey from the California,[17] Tennessee[18] and Wyoming[19] statutes.

That the legislature may prohibit the doing of an act and make the doing of that act a crime irrespective of the intent or motive with which it was committed, whether innocent or not cannot be doubted[20] C. V. Cooley stated that "many statutes which are in the nature of police regulations . . . , impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public, which shall render violation impossible.[21]" It does not seem to be an unreasonable exercise of the police power here. Previous experience with cases where it was necessary to prove intent has shown from the paucity of cases decided in favor of complainant, how crushing on the effectiveness of the law is this necessity[22] moreover retailers don't ordinarily sell goods below cost; outside of those areas where predatory price-cutting prevails, there is no reason whatsoever for it. It can hardly be said to restrict the normal channels of trade. It is only reasonable to say that the device of selling certain articles below cost is a purely competitive device; the retailer with an absolute monopoly certainly does not have to resort to it. And where that competition does prevail, the reason for the statute exists. Furthermore whatever valid reasons or occasions there are for selling goods below cost and which

17. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., supra note 9.

18. Rust v. Griggs, 172 Tenn. 565, 113 S. W. (2d) 733 (1938).

19. State v. Langley (Wyo.), 84 P. (2) 767 (1938).

20. Commonwealth v. Anderson, 272 Mass. 100, 172 N. E. 114, 69 A. L. R. 1097 (1930); Hargrove v. U. S. (C. C. A. 5th), 67 F. (2) 820, 90 A. L. R. 1276 (1933).

21. People v. Roby 52 Mich. 577, 18 N. W. 365, 50 Am. R. 270 (1884).

22. See 47 Yale Law Journal, 1206, note 30.

23. R. S. 56:4-14.

would not subject the vendor to the penalty of the statute, will in all probability be one of the exceptions where the statute does not apply.[23]

It is also contended by the court that the statutory crime is indefinite. However that act which constitutes the crime is very specific, it is the act of selling below cost, except in those cases where the act does not apply. The criterion for determining cost as defined in the statute[24] is replacement cost to the retailer. Certainly this standard is much more definite than that used in the Wyoming statute[25] where resort to reasonable standards of cost acounting was necessary to determine cost as defined by that statute. The few facts necessary here are certainly within the knowledge of every retailer. But the court contends that subdivision (c) of R.S. 56:4-7[26] withdraws the standard set up in subdivision (a), and points out no rule by which justifiable market conditions are to be determined. The Tennessee court attempts to explain the same subdivision in its statute by stating that in computing his cost or purchase price, "the local merchant cannot use as a basis some exceptional sale price made to him, either in this state or another state, not justified by market conditions."[27] But this only adds another phrase to be defined "exceptional sale price." However to set up a certain percentage below "cost to the retailer" as herein defined as an exceptional sale price would be impracticable and discriminatory inasmuch as the different percentage of profit under which different businesses operate would preclude any uniformity of standards. In view of the purpose of the legislation, these conditions imposed are reasonable in that they seek to prevent the sale of goods at a price far below that at which the goods are selling in the community, when if it were allowed the purpose of the statute would be

24. R. S. 56:4-7 (a) supra note 1.

25. State v. Langley (Wyo.), 84 P. (2) 767 (1938). See also Rust v. Griggs, supra note 18,—the statute there under review defined cost to the retailer as replacement cost of such product or commodity to the retailer at the time of sale in the quantity last purchased by the retailer; less any legitimate trade discounts . . . . and plus a mark-up amounting to (no) less than the minimum cost of distribution by the most efficient retailer.

26. See note 1.

defeated. Such would most certainly be the case if a retailer bought out the entire stock of a bankrupt organization at very low prices and was allowed to dispose of them in the ordinary course of trade at correspondingly low prices. The "loss leader", the use of which is sought to be outlawed by this legislation, would in effect be sanctioned.

The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct,[28] and know what acts it is his duty to avoid.[29] But in determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required by them, the courts must endeavor if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms.[30] So J. Holmes said "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . , he may incur the penalty of death." And again an act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it by common experience in the circumstances known to the actor.[31] A criminal statute is not unconstitutional because the application of it may be uncertain in exceptional cases.[32] In view of the foregoing, will not the experience of the

27. Rust v. Griggs, supra note 18.

28. Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 52 Sup. Ct. 559, 76 L. Ed. 1062, 86 A. L. R. 403 (1932); Connally v. General Construction Co., 269 U. S. 385, 46 Sup. Ct. 126, 70 L. Ed. 322 (1925); United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045 (1921).

29. United States v. Brewer, 139 U. S. 278, 11 Sup. Ct. 538, 35 L. Ed. 190 (1890).

30. Pacific Coast Dairy v. Police Court of the City and County of San Francisco, 214 Cal. 668, 8 Pac. (2) 140, 80 A. L. R. 1217 (1932).

31. Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232 (1912).

32. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 45 Sup. Ct. 141, 69 L. Ed. 402 (1925).

average retailer lend substance to the rule and enable him to make fairly accurate judgment?

A more valid objection to the statute lies in the exception which allows a retailer to meet the legal price of a competitor.[33] How a person is to determine the legality of a competitor's price is not declared. This imposes upon the seller the almost insuperable burden of determining whether his competitor's prices are legal. This is certainly a criticism which cannot be ignored.[34] Although the standard set up is definite competitor's prices must be legal,[35] the unreasonableness in its application, by imposing the burden on the seller, is so overwhelming as to make the act itself too indefinite as a rule of behavior.

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33. R. S. 56:4-14 (e), supra, note 1.

34. The difficulty may not be so great for the retailer since his activities are not complex. However wholesalers will bear the brunt of this hardship most.

35. Which in turn involves the difficulties met above (see excerpt from Nash v. United States, supra note 31).