RECENT CASES

CONSTITUTIONAL LAW—POLICE POWER—PROHIBITION OF PEDDLING —The defendant municipality adopted an ordinance which made it unlawful for any person, firm or corporation to hawk, peddle or vend any goods, wares or merchandise within the municipality, or to carry the same from place to place, or house to house, or to expose them for sale in a push cart, wagon, automobile or otherwise. Prosecutor was convicted of violating the ordinance and brought certiorari to review the conviction and to determine the constitutionality of the ordinance. *Held,* that the ordinance was unconstitutional as an improper exercise of the police power and an unlawful deprivation of the prosecutor's property rights. *New Jersey Good Humor, Inc. v. Board of Commissioners of Bradley Beach,* 124 N.J.L. 162, 11 A2d 113 (E. & A., 1940) reversing 123 N.J.L. 21, 7 A2d 824 (Sup. Ct., 1939).

In dealing with an ordinance of this type involving the exercise of the police power two problems face the court. Is the object of the ordinance one which is embraced within the scope of the police power? Are the means selected for the attainment of the object consonant with due process of law?

It is fundamental that the police power is to be exercised only to protect the public health, safety or morals. It is only when such is the purpose of a legislative act or local ordinance that any limitation on the private rights of the individual can be justified under either the United States or New Jersey Constitutions.[1] One group of citizens can not further their private interests at the expense of another group under the guise of the police power. The protection of a basic interest of society not the gain of particular individuals is to be sought. Particularly is this to be borne in mind in dealing with legislation which aims to

1. Commonwealth v. Campbell, 133 Ky. 50, 117 S.W. 383 (1909); People *ex rel.* Wineburgh Advertising Co. v. Murphy, 113 N.Y.S. 855, 88 N.E. 17 (1909); State v. Walker, 48 Wash. 8, 92 P. 775 (1907); City of Chicago v. Kautz, 313 Ill. 196, 144 N.E. 805 (1924); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920); Bruhl v. State, 111 Tex. Cr. R. 233, 13 S.W. (2d) 93 (1929).

protect property values.[2] That which is a protection of one man's property may be the wrongful taking of another man's property. Aesthetic considerations have been held not to justify the exercise of the police power.[3] Such considerations are treated as matters of luxury and indulgence rather than of necessity.

The avowed purpose of the ordinance in the instant case was to further the interest of the community in the protection of the business and profits of local storekeepers against the competition thereby outlawed. That this was an arbitrary use of the sovereign power to subvert competition contrary to the public interest the court was quick to point out. The law has never favored the fostering of monopolies unless the business is vested with the public interest.[4] A business may become so vested with the public interest because of the peculiar circumstances of the locality but local ordinances which seek to protect local business against the encroachment of outside competition can not be justified.[5] Economic autarchy would soon undermine the economic life of the state and nation and the evils of the pre-Constitutional period from 1783 to 1789 would descend on the nation once more.

A further purpose behind the ordinance was to protect the right of a residential community to peace and quiet. This is a proper object of the police power and a business which is a nuisance *per se* or in fact can be abated.[6] That was not the situation in this case.[7]

Were the means selected to attain the object of peace and quiet sub-

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2. Watchung Lake, Inc. v. Mobus, 119 N.J.L. 272, 196 Atl. 223 (Sup. Ct. 1938).

3. City of Passaic v. Paterson Bill Posting, A. & S. P. Co., 72 N.J.L. 285, 62 Atl. 267 (E. & A., 1905), dealing with the regulation of billboards.

4. Dobbins v. Los Angeles, 195 U.S. 223, 49 L. Ed. 169 (1904); Empire Home Furnishers v. White, 258 N.Y.S. 3, 235 App. Div. 522 (1932).

5. State v. Nolan, 108 Minn. 170, 122 N.W. 255 (1909); City of Edgerton v. Slatter, 219 Wis. 381, 263 N.W. 83 (1935); Whipple v. City of South Milwaukee, 218 Wis. 393, 261 N.W. 235 (1935); McKenna v. City of Galveston, 113 S.W. (2d) 606.

6. Lawton v. Steele, 152 U.S. 133, 38 L. Ed. 385 (1894); Town of Green River v. Fuller Brush Co., 65 F. (2d) 112 (C.C.A., 1932); Watchung Lake, Inc. v. Mobus, *supra*, note 2.

7. See also Malone v. City of Quincy, 66 Fla. 52, 62 So. 922 (1913); City of New Orleans v. New Orleans Butchers' Coop. Abattoir, 153 La. 536, 96 So. 113 (1923).

stantially related to the object? The court found that prohibition of peddling as distinguished from regulation was not essential to the realization of this object.[8] Prohibition, the most drastic form of regulation, is justified if the public health, safety or morals can be protected in no other way.[9] If the property involved is suited only to the use the owner seeks to put it to the prohibition of such use results in the taking of property without due process of law.[10] The necessity of the individual case determines the degree of regulation proper.[11] Restriction of business to certain localities in the municipality[12] and restrictions on the manner of conducting a business[13] are examples of lawful methods of regulation short of absolute prohibition.

INJUNCTION—LAWFUL PICKETING—LOCATION—Complainant ignored a letter from the union, which had completed organization of the complainant's employees, requesting a conference to adjust wages and hours, whereupon a few of the employees went on strike and picketing began. Complainant filled their places and on bringing suit, obtained an injunc-

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8. Pacific States Supply Co. v. City and County of San Francisco, 171 Fed 727 (1909) prohibiting rather than regulating stone quarry invalid; Patout Bros. v. City of New Iberia, 138 La. 697, 70 So. 616 (1916); City of St. Louis v. Atlantic Quarry & Construction Co., 244 Mo. 479, 148 S.W. 948 (1912); Parker v. Colburn, 196 Cal. 169, 236 P. 921 (1925); Prior v. White, 180 So. 347.

9. Weaver v. Public Service Commission of Wyoming, 40 Wyo. 462, 278 P. 542 (1929).

10. Williams v. State, 85 Ark. 470, 108 S.W. 838 (1908), *aff.* 217 U.S. 79, 54 L. Ed. 673 (1910). Prohibition on soliciting business on railway trains did not prevent advertising in other places, hence valid; Watchung Lake, Inc. v. Mobus, *supra* note 2; City of Chicago v. Chicago & O. P. Elevated R. Co., 250 Ill. 486, 95 N.E. 456 (1911); City of Portland v. Western Union Telegraph Co., 75 Ore. 37, 146 P. 148 (1915); Calvo v. City of New Orleans, 136 La. 480, 67 So. 338 (1915).

11. City of Passaic v. Paterson Bill Posting, A. & S. P. Co., *supra* note 3; Tolliver v. Blizzard, 143 Ky. 773, 137 S.W. 509 (1911).

12. City of Seattle v. Hurst, 50 Wash. 424, 97 P. 454 (1908); City Cab Co. v. Hayden, 73 Wash. 24, 131 P. 472 (1913).

13. City of Shreveport v. Dantes, 118 La. 113, 42 So. 716 (1907); Goodrich v. Busse, 247 Ill. 366, 93 N.E. 292 (1910); Town of Green River v. Fuller Brush Co., *supra* note 6.

tion against picketing its restaurant under the rule of *Mode Novelty Co. v. Taylor,* 122 N.J.Eq. 593, 195 Atl. 819 (Ch. 1937). The union, obedient to the court's decree, moved the pickets some 200 feet away from complainant's store and complainant brings a supplemental bill to enjoin. *Held*: injunction denied on the ground that the activity when taken together with surrounding circumstances is not picketing according to the judicial defintion thereof. *J. R. Thompson Co. v. Delicatessen and Cafeteria Workers, etc.,* 126 N.J.Eq. 119, 8 Atl. (2d) 130 (Ch., 1939).

Since the day when Justice Powers decided that a combination, to bring an employer to terms by ostracizing his employees from the craft by dubbing them "scabs" was a criminal conspiracy at common law,[1] the courts have constantly modified their attitude towards organized labor.

When a complete analysis of what constitutes lawful picketing in New Jersey is made we are faced with a volume of decisions which form no progressive trend, but rather an ebb and flow of judicial sentiment.[2]

As this case is decided primarily on what constitutes picketing and when such is illegal, it would be appropriate to review some of the decisions in order to gather some concept of what act or acts result in picketing, and then see how they compare with the decisions of other jurisdictions.

"Peaceful picketing is a contradiction in terms. Picketing is a militant term in character and purpose."[3] So said the Court of Chancery

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1. State v. Stewart, 59 Vt. 273, 9 Atl. 559 (1887); *Contra*: Willson & Adams Co. v. Pearce, 256 N.Y.S. 624, 240 App. Div. 718 (1933); S. A. Clark Lunch Co. v. Cleveland Waiters and etc., 22 O. App. 265, 154 N.E. 362 (1927).

2. 4 U. OF NEWARK L. REV. 331; Milton R. Konvitz, *Labor and the New Jersey Courts,* 1935, 4 MERCER BEASLEY L. REV. 1.

3. Elkind and Sons v. Retail Clerks, etc., Assn., 114 N.J.Eq. 586, 169 Atl. 494 (Ch. 1933); *Contra*: Stillwell Theatres v. Kaplan, 259 N.Y. 405, 174 N.E. 63. "Courts may not decide controversies between capital and labor, so long as neither party resorts to violence, deceit, or misrepresentation to bring about the desired result." (1932). Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566 (1933); J. H. & S. Theatres v. Fay, 260 N.Y. 315, 183 N.E. 509 (1933); Paramount Enterprises v. Mitchell, 140 S. 328 (1932). "Neither employer nor employee may use threats, force, or intimidation in bringing their side of the controversy before the public, nor urge, or advertise it by false statements, insulting language, or other

in 1933. However, in 1934 the same court said: "Where a dispute exists between employer and employees, the latter have the right to peaceably picket."[4] Again in the same year, the court said: "Picketing in its mildest form is a nuisance which the legislature is powerless to legalize."[5]

It was also held, that in a labor dispute, the statute, prohibiting issuance of an injunction to enjoin persons from peaceably being on the streets to obtain or communicate information, did not legalize picketing.[6] New Jersey courts have repeatedly held, that carrying placards

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means calculated to become a nuisance, obstruct traffic, or impede orderly course of business or other relations."

Bomes v. Providence Moving Picture Mach. Oper., etc., 51 R.I. 499, 155 Atl. 581 (1931); Tree-Mark Shoe Co. v. Schwartz, 248 N.Y.S. 56, 139 Misc. 136 (1931). "A labor union may picket employer's place of business, though no strike be in progress."

4. Restful Slipper Co. v. United Shoe etc. Union, 116 N.J.Eq. 591, 174 Atl. 543 (Ch. 1934); International Pocket Book Workers v. Orlove, 158 Md. 496, 148 Atl. 826 (1930); F. C. Church Shoe Co. v. Turner, 218 Mo. App. 516, 279 S.W. 232 (1926); United Chain Theatres etc. v. Phila. Picture Mach. Oper., 50 F. (2d) 189 (1931); Kirmse v. Adler, *supra* note :. *Contra*: Traub Amusement Co. v. Macker, 215 N.Y.S. 397, 127 Misc. 335 (1926). "Peaceful picketing will be enjoined where it causes loss to owner of the picketed business, if no strike exists other than owners refusal to employ union labor exclusively."

5. J. Lichtman & Sons v. Leather etc. Union, 114 N.J.Eq. 596, 169 Atl. 498 (Ch. 1933); Elkind and Sons v. Retail Clerks etc., *supra* note 3; *Contra*: Inter. Pocket Book Workers v. Orlove, *supra* note 4; Bayer v. Brotherhood of Painters and Decorators, 108 N.J.Eq. 257, 154 Atl. 759 (1931).

Tree-Mark Shoe Co. v. Schwartz, *supra* note 3; Kirmse v. Adler, *supra* note 3; Fenske Bros. v. Upholsterers International Union, 358 Ill. 239, 193 N.E. 112 (1935); Smith Hurd Ann. Statutes, ch. 48, sec. 2a; J. H. & S. Theatres v. Fay, *supra* note 3; 29 U.S.C.A., sec. 52; 45 U.S.C.A., sec. 152; United Chain Theatres etc. v. Phila. etc., *supra* note 4.

"Conduct of union in sending out post cards to potential patrons of the theatre advising recipients of controversy, and urging patronage of other theatres, and in driving sound trucks with like signs into vicinity of theatre, was lawful."

Music Hall Theatre v. Moving Picture Mach. Oper. etc., 249 Ky. 639, 61 S.W. (2d) 283 (1933).

6. Elkind & Sons v. Retail Clerks etc. Assn., *supra* note 3. *Contra*: Kirmse v. Adler, *supra* note 3; Fenske Bros. v. Upholsterers Inter. etc., *supra* note 5; Exchange Bakery & etc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Tree-Mark Shoe Co. v. Schwartz, *supra* note 3; Cinderella Theatre Co. v. Sign Writ-

containing false, misleading, threatening, or libelous statements will be enjoined no matter by whom carried,[7] even though they have gone so far as saying that picketing is lawful if it does not have immediate tendency to intimidate the other party to the controversy, or to obstruct free passage,[8] such as the streets afford, consistent with the rights of others to enjoy the same privilege.[9] However, if large numbers assemble to picket in furtherance of an employees' strike (all of whom may be employees) in the vicinity of the employer's place of business, such assembling will be enjoined because it creates a nuisance[10] even in the face of the statute[11] which limits picketing to disputes between employer and employee. The court in this case gave no intimation as to its position if the picketing was free from intimidation, coercion, etc., and otherwise peaceable.

A strike to compel the employer to hire union labor exclusively was held by the New Jersey courts to be unlawful as is also any act in fur-

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ers Local, 6 Fed. Supp. 164 (1934). "Patrolling in front of Pl's theatres with unfair to organized labor signs and distribution of cards of like tenor is unrestrainable under the statute against injunctive relief in labor disputes." Clayton Act (29 U.S.C.A., sec. 104-106).

7. Elkind & Sons v. Retail Clerks etc. Assn., *supra* note 3. *Contra*: S. A. Clark Lunch Co. v. Cleveland Waiters etc. Local 106, *supra* note 1; Engelmeyer v. Simon, 265 N.Y.S. 636, 148 Misc. 621 (1933); Kirmse v. Adler, *supra* note 3; R. E. Hicks Corp. v. National Salesmen Training Assn., 19 F. (2d) 963 (1927). "Equity will not enjoin publication of libel in absence of acts of conspiracy, intimidation, or coercion." Wahlgreen v. Bausch & Lamb Optical Co., 68 F. (2d) 660; A. Hollander & Sons v. Jos. Hollander, Inc., 117 N.J.Eq. 578, 177 Atl. 80 (Ch. 1935). "This court is without jurisdiction to restrain injury to business or property threatened by false representations as to character, quality, or title to property." Mayer v. Journeymen Stonecutters Assn., 47 N.J.Eq. 519, 20 Atl. 492.

8. Bayonne Textile Corp. v. Amer. Fed. of Silk Workers, 114 N.J.Eq. 307, 168 Atl. 799 (Ch. 1933); Eastwood-Neally Corp. v. International Assn. etc., 124 N.J.Eq. 274, 1 Atl. (2d) 477 (Ch. 1938).

9. Restful Slipper Co. v. United Shoe & etc., *supra* note 4; Kirmse v. Adler, *supra* note 3; Bayonne Textile Corp. v. Amer. Fed. etc., *supra* note 8; Engelmeyer v. Simon, *supra* note 7.

10. J. Lichtman & Sons v. Leather etc. Union, *supra* note 5. *Contra*: Case cited *supra* note 6.

11. Evening Times Printing & Publishing Co. v. Amer. etc. Guild, 122 N.J.Eq. 545, 195 Atl. 378 (Ch. 1937).

therance thereof including picketing.[12] Of course, acts of labor unions may be lawful or unlawful according to circumstances. It is conceded in many jurisdictions that the employees' right to collective bargaining is a valuable right to be protected,[13] and to achieve that end employees may either strike, picket, or do both.[14] Any injury resulting from such lawful picketing by labor union members is merely incidental.[15] In fact, sympathy strikes in allied trades are condoned in order to bring an employer into line.[16] Self interest, provided it is not too remote, is

12. J. Lichtman & Sons v. Leather & etc. Union, *supra* note 5; Elkind & Sons v. Retail Clerks etc. Assn., *supra* note 3; International Ticket Co. v. Wendrich, 122 N.J.Eq. 222, 193 Atl. 808 (Ch. 1937), *aff'd* 123 N.J.Eq. 172, 196 Atl. 474 (E. & A. 1938); Blakely Laundry Co. v. Cleaners & Dyers Union, 11 N.J. Misc. 915, 169 Atl. 541 (Ch. 1933); Wasilewski v. Bakers Union, 118 N.J.Eq. 349, 179 Atl. 284 (Ch. 1935).

Accord with qualifications: Moreland Theatres Corp. v. Portland Motion Picture Mach. Oper. etc., 140 Ore. 35, 12 P. (2d) 333 (1933). "Combinations to injure another's business is in law malicious, and renders anything done in furtherance thereof unlawful, even if the thing done is of itself lawful."

Contra: Exchange Bakery & etc. v. Rifkin, *supra* note 6; Interborough Rapid Transit Co. v. Lavin, 247 N.Y. 65, 159 N.E. 863 (1928); Fenske Bros. v. Upholsterers Inter. etc., *supra* note 5; Aeolian Co. v. Fischer, 29 F. (2d) 679 (1928); Armstrong Cork & Insul. Co. v. Walsh, 177 N.E. 2 (1931); S. A. Clark Lunch Co. v. Cleveland Waiters etc., *supra* note 1; R. A. Freed & Co. v. Doe, 278 N.Y.S. 68, 154 Misc. 644 (1935).

13. Standard Oil Co. v. Beretelsen, 243 N.W. 701 (1932); Exchange Bakery etc. v. Rifkin, *supra* note 6; Fenske Bros. v. Upholsterers Inter. etc., *supra* note 5.

14. Exchange Bakery etc. v. Rifkin, *supra* note 6.

15. Stillwell Theatres v. Kaplan, *supra* note 3; S. A. Clark Lunch Co. v. Cleveland Waiters etc., *supra* note 1; Kirmse v. Adler, *supra* note 3; Fenske Bros. v. Upholsterers Inter. etc., *supra* note 5.

16. Willson & Adams Co. v. Pearce, *supra* note 1; S. A. Clark Lunch Co. v. Cleveland Waiters etc., *supra* note 1; Aeolian Co. v. Fischer, *supra* note 12; Tree-Mark Shoe Co. v. Schwartz, *supra* note 3; Exchange Bakery & etc. v. Rifkin, *supra* note 6; Interborough Rapid Transit v. Lavin, *supra* note 12; Stillwell Theatres v. Kaplan, *supra* note 3. "Acts of labor unions may be legal or illegal according to circumstances." *Accord*: Fenske Bros. v. Upholsterers Inter. etc., *supra* note 5.

Forstmann & Huffmann Co. v. United Front Comm. of Textile Workers, 99 N.J.Eq. 230, 133 Atl. 202 (Ch. 1926); Gevas v. Greek Restaurant Workers Club, 99 N.J.Eq. 770, 134 Atl. 309 (Ch. 1926). *Contra*: Market St. Corp. v. Delicatessen & Cafeteria Workers etc., 118 N.J.Eq. 448, 179 Atl. 689 (Ch. 1935); Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P. (2d) 372 (1935); Sarros

generally justification for acts of employees injurious to employers' business in industrial conflicts.[17]

Many courts hold that both primary and secondary boycotts are legal, while others hold that only primary boycotts are legal on the part of employees towards their employer even if incidental loss of business or harm results thereby.[18]

Most jurisdictions have the rights of the parties determined by statutes, but, the crux of the problem lies in the court's construction of what the statute means. Some courts construe it liberally,[19] while others strictly and narrowly.[20] New Jersey gives a narrow and strict construction; and she is in the minority.[21]

There is no doubt that any move made towards a more liberalized construction of the statute must be made with extreme caution. How-

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v. Nouris, 15 Del. Ch. 391, 138 Atl. 607 (1927); Blakely Laundry Co. v. Cleaners & Dyers etc., *supra* note 12; Wasilewski v. Bakers Union, *supra* note 12; Aeolian Co. v. Fischer, 40 F. (2d) 189 (1930).

17. United Chain Theatres v. Phila. etc. Oper. Local, *supra* note 4; Kirmse v. Adler, *supra* note 3; Aeolian Co. v. Fischer, *supra* note 12. "Refusal of affiliated unions to work with non-union men depends on motive and justification for its legality." Stillwell Theatres v. Kaplan, *supra* note 3. "A court cannot restrain the conduct of a labor union within the allowable area of economic conflict with an employer."

18. Lisse v. Cooks, Waiters & etc. Local, 41 P. (2d) 314 (1935). "Trade unions can carry on boycott both primary and secondary in connection with strike."

Aeolian Co. v. Fischer, *supra* note 12. "Secondary boycott is legal unless maliciously intended to destroy another's business and good will."

Holding that secondary boycott is illegal: Paramount Enterprises v. Mitchell, *supra* note 3. Holding both illegal: Moreland Theatres Corp. v. Portland Mach. Oper. etc., *supra* note 12. Minn. Chamber of Commerce v. Fed. Trade Comm., 13 F. (2d) 673 (1926).

19. Fenske Bros. v. Upholsterers Inter etc., *supra* note 5; Smith Hurd Ann. Statute, ch. 48, sec. 2a; Clayton Act, 29 U.S.C.A., sec. 104, 106; Kirmse v. Adler, *supra*, note 3; Texas & Mo. Ry. Co. v. Brotherhood of Ry. and Steamship Clerks. 74 L. Ed. 1034 (1930); 29 U.S.C.A., sec. 52; 45 U.S.C.A., sec. 152; Railway Labor Act, sec. 2; Music Hall Theatre v. Moving Pict. Mach. Oper., *supra* note 5; Cinderella Theatre Co. v. Sign Writers etc., *supra* note 6. Borderline Case: Interborough Rapid Transit Co. v. Lavin, *supra* note 12.

20. J. Lichtman & Sons v. Leather etc., *supra* note 5; Elkind and Sons v. Retail Clerks etc., *supra* note 3; Moreland Theatres Corp. v. Portland etc Operators, *supra* note 12

21. R.S. (1937) 2:29-27.

ever, it still remains essential that such a move be made. The tendency towards that end is amply reflected in the decision of the instant case. However subtle the distinction which the learned Vice Chancellor made, may prove to be, it is immaterial. If the court must resort to that sort of finesse in order to reach a just result, then let it continue to do so, in order that ultimately it will have come to accord with modern trends.[22]

MORTGAGES—THIRD PARTY BENEFICIARY—ACTION AT LAW AGAINST ASSUMING GRANTEE FOR DEFICIENCY—To secure the payment of a loan, A executed a bond and mortgage to plaintiff. Subsequent thereto, A deeded the mortgaged premises to B, who, by terms of the contract of sale assumed to pay the mortgage. The mortgage was foreclosed and on a sheriff's sale a deficiency resulted. Plaintiff brought suit at law to recover a deficiency judgment against B. From a judgment in favor of plaintiff, B appealed. *Held*: Affirmed. A mortgagee may properly maintain an action at law against an assuming grantee for a deficiency after foreclosure sale. *Herbert v. Corby et al.*, 124 N.J.L. 249, 11 Atl. (2d) 240 (S. C. 1940).[1]

This is the first case in which a law court of New Jersey has been called upon to squarely decide this issue. Previously, a series of decisions of the local courts had established the principle that court of equity was the only forum in which the various rights and obligations of the mortgagee, mortgagor-grantor, and assuming grantee could be adjudicated in a single suit in such a way as to do complete justice to each of the parties.[2]

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22. "No picketing will be allowed in or on employers place of business if the strike is over." *Accord*: Feller v. Local 144, 121 N.J.Eq. 452, 191 Atl. 111 (E. & A. 1937); Gevas v. Greek Restaurant Workers Club, *supra* note 16; Snead & Co. v. International Molders Union, 103 N.J.Eq. 332, 143 Atl. 331 (E. & A. 1928); Mitnick v. Furniture Workers etc., 124 N.J.Eq. 147, 200 Atl. 553 (Ch. 1938). *Contra*: Nann v. Rainst, 255 N.Y. 307, 174 N.E. 690; Tree-Mark Shoe Co. v. Schwartz, *supra* note 3.

1. Herbert v. Corby, 17 N.J.Misc. 204, 7 Atl. (2d) 400 (Cir. Ct. 1939).

2. See N. J. Annotations to A. L. I. Contracts.

Restatement, sec. 136, subsec. 1-a: If a creditor, who sues the promisor-grantee, is met by the defense of fraud or mistake in the contract and prevails in the suit,

The proponents of this view argue thusly. It is essential that the mortgagor be joined in the suit, since it is his property, a promise to him, of which the mortgagee is seeking to avail himself and that property should not be taken without giving the owner his day in court. Moreover, it is unfair to charge the assuming grantee at the suit of the mortgagee unless at the same time all claim against him on the part of the mortgagor is extinguished. This cannot be judicially determined unless the mortgagor is joined. That equity has jurisdiction to settle and enforce such rights and obligations, in order to avoid circuity of action, is undoubted.[3]

The mere assumption to pay the mortgage on the land, made by the grantee to the grantor, is at most an indemnity merely, and though, if the grantor be personally liable for the payment of the mortgage, the mortgagee may, in equity, pursue the grantee on his assumption, that, however, is because and only because the mortgagee is in equity entitled to the benefit of all collateral securities which his debtor has taken for the mortgage debt.[4] But that right is an equitable, not a legal one, and only enforceable in the Court of Chancery by way of subrogation.[5]

To come within the purview of the doctrine of *Lawrence v. Fox*, the benefit of the third party must have been within the contemplation of the parties and it must have been more than purely incidental.[6]

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but then being unable to collect his judgment, sues the original debtor, the creditor would have to try the same question over again with the possibility of a different result for the grantor is not precluded by the judgment against the grantee. In Green v. Stone, 54 N.J.Eq. 387, 34 Atl. 1099 (E. & A. 1896), the court held that the defense that the clause assuming payment of a mortgage was inserted in a deed by mistake, must be asserted by a crossbill to which the promisee-grantor must be made a party.

3. Holland Reform School Soc. v. Jacob De Lazier, 85 N.J.Eq. 497, 97 Atl. 253 (E. & A. 1916); Pruden v. Williams, 26 N.J.Eq. 212 (Ch. 1875); Biddle v. Pugh, 59 N.J.Eq. 480, 490, 45 Atl. 626 (Ch. 1900); Uptown Bldg. & Co., Newark v. Leff, 112 N.J.Eq. 543, 165 Atl. 118 (Ch. 1933).

4. Klapworth v. Dressler, 13 N.J.Eq. 62, 78 Am. Dec. 69 (Ch. 1860); Mount v. Van Ness, 33 N.J.Eq. 262, 265 (Prerog. Ct. 1880).

5. *Supra*, note 3. Green v. Stone, 54 N.J.Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577 (E. & A. 1896); Teitz v. Meano, 107 N.J.Eq. 210, 151 Atl. 729 (E. & A. 1930).

6. 20 N.Y. 268 (1859). It is not sufficient that a promise be made by one to

Where a grantee assumes to pay the mortgage on the property conveyed to him, it is a reasonable presumption that the grantor and grantee have in mind or contemplate and regard only their own interests and not the interests of the mortgagee. They are not seeking to increase the security of the mortgagee. The grantor is seeking only his own interests, indemnity and security that he will never have to pay the mortgage after he has parted with the mortgaged property and the grantee is seeking to promise the least possible in order to get the property. Any other presumption would ignore the practical basis of such business transactions, and would contradict the universal experience of mankind. The grantor of the mortgaged property is entirely careless and indifferent as to the interests of the mortgagee. He is anxious to sell and cares nothing about the mortgagee. Can it be rationally said that the grantor would imperil his sale by asking or insisting that his grantee shall assume a mortgage for which he is not himself personally liable? The contract of the grantee is solely one of indemnity to the grantor alone.[7]

The court, in the instant case, by its unprecedented decision heralded an innovation of startling significance. The jurisdiction over deficiency suits by a mortgagee against an assuming grantee is no longer limited in New Jersey to the equitable forum, but is concurrent in the courts of law and equity. The court adopted the classic doctrine of *Lawrence v. Fox* and held that the contract of assumption was made for the direct benefit of the mortgagee and he may therefore maintain an action at law under the provisions of a statute allowing a person for whose benefit a contract is made to sue directly thereon.[8]

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another, from the performance of which a benefit may inure to a third, for if this were true, there would be no limit respecting the number and character of actions which might be maintained by strangers to a contract because of any indirect or incidental benefit which might accrue to them through its performance.

7. Morris v. Mix, 4 Kan. App. 654, 46 P. 58 (1896); Coane v. Garibaldi, N.J. Cir. Ct. 1934 (unpublished).

8. R. S. 1937, 2:26-36. It is arguable that by this decision the court has unconditionally usurped the inherent jurisdiction of the equity court. It has "stolen a weapon from the arsenal" of Chancery. For all practical purposes, suits for deficiencies against an assuming grantee will henceforth be instituted in the law forum, thereby depriving equity of a substantial proportion of its business. Further, it is indisputable that suits of this type were within the inherent jurisdiction

As the major premise for its decision, the court relied on a statute passed in 1898 which permitted a person for whose benefit a contract was made, either simple or sealed to sue thereon in any court.[9] Previous thereto, a third person might sue directly at law upon a simple contract made for his benefit, but he might not do so upon a sealed contract.[10] But in 1898 the Legislature, it was held, in effect, removed the technical objection to the beneficiary's bringing law suits based on sealed instruments and repeated the principle applied to simple contracts.[11] We question the judicial interpretation of the legislative intent in the enactment of this statutory provision.

Before the passage of the statute, there was not to be found the slightest intimation that the nature of a sealed instrument precluded the mortgage from bringing a deficiency suit at law against the assuming grantee. Not a single case is recorded where such an attempt proved fruitless. There existed no judicial determination declaring the mortgagee as an intended beneficiary. What then was the basis for the court's judicial determination? Why has a period of over forty years elapsed before the alleged application of the statute to a mortgagee was discovered?

It has been firmly established by a series of decisions of the New Jersey courts that a mortgagee has no contract rights against a grantee who has covenanted with the mortgagor to discharge the mortgage

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of equity under the fundamental equitable canon that a creditor may have the benefit of all collateral obligations for the payment of a debt, which a person standing in the position of a surety for others holds, for his indemnity and to relieve him or his property from liability for such payment.

Maure v. Harrison, 1 Eq. Cas. Abr. 93; Moses v. Murgatrayd, 1 Johns Ch. 119; Phillips v. Thompson, 2 Id. 418; Pratt v. Adams, 7 Paige 615; New London Bank v. Lee, 11 Conn. 112.

This principle has been applied to cases involving the assumption of a mortgage or in other words, the undertaking of a grantee to pay off the incumbrance is a collateral security acquired by the mortgagor which inures by an equitable subrogation to the benefit of the mortgagee. In such case, the mortgagor stands as a surety and the grantee as the principal for the payment of the debt. In Klapworth v. Dressler, 13 N.J.Eq. 62 (Ch. 1860); Crowell v. Hospital of St. Barnabas, 27 N.J.Eq. 650 (E. & A. 1876).

9. R. S. 1937, 2:26-36, N.J.S.A. 2:26-36.

10. Crowell v. Hospital of St. Barnabas, *supra*, note 8.

11. *Supra*, note 9.

debt, since he is not regarded as a third party beneficiary and that consequently he cannot sue the assuming grantee at law.[12] Yet the court in the instant case has disregarded these succinct statements of the law as controlling the issue, because they were in the main *dicta*. Such *dictum*, if *dictum* it is, should, it would seem, be regarded as *judicial dictum* in contradistinction to mere *obiter dictum*.[13] The question before the court in each case was whether or not equitable relief was possible and before deciding this, it was necessary to hold on the issue whether the complainant was or was not entitled to relief at law, since, if he were, the fundamental principle of equity jurisprudence that equity will only act in the absence of an adequate remedy at law would have barred a recovery. Every recovery in equity, awarded to a mortgagee at the expense of a grantee who has covenanted with the mortgagor-grantor alone, to pay the mortgage debt, inferentially is a holding that a court of law has no jurisdiction of the subject of the action sued upon, for otherwise the mortgagee would be shunted to his legal remedy. Such expressions of the equity courts are binding upon them and as such cannot be disregarded as mere *obiter dictum*.

The statute of 1898[14] extended the beneficiary's right to sue on contracts under seal. The question now arises whether the grantee has made himself a party to a sealed instrument by assuming the mortgage debt in the deed of conveyance. The court has based its major premise upon an affirmative answer to this query. But, it might well be argued that it is but a simple contract, for the reason that the party has nowhere bound himself under seal. The seals of the grantor in the deed to the grantee are not the grantee's seals. The instrument does not profess to bind him under seal. True, it contains a clause that he assumes and promises to pay the mortgage debt, but it does not contemplate that

12. Crowell v. Hospital of St. Barnabas, *supra*, note 8; Wise v. Fuller, 29 N.J.Eq. 257 (Ch. 1878); Norwood v. DeHart, 30 N.J.Eq. 412 (Ch. 1879); Eakin v. Schultz, 61 N.J.Eq. 156, 47 Atl. 274 (Ch. 1900); Kleinmer v. Kerns, 71 N.J.Eq. 297, 71 Atl. 332 (E. & A. 1906); Feitlinger v. Heller, 112 N.J.Eq. 209, 164 Atl. 6 (E. & A. 1933); Fisk v. Wuensch, 115 N.J.Eq. 391, 171 Atl. 174 (Ch. 1934); Garfinkle v. Vinik, 115 N.J.Eq. 42, 169 Atl. 527 (Ch. 1933).

13. For a lucid distinction see Buchner v. Chicago, M. & N. W. Ry. Co., 60 Wis. 264, 19 N.W. 56 (1884).

14. *Supra*, note 9.

he is to become bound by the promise by signing and sealing the instrument, but only accepting it, and the benefit under it. It is, therefore, a mere promise, which acquires its binding force by acts *in pais* without any signature or sealing whatever. And it seems impossible upon such facts to say that the party has promised under seal. However, the courts of New Jersey, with juristic nicety, have held that the grantee by acceptance of the deed becomes bound as a covenantor to discharge the mortgage debt, steps into the shoes of the mortgagor as to that debt and becomes the principal debtor. His acceptance is equivalent to his sealing.[15]

Then the court said that it could not imagine a contract made more for the benefit of a third party than in the case of an assuming grantee. We wonder what the expression of the court would be as to the agreement of an assuming grantee where the grantor was not personally liable. Would it cast aside precedent in the case of a donee beneficiary and allow him to sue within the purview of the statute? It is unfortunate that the court gave no reasons why it considered the assumption agreement to be for the intended benefit of the mortgagee but cursorily dismissed the problem as being too apparent for controversy.[16] Professor Williston did not find the situation as simple, for in his treatise on Contracts he stated that "in regard to contracts to discharge a debt of the promisee, the greatest confusion prevails."[17]

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15. Finley v. Simpson, 22 N.J.L. 311 (Sup. Ct. 1850); Huyler v. Atwood, 26 N.J.Eq. 504 (Ch. 1875); Green v. Stone, 54 N.J.Eq. 387, 34 Atl. 1099 (E. & A. 1896); Camden Safe Deposit & Trust Co. v. Warren, 121 N.J.Eq. 141, 187 Atl. 651 (Ch. 1936). *Contra*, Hollister v. Strahon, 23 S.D. 570, 122 N.W. 604, 21 Ann. Cas. 677 (1909); Willard v. Wood, 164 U.S. 502, 41 L. Ed. 531 (1896).

16. It is significant to note here that the two latest cases based on the third party beneficiary rule were disposed of by the highest court of the state as incidental beneficiaries. Crown Fabrics Corp. v. Northern Assur. Co., 124 N.J.L. 27, 10 Atl. (2d) 750 (E. & A. 1940); Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 11 Atl. (2d) 83 (E. & A. 1940). Certainly this factor alone should have warranted a detailed explanation in the case *sub judice*.

17. Williston on Contracts, Vol. II (Rev. Ed. 1936), sec. 380, p. 1101. The court in furtherance of its decision held that the assumption agreement was contained in the terms of the contract of sale and not in the deed of conveyance and therefore as a collateral agreement may be sued separately thereon. If the case could have been disposed of so simply and completely on this ground, why

In the final analysis, although the reasoning of the court was far from convincing, the result is both a just and a proper one. There exists no valid reason why a contract to sell land providing that the amount of the mortgage shall be paid to the mortgagee should not be regarded as made for the benefit of the mortgagee. A debt is something which one owes to another. It does not cease to be a debt because some security has been given for its payment. If such were the case there would be little use for the common legal expression "secured debts" and "unsecured debts." A debt whether secured or unsecured remains a debt. A mortgage is only a more solemn form of debt. As Williston points out, a promise by a third person to pay a mortgage debt cannot be distinguished in principle from a promise to pay any other debt.[18] A mortgage is a debt, although a debt is not necessarily a mortgage. To argue otherwise would seem to be splitting hairs or drawing too refined distinctions. Further, the law court has always been the proper province for a straight money demand.

It is of the greatest importance to decide whether the subrogation in equity or the enforcement at law approach be adopted in a particular case, for on the former theory the court's reason that the mortgagee's right is simply a right of substitution, subject, however, to the equities between the purchaser and his immediate grantor. That is to say, water cannot rise above its source.[19]

On the other hand, suing as a third party beneficiary at law,[20] the

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did the court go to such pains in sustaining its decision on the hypothesis of a sealed contract?

18. 15 H. L. R. 767, 782.

19. Where the mortgagee's right is derivative, the case admits of set-off.

Keller v. Ashford, 133 U.S. 610, 10 S. Ct. 494 (1890); Episcopal City Mission v. Brown, 158 U.S. 222, 155 S. Ct. 833 (1894). One who comes in by "the privity of substitution" acquires no better right against the promisor than the promisee himself had.

20. The annotation in 21 A.L.R. 454 points out that the mortgagee may sue at law in 34 states of the Union. Cases in other jurisdictions have enforced contracts against a grantee in a suit by the mortgagee upon the assumed ground that the estate conveyed to the defendant and the retention of part of the purchase price by him makes him the holder of a trust fund to which the creditor can resort in law even without any promise; while still others consider that the mortgagor when receiving the promise acts as agent for the mortgagee, which act the latter may, and, by bringing the action, does ratify and adopt.

mortgagee's rights are independent of the mortgagor-promisee's rights and are subject only to defenses arising out of the very transaction such as condition, breach of counter-promise, failure of consideration.[21] Generally stated, a mortgagee's rights against the assuming grantee may be greater on the third party beneficiary theory than on subrogation in equity.

The court's opinion in the reported case seems wholly unaware of the impact it would have on established practice.[22] It endeavored to escape the force of the Chancery decisions by saying that the statements made were *dicta*. Even assuming this to be true, the principle enunciated therein has never been questioned by any court and having stood unchallenged for almost half a century, the community had a right to regard it as a just declaration and exposition of the law and to regulate their actions by it.

The attitude of the Court of Errors and Appeals of New Jersey, as evidenced by recent cases, will undoubtedly favor upholding the present practice in the state unless the necessity for a change was shown by cogent and compelling reasons, of which the instant case is completely devoid.[23]

REPLEVIN — DELIVERY AND REDELIVERY BONDS. — Plaintiff in this action sued the defendant who was surety on the replevin bond given by the plaintiff in the replevin action. The defendant in the replevin action within twenty-four hours posted a "re-delivery bond" which permitted him to retain possession of the chattel pending the replevin action. Judgment was awarded to the plaintiff in the replevin action and the truck was delivered to her. Under a rule to show cause why a

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21. Dunning v. Leavitt, 85 N.Y. 30, 39 Am. Rep. 617 (1881); First Carolina's Joint Stock Land Bank v. Page, 206 N.C. 18, 173 S.C. 312 (1934); Hagman v. Williams, 56 S.D. 414, 228 N.W. 811 (1930); Schult v. Doyle, 200 Iowa 1, 201 N.W. 787 (1925).

22. Opinion written by Chief Justice Brogan, Justices Donges and Porter concurring.

23. Ramsey v. Hutchinson, 117 N.J.L. 222, 187 Atl. 650 (E. & A. 1936): "Irrespective of the inherent merit of this construction, a ruling uniformly made by the Supreme Court or the Court of Chancery over a course of years should not be set aside by us, except for cogent and important reasons."

new trial should not be granted, the court later reversed itself and ordered the return of the chattel to the defendant in replevin action. Before this reversal, the plaintiff in the replevin action left the state and disposed of the chattel. *Held*: There was no breach of any condition of the bond by the surety, since possession was obtained not by force of the replevin bond but under the judgment of the trial court. *Kivan v. Margolis,* 123 N.J.L. 359, 8 Atl. (2d) 697 (E. & A. 1939).

The legal relationships arising out of the bond are resolved by the principles which apply in the law of contracts.[1] *A fortiori* that consideration which is essential to the validity of a contract must also obtain to support the obligation on a replevin bond. It would seem that the mere seizing of the chattel by the sheriff pursuant to the provisions of the statute[2] as embodied in the bond would support the promise of the obligor. Certainly such action is a detriment to the possessor. Yet such was not the exchange primarily intended by the plaintiff in the replevin action. It was given in contemplation of the receipt of possession of the chattel. This he did not receive, but he did receive a legal substitute[3] in the nature of a re-delivery bond from defendant in the replevin action. To state that the replevin bond has no more efficacy[4] arises out of a casual observation to the effect that defendant in the replevin action has been restored to his *status quo,* and therefore plaintiff's position should not be altered. But in making such an argument it is forgotten that defendant in replevin suit, has given up some valuable rights by executing his re-delivery bond[5] in exchange for plaintiff's obligation, which in view of knowledge of the statute, must be held to be in the contemplation of plaintiff, in replevin, when he made his promise in the replevin bond, and to be a sufficient consideration to give it legal effect.

The difficulty seems to be in the fact that the replevin defendant re-

1. See Ordinary v. Connolly, 75 N.J.Eq. 525 (Prerog. C. 1909); Johnson v. Mason, 64 N.J.L. 258 (E. & A. 1900).

2. R. S. 2:32-285 and 291.

3. See Webster v. Price, 1 Root 56 (Coun. 1789); Buel v. Davenport, 1 Root 261 (Conn. 1791). R. S. 2:32-291 provides for re-delivery bond and does not expressly or implicitly relinquish any duties under the replevin bond.

4. But see York Ice Machinery Corp. v. Robbins, 185 Atl. 626 (Pa. 1936).

5. R. S. 232-294.

obtained possession of the chattel and thus kept it out of the hands and control of the plaintiff and his sureties so that he could not perform as the bond provided. But plaintiff, in replevin, did get possession of the bond. Once admitting that the bond was a continuing obligation why should the fact that such possession was had after the judgment, but before the final determination of the action change the result?

The need of protection for the party out of possession is as great at any time he is relieved of his possession as when it is had immediately under the replevin bond. The facts of this case fully substantiate this position. Furthermore, to deny that the bond is still in force is a failure to give full effect to the right of seeking a reversal.

It is my opinion that it is too restrictive to argue that the only purpose of the replevin bond is to prevent plaintiff in replevin from keeping the defendant in such action out of possession for an unreasonable time by delaying the trial. It should have a greater extent so as to include the purpose of guaranteeing that the chattel is returned to the party to whom it is awarded, which award may be rendered at any time before the final determination of the action.

The facts are conducive only to one logical conclusion which is that the obligors were bound by the replevin bond and became liable thereon when they breached the conditions thereof by failing to prosecute the action "with effect"[7] and did not duly return[8] the chattel as had been ordered by the trial court.[9]

EASEMENTS — LIGHT AND AIR BY IMPLIED RESERVATION. — Complainant grantor owned lots 1 and 2 with a house on lot 1 with windows overlooking lot 2 and conveyed lot 2 to defendant by warranty deed. Defendant now proposes to build on lot 2 and thereby cut off light and air from windows in house retained by complainant. *Held*: easement of light and air was created by implied reservation and injunc-

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6. See Gibbs v. Bartlett, 2 Watts & S. (Pa.), 42 Cent. Rep. sec. 470, 488.

7 and 8. R. S. 2:32-285. See Pinkley v. Yount, 172 S.W. 431 (Mo. 1914); Fergus Motor Co. v. Schott, 26 P. 2d 365 (Mont. 1933).

9. Hazam v. U. S. Fidelity & Guaranty Co., 109 N.J.L. 434 (E. & A. 1932); Kaufman v. DeCozen Motor Co., 119 N.J.L. 514 (E. & A. 1938).

tion restraining defendant granted. *Blumberg v. Weiss,* 126 N.J.Eq. 616, 10 Atl. (2d) 743 (Ch. 1940).

That, in the absence of other factors hereinafter discussed, an easement in favor of the grantor should be implied would seem to follow from the statement "when the owner of two tenements sells one of them or the owner of one entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains."[1]

That an easement of light and air can be created by implication was definitely settled in an early case[2] and followed in later cases wherein easements of light and air implied by grant have been upheld.[3] There have been cases where there has been an easement by implied reservation.[4] However, in no previous decision of our state has there been an implied reservation of an easement of light and air although there has been dictum in one case to this effect.[5]

A requisite to the creation of an implied easement is that it be necessary to the beneficial enjoyment of the land in favor of which the

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1. Central Railroad Co. v. Valentine, 29 N.J.L. 561 (E. & A. 1862). Also, "But if the owner of a tract of land . . . sells or devises either part (servient or dominant) an easement is created by implication in or to the other part. And this is the case even if it is the servient part that is sold or devised." Denton et ux v. Leddell, 23 N.J.Eq. 64 (Ch. 1872). See also Taylor v. Wright, 76 N.J.Eq. 121, 79 Atl. 433 (Ch. 1909).

2. Sutphen v. Therkelson, 38 N.J.Eq. 318 (Ch. 1884), the court there saying that although an easement of light and air cannot be created by prescription or mere user for 20 years under a claim of right (Hayden v. Dutcher, 31 N.J.Eq. 217 ,Ch. 1879), still it could be created by implied grant.

3. Ware v. Chew, 43 N.J.Eq. 493, 11 Atl. 746 (Ch. 1887); Greer v. Van Meter, 54 N.J.Eq. 270, 33 Atl. 794 (Ch. 1896); Bloom v. Koch, 63 N.J.Eq. 10, 50 Atl. 621 (Ch. 1902); Lengyel v. Meyer, 70 N.J.Eq. 501, 62 Atl. 548 (Ch. 1905); Fowler v. Wick, 74 N.J.Eq. 603, 70 Atl. 682 (Ch. 1908); Cerra v. Maglio, 98 N.J.Eq. 481, 131 Atl. 96 (Ch. 1925); Engel v. Siderides, 112 N.J.Eq. 431, 164 Atl. 397 (E. & A. 1932).

4. Seymour v. Lewis, 13 N.J.Eq. 439 (Ch. 1861), easement of flow of water; Taylor v. Wright, 76 N.J.Eq. 121, 79 Atl. 433 (Ch. 1909).

5. In Denman v. Mentz, et al., 63 N.J.Eq. 613, 52 Atl. 1117 (Ch. 1902), the grantor having conveyed the "servient" tenement now seeks to have an easement of light and air implied by reservation, the court saying, "While the deed

easement is claimed.[6] The degree of necessity has been interpreted to be that which is convenient and comfortable enjoyment of the property as it existed at the time the grant was made.[7] The same rule as to the degree of necessity according to our cases, applies in the case of reservation as in grant.[8] The precedent for this was found in an early English case which, however, has been repudiated in more recent and sounder opinions and which is contrary to the weight of American authorities.[9] The degree of necessity according to the latter in cases of reservation by implication is that of strict necessity, i.e., there can be no other reasonable mode of enjoying the dominant tenement without the easement. The reason for this distinction is that a grant is taken more strongly against the grantor and if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant.[10] The weight of authority goes even further with respect to easements of light and air, holding that such easement can be created only by express grant or express reservation.[11] As stated in one case[12] to allow easements of light and air by implied reservation would be

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is absolute in its terms and while it purports to convey every interest which he had in the land granted, a reservation would nevertheless be implied assuming that the light was "necessary in the very lax sense in which that word has been used were it no for . . . "

6. Taylor v. Wright, 76 N.J.Eq. 121, 79 Atl. 433 (Ch. 1909); 9 R.C.L. 763.

7. Kelly v. Dunning, 43 N.J.Eq. 62, 10 Atl. 276 (Ch. 1887), citing Pyer v. Carter, 1 Hurl & Norm 916. "I do not understand the rule to have been adopted in this state that the easement must be absolutely necessary to any enjoyment of the property, whatever, as in the case of a way of necessity." Taylor v. Wright, 76 N.J.Eq. 121, 79 Atl. 433 (Ch. 1909).

8. Taylor v. Wright, *supra* note 7; see Toothe v. Bryce, 50 N.J.Eq. 589 ,25 Atl. 182 (Ch. 1892), and Hess v. Kenney, 69 N.J.Eq. 138, 61 Atl. 464 (Ch. 1905).

9. See Toothe v. Bryce, *supra* note 8, for a survey of the English and American cases.

10. 9 R.C.L. 765-6. V. C. Pitney in Toothe v. Bryce, *supra* note 8, said, "But in the case of a reservation, it has been held that there can be no implied reservation of an easement in the land granted when the grantor has conveyed as he generally does, all his right, title and interest therein except such an easement as is absolutely necessary to any enjoyment of it whatever, as in the case of a way of necessity to permit the grantor to claim such reservation is to permit him to derogate from his own grant."

11. 56 A.L.R. 1135 at p. 1140.

12. Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379 (1869).

unsuited to a country like ours "where real estate is constantly and rapidly appreciating, and being subject to new and more costly forms of improvement and where it so frequently changes owners as almost to become a matter of merchandise. . . It would moreover in many cases be a perpetual encumbrance upon the servient estate and operate as a veto upon improvements in our towns and cities. It will be safer . . . to leave the parties on questions of light and air, to the boundary lines they name and the terms they express, in their deeds and contracts." In view of the foregoing it is submitted that, assuming easements of light and air, by implied reservation, still there was not that necessity which justifies the decision in the present case.

Let us assume that an easement of light and air should have been reserved by implication. An easement in land is such an interest in a concerning land and real estate as the Statute of Frauds contemplates[13] and as such admits of being aliened or released and the absolute sale and grant of the land on or over which the easement is claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted, which is separable from the tenement retained and can be aliened or released by the owner.[14] But granting that the transfer of the property did not effect a release of the easement. The deed was a warranty deed with full covenants of warranty, one of which is the covenant against encumbrances. An encumbrance in this sense has been defined as every right to or interest in the land, to the diminution of the value of the land but consistent with the conveyance of the fee by the conveyance.[15] An easement is such a claim or right as interferes with the possession of the proprietor, and affects the estate both in quantity and value and falls within the terms of the covenants, and if the easement is an encumbrance, then when the grantor conveyed by warranty deed one of two things must have happened, either the covenant against encumbrances negatived the implied reservation of an easement or it was broken as soon as made. The presence of the covenant against encumbrances would seem to negative the im-

13. Ware v. Chew, 43 N.J.Eq. 493 (Ch. 1887); Bloom v. Koch, 63 N.J.Eq. 10 (Ch. 1902).

14. Denman v. Mentz, 63 N.J.Eq. 613 (Ch. 1902), citing Guffield v. Brown, 4 de G. J-S 185.

15. 9 R.C.L. 736.

plication of a reservation and narrow the necessity to absolute necessity, e.g., to the case of a way of necessity given by the policy of the law that no land may be made inaccessible or useless. But if notwithstanding this covenant it should be held that there was an implied reservation, the grantor would be liable on the covenant.[16] However, to prevent this absurd consequence, the court would be constrained to hold that the covenant did not extend to the reservation, in other words that it only extended to what was actually conveyed, viz., the land minus the thing reserved. But if this were so, the consequence would be that a covenant against encumbrances could be satisfied by the same type of deed pertaining to the same land having different results. So where A owns lots 1 and 2 and conveys lot 2, the servient lot to B, by warranty deed, the covenant not embracing the easement, A could set up an implied reservation of an easement. But when B sells lot 2 to C by warranty deed, the existence of the easement would constitute a violation of the encumbrance. So the most just and logical result would be to negative the reservation.

Moreover to allow the easement to stand would violate the spirit of the recording acts, which is to make the state of the title appear on the record and protect purchasers and encumbrancers against undisclosed titles and liens.[17] The searcher would have to determine whether at any time within the last 60 years there was a jointure of the title between the lot searched and and the three adjoining lots and what buildings were on those lots. Since an easement is a legal and not an equitable right, sale to a bona fide purchaser would not cut it off and lands would become encumbered with such easements.

It is consequently submitted that a more just result would obtain were the easement denied.

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16. Denman v. Mentz, 63 N.J.Eq. 613 (Ch. 1902).
17. 23 R.C.L. 171.