DIGESTS OF OPINIONS*
BY
JUSTICE WORRALL F. MOUNTAIN

ADMINISTRATIVE LAW—ENVIRONMENTAL CONTROL—*Young v. Board of Health of the Borough of Somerville*, 61 N.J. 76, 293 A.2d 164 (1972).

Residents of certain Somerset County communities sought an adjudication invalidating resolutions to fluoridate their drinking water supply. Between May and September of 1970, the respective Boards of Health of Raritan, Somerville, Branchburg, and Bridgewater requested their supplier of drinking water, Somerville Water Company, to supply water containing one part fluoride to each one million parts of water to the communities. 61 N.J. at 77, 293 A.2d at 164. Upon learning of these requests, the plaintiffs, all residents and taxpayers of the various communities, sought to enjoin the four boards from implementing the fluoridation program. On the return day of the order to show cause why a preliminary injunction should not issue, the plaintiffs moved for summary judgment. The court denied the motion and by stipulation of counsel, the court's decision was given the effect of a summary judgment for the defendants. The plaintiffs appealed and the supreme court certified the case on its own motion pursuant to N.J.R. 2:12-1. *Id.* at 77, 293 A.2d at 164.

In upholding the validity of the resolutions, Justice Mountain stated that such action was merely an implementation of the policies enunciated by the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection, which agencies are "charged with overall responsibility in this area of public health." *Id.* at 82, 293 A.2d at 167. Justice Mountain was quick to discount any question of the Boards' power to invoke such a plan—any necessary authority stemmed from the rules promulgated by those same state environmental agencies. Finally, Justice Mountain perceived no merit in the plaintiffs' argument that any fluoridation program had to originate out of an ordinance rather than by resolution. In fact, he posited that "[w]here a general rule or declaration of policy has already been made, its particular implementation by a board of health will normally take the form of a resolution." *Id.*

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* At the time these digests were prepared, there were a small number of cases, in which Justice Mountain filed an opinion, that had not been approved for publication.

ADMINISTRATIVE LAW—RACIAL DISCRIMINATION—*New Jersey Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 288 A.2d 855 (1972).

In 1970, the Division on Civil Rights (Division) promulgated a Multiple Dwelling Reporting Rule, which required all owners of multiple dwellings comprised of twenty-five or more units to file an annual report concerning "the racial designation of tenants and applicants" of their buildings. 60 N.J. at 333, 288 A.2d at 856.

Plaintiffs, an association comprised of individual owners and landlords of multi-unit dwellings, challenged the rule, which was designed to aid in the implementation of the Law Against Discrimination, contending that it offended that very statute which it sought to enforce. *Id.* The Law Against Discrimination forbids an owner of real property to record any specification as to race, creed, color, national origin, ancestry, marital status or sex concerning tenants. N.J. STAT. ANN. §§ 10:5-1 to 38 (West 1976 & Cum. Supp. 1979-1980).

Justice Mountain turned to the fundamental purpose of the Law Against Discrimination to resolve the apparent inconsistency between that statute and the challenged Multiple Dwelling Reporting Rule. 60 N.J. at 334–40, 288 A.2d at 857–60. The purpose of the Law Against Discrimination was found to be the eradication of racial discrimination. *Id.* at 335, 288 A.2d at 857–58. By 1971, noted Justice Mountain, little progress had been made in the area of housing. *Id.* He also stated that it was the hope of the rule's framers that statistical data derived from the reports would identify housing discrimination so that official action could be taken. *Id.* at 335, 288 A.2d at 858.

Justice Mountain rejected an overly literal interpretation of the Law Against Discrimination. He declared that "[i]t is now generally accepted that despite earlier statements describing the Constitution as being color blind . . . those who seek to end racial discrimination must often be acutely color conscious." *Id.* at 336, 288 A.2d at 858. Justice Mountain made clear that, in interpreting a statute, "primary regard must be given to the fundamental purpose for which the legislation was enacted. Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter. This doctrine permeates our case law." *Id.* at 338, 288 A.2d at 859.

Justice Mountain declared, that when viewed in such light the Multiple Dwelling Reporting Rule, or its requirements, could not be viewed as being unreasonable and therefore its validity must be upheld. *Id.* at 336, 341, 288 A.2d at 858, 861.

ADMINISTRATIVE PROCEDURE—COURTS—*Passaic County Probation Officers' Association v. County of Passaic,* 73 N.J. 247, 374 A.2d 449 (1977).

The Chief Probation officer of Passaic County issued a directive which extended the working hours of the probation officers. The order was issued as a response to an earlier action of the county court judges, which order similarly extended the hours during which trial court would be held. The Passaic County Probation Officers Association initiated action to enjoin the enforcement of the directive and to compel negotiations on the working hours modification. The chancery division denied such relief. The supreme court certified the cause on its own motion. 68 N.J. 497, 348 A.2d 538 (1975).

Justice Mountain, writing for the majority, held that the probation officers are an integral part of the court system and, as such, they "come within the regulatory control and superintendence" of the supreme court. 73 N.J. at 253, 374 A.2d at 452. Furthermore, the Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13A-5.3 (West 1965) was found not to give the probation officers the right to insist upon prior negotiations on the issue of extended hours. The appropriate route of redress was found to be the presentation of a "grievance" pursuant to article I, section 19 of the New Jersey Constitution.

Justice Mountain reviewed the nature of the constitutional mandate under article VI, section 2, paragraph 3 and section 7, paragraph 1 which vests the authority and obligation of administering the judicial system in the supreme court. In determining that the New Jersey Employer-Employee Relations Act did not apply to the probation officers, he noted that it would be inconsistent to allow legislative enactments to dilute or modify that constitutional mandate. The court did, however, recognize a constitutional right to put forth a grievance to the court concerning the negotiability of hours of work under article I, section 19. This grievance procedure was to be initiated with the county court judges of Passaic County and was to be followed by good faith discussions on the issue of the extention of working hours. 73 N.J. at 257, 374 A.2d at 454.

CIVIL SERVICE—ADMINISTRATIVE PROCEDURE—*Williams v. Civil Service Commission,* 66 N.J. 152, 329 A.2d 556 (1974).

Henry Williams was awarded a provisional appointment as Assistant Dog Warden of the City of Orange. During the course of his

employment, he became aware of certain inadequacies with regard to the operation of the Orange dog shelters. These conditions were brought to the attention of Williams' superior, and when no action was taken, he revealed the situation to a newspaper reporter. Upon the publication of this exposé, complaints pertaining to Williams' job performance were given to the local governing body which resulted in a request for Williams' resignation. Williams refused to resign, and produced a second news item. He also personally expressed his views at a public meeting of the municipal governing body. Shortly thereafter, he was discharged. 66 N.J. at 155, 329 A.2d at 557.

After his dismissal, Williams submitted a written request for a hearing relating to his termination before the Civil Service Commission, which request was denied. He appealed to the appellate division, which reversed the denial and remanded for a full hearing before the Commission. 124 N.J. Super. 444, 307 A.2d 628 (App. Div. 1973). Upon application by the Civil Service Commission, the supreme court granted certification. 63 N.J. 584, 311 A.2d 7 (1973).

The supreme court, speaking through Justice Mountain, affirmed the judgment of the appellate division, but modified the ruling in one respect. The appellate court had based its analysis on *Board of Regents v. Roth*, 408 U.S. 564 (1972). Justice Mountain recognized that although Williams was a provisional employee who could be dismissed at any time, and thus enjoyed no property right per se in his position, his dismissal may impose a "stigma" upon him that would affect his future employment opportunity in the public sector. Section 4:1-8.14 of the New Jersey Administrative Code allows the Chief Examiner and Secretary of the Commission to look with disfavor upon an applicant for a Civil Service position who had previously been removed from public service. 66 N.J. at 157, 329 A.2d at 558. This administrative rule clearly imposed a stigma upon the plaintiff, and thus entitled him to a hearing. The court, in its modification of the appellate division ruling, called for a hearing before the employer-municipality rather than the Civil Service Commission. Williams was a temporary employee, and was not entitled to the full statutory protections of a Commission hearing since these protections belong to those who are appointed within the merit and fitness system that comprises Civil Service. *Id.* at 159, 329 A.2d at 559.

CONDEMNATION OF LAND—EASEMENTS—*Housing Authority of Atlantic City v. Atlantic City Exposition, Inc.*, 62 N.J. 322, 301 A.2d 441 (1973).

Atlantic City Exposition, Inc., (Exposition) was the owner of certain property in Atlantic City, which property faced the boardwalk on the south and had a frontage along its easterly side which ran adjacent to South George Street for some 223 feet. 62 N.J. at 325, 301 A.2d at 442. Exposition's title extended some twenty-five feet from the sideline of the street to the center line, and was subject to the public easement for roadway purposes. *Id.*

The Housing Authority of Atlantic City (Housing Authority) designated the land a blighted area and included it within a renewal project which it was about to undertake. *Id.* The twenty-five foot strip was originally designated as "Property to be Acquired by Reversion," but was subsequently omitted from descriptions of the lands to be condemned. *Id.* On January 4, 1969, the municipality adopted an ordinance which vacated its public easement on South Georgia Avenue. *Id.* Defendant Exposition argued that the value of its property was substantially increased by the known fact that the twenty-five foot strip on South Georgia Avenue was about to be vacated, and accordingly should be reflected in its condemnation award. *Id.* at 326, 301 A.2d at 443. The defendant also argues that the description used by the municipality in the condemnation documents excluded the twenty-five foot South Georgia Avenue strip. *Id.*

At a trial *de novo,* the court reduced the commissioners' award of $265,000 to $224,238.74, ruling that the twenty-five foot South Georgia Avenue strip had no value at the time of condemnation, and that the then contemplated vacation of the public easement afforded the defendant no basis for an additional element in the award determination. *Id.* at 324–26, 301 A.2d at 442–43. The appellate division, in an unreported opinion, reversed the trial court's findings and remanded the case for a new trial. *Id.* at 325, 301 A.2d at 442. The Supreme Court of New Jersey granted certification to the Housing Authority's petition. 61 N.J. 163, 293 A.2d 393 (1972).

Justice Mountain, speaking for a unanimous court, found the description of the condemned land to be sufficient to include the South Georgia Avenue roadbed. *Id.* at 326, 301 A.2d at 443. He stated that it is "well settled that a description of property appearing in a deed which carries only to the sideline of a road, will be sufficient . . . to convey title to the center line of the road. . . ." *Id.* To defeat this rule of deed interpretation, there must be explicit wording to the contrary, which was absent in this case. *Id.*

With regard to the second aspect of the case, the court agreed with the trial court that the planned vacation of South Georgia Avenue afforded the defendant no additional element in the determina-

tion of its award. *Id.* at 329–30, 301 A.2d at 444–45. Justice Mountain reasoned that since title to the twenty-five foot strip was "part and parcel" of the urban renewal program, the roadbed strip had no value if it was not included in the rebuilding program. *Id.* at 329, 301 A.2d at 444. He also pointed out that such vacation would never have taken place had title to the roadbed been vested in anyone other than the Housing Authority. *Id.* Finally, Justice Mountain stated that any contemplated improvements by the Housing Authority pursuant to condemnation must be "equally irrelevant upon the issue of fair value." *Id.* at 330, 301 A.2d at 445.

CONDEMNATION OF LAND—VALUATION—*New Jersey v. Township of South Hackensack*, 65 N.J. 377, 322 A.2d 818 (1974).

To facilitate the construction of Interstate Route 80, the Commissioners of Transportation condemned portions of six north-south streets in the Township of South Hackensack. As part of the construction of Route 80, the state built overpasses to permit north-south traffic through South Hackensack. The state also rerouted sewers that had laid under the condemned roadbeds.

The commissioners in condemnation granted an award in favor of South Hackensack, and the State appealed. The result of a trial *de novo* was a jury verdict that indicated the property was of no value. In an unreported decision, the appellate division reversed and remanded for a new trial. The supreme court granted certification on the State's petition. 64 N.J. 321, 315 A.2d 409 (1974).

The supreme court found that the doctrine of substitute facilities governed this case. This doctrine provides for a damages award in the amount necessary to construct substitute or replacement facilities whenever a state condemns municipally owned property. Justice Mountain, speaking for the court, held that when a condemnor takes portions of municipally owned property and such property cannot be valued by an examination of comparable sales of similar property, the just compensation for the property will be "an amount sufficient to pay the cost of constructing a substitute or replacement facility . . . ." 65 N.J. at 382, 322 A.2d at 821. Such compensation could take the form of a monetary award sufficient to allow construction of a replacement facility, or the condemnor may actually construct the replacement. *Id.* at 385–86, 322 A.2d at 823. The opinion of the appellate division was affirmed and the case remanded to the law division for further proceedings.

CONSTITUTIONAL LAW—COMMERCE CLAUSE—*Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 68 N.J. 451, 348 A.2d 505 (1975), *vacated and remanded sub nom. City of Philadelphia v. New Jersey*, 430 U.S. 141 (1977).

Two separate actions were brought challenging the validity of New Jersey's Waste Control Act, N.J. STAT. ANN. §§ 13:1*I*-1 to -10 (West 1979), and certain administrative regulations which prohibited the transport into New Jersey of waste originating outside the state. The lower courts ruled the prohibitions unconstitutional, finding them to be in violation of the commerce clause.

Justice Mountain, emphasizing the acute impact on state interests of waste disposal, reversed the lower courts and upheld the state scheme of regulation. He noted that the purpose of the prohibitions was not to discriminate against interstate commerce, but rather to promote the health of the people and the ecological value of the land. 68 N.J. at 473, 348 A.2d at 516. The lack of market value of the waste when combined with one harmful impact on health, served to put the waste beyond the pale of protection of the commerce clause. *Id.* In addition, Justice Mountain asserted that the commerce clause has a narrower breadth in areas where the validity of state legislation is being questioned, as opposed to the one sweeping scope allowed when federal control is to be extended. *Id.* at 469, 348 A.2d at 514.

The Justice felt there was no indication that Congress had intended to pre-empt state regulation in this area. The prohibition was pursuant to a legitimate state interest, and the means were suitable to one desired end. Equally important was the balance between the benefit derived and the burden imposed. The benefits were significant and critical; the burden was minimal, and many alternatives were available to those affected. *Id.* at 475–76, 348 A.2d at 517–18.

Justice Mountain concluded by weighing the state's legislative action and the right of protection it sought to impose. He stated that where the effect upon commerce is minimal, and the protection of the citizens' welfare is at stake, "we have no hesitancy in sustaining the state action." *Id.* at 478, 348 A.2d at 519.

CONSTITUTIONAL LAW—EQUAL PROTECTION—*State v. Senno*, 79 N.J. 216, 398 A.2d 873 (1979).

Consolidated in this opinion were the cases of three separate defendants, each of whom was charged with the commission of a nonin-

dictable offense. Each of three defendants sought acceptance to the pretrial intervention (PTI) program in the county where his or her infraction occurred. 79 N.J. at 221–22, 398 A.2d at 880. The PTI programs are operated under the supreme court's rulemaking authority and provide for selected applicants to receive rehabilitative services or supervision instead of ordinary prosecution for the crimes with which they are charged. *Id.* at 227–28, 398 A.2d at 879. Five counties limit participation in the PTI programs to those who have been charged with indictable offenses. *Id.* at 229, 398 A.2d at 880.

The defendants appealed from lower court judgments which excluded their entry into the PTI programs due to the nature of their offenses. *Id.* at 222, 398 A.2d at 876. On appeal, the defendants argued that: (1) limitation on eligibility for PTI programs did not comport with the court rules governing PTI; (2) the classification limiting eligibility to those charged with indictable offenses was a violation of equal protection; and (3) admission to PTI programs of those charged with nonindictable offenses in some counties also acted to deprive certain people of equal protection. *Id.* at 222–23, 398 A.2d at 876–77.

Writing for a unanimous court, Justice Mountain stated that the distinction between nonindictable and indictable offenses has been longstanding in the state. An examination of the court rules concerning PTI revealed that no PTI program was permitted to make exception to the rule that " 'every defendant who has been accused of any *crime* shall be eligible for admission into a PTI program.' " *Id.* at 223, 398 A.2d at 877 (emphasis in original). However, a program was permitted to "make provision for the inclusion of persons charged with nonindictable offenses." *Id.* at 224, 398 A.2d at 877. The court thus disagreed with the defendants' contention that counties were not permitted to limit eligibility to PTI programs to those who were charged with indictable offenses. *Id.*

Justice Mountain next addressed the two claims of unconstitutionality. He held that the class of defendants accused of nonindictable offenses was not "suspect" nor was a fundamental right or interest at issue. Scrutiny of the matter was, therefore, properly made under the "rational basis" test. *Id.* at 226–27, 398 A.2d at 878–79. Justice Mountain reviewed the reasons for development of PTI programs and concluded that the limits placed upon the programs comported with these reasons. The court reached the conclusion that "the exclusion of disorderly and other petty offenses from a PTI program clearly rests upon a rational basis." *Id.* at 229, 398 A.2d at 880.

With regard to the defendants' second claim of unconstitutionality, the court noted that although the counties in which the defend-

ants were charged excluded nonindictable offenses from PTI programs and other counties did not maintain this policy, the court found that lack of uniform standards was not a deprivation of the defendants' rights of equal protection. A review of United States Supreme Court cases construing the equal protection clause revealed that " '[t]erritorial uniformity is not a constitutional requisite.' " *Id.* State legislatures have specifically been accorded the right to prescribe variations in criminal procedures among areas in the same state, especially where those procedures were experimental in nature. The PTI program had been characterized, in other decisions, as experimental. *Id.* at 229–31, 398 A.2d at 880–81. Justice Mountain found no impairment of the equal protection rights of any of the defendants. Therefore, the judgments of the courts below were affirmed. *Id.* at 232, 398 A.2d at 881.

CONSTITUTIONAL LAW—FEDERAL PRE-EMPTION—*City of Philadelphia v. New Jersey*, 73 N.J. 562, 376 A.2d 888 (1977), *rev'd on other grounds*, 437 U.S. 617 (1978).

In 1973, New Jersey enacted the Waste Control Act, N.J. STAT. ANN. §§ 13:1*I*-1 to -10 (West Cum. Supp. 1978-1979) (Act). This Act prohibited the disposal, in New Jersey, of solid and liquid wastes which originated out of the state. The constitutionality of the statute was upheld by the Supreme Court of New Jersey. 68 N.J. 451, 348 A.2d 505 (1975). The United States Supreme Court vacated the judgment and remanded it for reconsideration on the question of possible pre-emption by the newly enacted Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901. 430 U.S. 141 (1976).

Justice Mountain, writing for a unanimous New Jersey supreme court, held that the Federal Resource Conservation and Recovery Act "does not effect federal pre-emption either as to the disposal of hazardous wastes or with respect to any other area of solid waste disposal." 73 N.J. at 566, 376 A.2d at 890. An examination of 42 U.S.C. §§ 6921-6931 revealed that the states are subject to minimum standards, but that individual states are not prevented from instituting more stringent requirements for disposal of wastes. The court determined "that both the federal and state regulations operate without conflict. The New Jersey plan will be in strict compliance with all federal requisites even though out-of-state wastes are prohibited." 73 N.J. at 569, 376 A.2d at 891. Therefore, upon the determination of no federal pre-emption, the court ordered the attorney general to commence enforcement of the New Jersey Statute thirty days after this opinion was rendered, in order to allow for appeal.

The United States Supreme Court agreed with Justice Mountain's finding that the state law was not pre-empted by federal legislation. However, the statute was deemed invalid upon the determination that it violated the commerce clause. 437 U.S. 617 (1978).

CONSTITUTIONAL LAW—FREEDOM OF PRESS—*In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S.Ct. 598 (1978).

The New York Times Company (*Times*) and Myron Farber, a reporter for the *Times*, challenged criminal and civil contempt judgments entered against them as the result of their failure to comply with two subpoenas *duces tecum*. 78 N.J. at 263, 394 A.2d at 332. These contempt judgments were related to the criminal prosecution of Dr. Mario Jascalevich, who was accused of causing the deaths of several persons through the use of the drug curare. Farber, while working as an investigative reporter, had compiled certain documents and materials which were instrumental in bringing about the indictment and prosecution of Dr. Jascalevich. The defense sought to obtain these materials and two subpoenas *duces tecum* were issued directing the *Times* and Farber to produce them. *Id.* at 263–64, 394 A.2d at 332.

The *Times* and Farber refused to disclose the information and moved to quash the subpoenas, claiming that the first amendment and the New Jersey shield statute, N.J. STAT. ANN. § 2A:84A-21 (West Cum. Supp. 1978-1979), afforded them protection against compelled disclosure of confidential information. 78 N.J. at 265–66, 270, 394 A.2d at 333, 335. The motion to quash was denied by the trial judge, who then ordered Farber to produce the subpoenaed materials for an *in camera* inspection. Farber persistently refused to comply with the order to produce and was ultimately found guilty of both criminal and civil contempt. *Id.* at 264, 394 A.2d at 332.

The Supreme Court of New Jersey, in a five-to-two decision, affirmed the criminal and civil contempt convictions. In the majority opinion, authored by Justice Mountain, the court rejected the appellants' claim to a first amendment privilege to withhold subpoenaed documents or confidential information despite a legitimate demand. The court cited as controlling the United States Supreme Court decision in Branzburg v. Hayes, 408 U.S. 665 (1972). In *Branzburg*, the Supreme Court had held that reporters did not have a constitutional right to refuse to appear and testify before state and federal grand juries. *Id.* at 667. The New Jersey supreme court, in applying this holding to the facts in *Farber*, stated that the obligation to produce materials sought by a criminal defendant is at least as significant as

the obligation to appear before a grand jury. 78 N.J. at 268–69, 394 A.2d at 334.

Justice Mountain agreed that appellants were entitled to protection under the literal terminology of the shield law. *Id.* at 270, 394 A.2d at 355. However, he concluded that this privilege must yield to Dr. Jascalevich's sixth amendment right "to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI; N.J. CONST. art. I, para. 10. The court acknowledged the strong legislative intent to provide broad protection to the press with regard to confidential information, but held that the Constitution must prevail over the statute. 78 N.J. at 271–72, 394 A.2d at 335–36.

Justice Mountain stated that should similar situations arise in the future, before an *in camera* inspection may be ordered, the trial judge must be satisfied that the materials sought are relevant to the defense and are unavailable from "any less intrusive source," and that the defendant has a legitimate need for them. *Id.* at 276–77, 394 A.2d at 338. Finally, the court noted that the decision to require these preliminary determinations was not based upon any first amendment mandate but rather upon the court's deference to the expressed legislative intent to protect the confidentiality of journalists' sources and information. *Id.* at 276, 394 A.2d at 338.

In a concurring opinion, Chief Justice Hughes noted that it would have been preferable if the trial judge had documented the threshold requirements for access to the material claimed to be privileged. The Chief Justice enumerated those requirements as including whether the documents were relevant and material, whether there was a less intrusive means of acquiring the desired information, whether there was protection under the shield law, and whether the defendant had a substantial sixth amendment right to the evidence. However, since appellants refused to submit to an *in camera* examination of the materials, they had themselves prevented any fuller hearing from taking place. *Id.* at 281–82, 394 A.2d at 341–42 (Hughes, C.J., concurring). Chief Justice Hughes then declared that to permit the press to resist *in camera* inspection would be to take the ultimate decision from the courts and put it in the hands of the press itself. In conclusion, he emphasized the importance of a fair trial among the precious rights secured by the Constitution. *Id.* at 282–83, 394 A.2d at 342.

CONSTITUTIONAL LAW—JUDICIAL APPOINTMENTS—*Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977).

On September 16, 1976, Governor Brendan Byrne nominated state senator Stephen B. Wiley for the position of Associate Justice of the Supreme Court of New Jersey. At the time he was nominated, Wiley was serving a four-year senatorial term which began on January 8, 1974. In 1974, the New Jersey legislature had passed a statute which increased the salaries of associate justices of the supreme court. N.J. STAT. ANN §§ 2A: 1A-6 to -8 (West Cum. Supp. 1978-1979). 72 N.J. at 295–96, 370 A.2d at 826–27.

The Supreme Court of New Jersey, speaking through Justice Mountain, held that the portion of the salary statute relating to legislator-appointees violated article IV, section 7, paragraph 9(5) of the New Jersey Constitution. 72 N.J. at 297, 370 A.2d at 827. This constitutional provision prohibits special legislation affecting the emoluments of a public officer. *Id.* The debate then focused on the special or general nature of the legislation. *Id.* at 298, 379 A.2d at 828. The court concluded that the provision was special because it created an arbitrary classification, *id.* at 300–01, 370 A.2d at 829, which did not "rest upon any rational or reasonable basis relevant to the purpose and object of the act." *Id.* at 301, 370 A.2d at 829. Therefore, the court excised the special provision from the salary enactment. *Id.* at 301, 370 A.2d at 830. As a result, the appointment violated article IV, section 5, paragraph 1 of the New Jersey state constitution, which "prohibits any legislator during the term for which he was elected, from being nominated to a judgeship the emoluments of which have been increased during such term." *Id.* at 308, 370 A.2d at 833.

In his dissent, Chief Justice Hughes asserted that the court's decision to invalidate the nomination of Senator Wiley was neither necessary nor constitutionally mandated. *Id.* at 308, 370 A.2d at 834. With regard to N.J. STAT. ANN. § 2A: 1A-6 (West Cum. Supp. 1978-1979), the Chief Justice observed that by inserting a clause excluding members of the senate and assembly from the salary increase provisions during their legislative term, the legislature obviously intended to comply with the "ineligibility" provision of N.J. CONST. art. IV, § V, para. 1. *Id.* at 309, 370 A.2d at 834. In arguing that the exclusion clause of N.J. STAT. ANN. § 2A: 1A-6 (West Cum. Supp. 1978-1979) was a valid legislative enactment and not an unconstitutional attempt to circumvent the ineligibility mandate, Chief Justice Hughes noted the general rule that it often becomes necessary to look beyond the superficial language of a constitutional provision in

order to ascertain its true intent and purpose. *Id.* at 311, 370 A.2d at 835. In this regard, the Chief Justice concluded that the ineligibility provision of the New Jersey Constitution was intended to prevent situations where a legislator is influenced to vote for an increase in the salary of a position because he could be appointed to that position during his legislative term.

According to the Chief Justice, the exclusion clause of N.J. STAT. ANN. § 2A: 1A-6 (West Cum. Supp. 1978-1979) is entirely consistent with this constitutional intent since an appointee to a judicial office would not be allowed to receive the salary increase, at least until expiration of his legislative term, thereby eliminating the possibility of any self-interest. *Id.* at 319, 370 A.2d at 839. However, Chief Justice Hughes questioned the viability of the statutory language which disqualified a legislator-appointee from the salary increase during the balance of his legislative term. Viewing this language as constitutionally defective in that it would allow an appointee to occupy an office the emoluments of which had been increased during his legislative term, the Chief Justice believed that the statute might still be salvaged by discarding the limiting language. This remedy would be consonant with the principle that the courts should, whenever possible, strain to prevent rendering a legislative act unconstitutional. *Id.* at 325–27, 370 A.2d at 843–44.

Finally, Chief Justice Hughes stated that under his construction of the statute in question it would not be considered a "special law" in violation of N.J. CONST. art. IV, § VII, para. 9, since it would apply equally to all members of the New Jersey Legislature eligible for appointment to a judicial office. In the Chief Justice's view, the fact that some legislator-appointees may receive less compensation than their colleagues does not create an arbitrary classification since the alternative would be to render them ineligible for appointment altogether. *Id.* at 332, 370 A.2d at 846–47.

CONSTITUTIONAL LAW—LIMITATIONS OF ACTIONS—*Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 666 (1972).

While crossing Bergenline Avenue in North Bergen on June 6, 1968, Frances Rosenberg caught the heel of her shoe in a fissure in the road and was injured when she subsequently fell. 61 N.J. at 193, 293 A.2d at 663. The road had been paved with concrete by the New Jersey Asphalt & Paving Company (Asphalt Company) in 1935. *Id.* At some point in time between 1935 and 1968, prior to the accident, the two easternmost lanes had parted, leaving this opening between them. *Id.* In bringing suit, the plaintiff joined as defendants the As-

phalt Company, its successor in interest, Lettieri and Bellezza Company (Lettieri), the Township of North Bergen and Public Service Coordinated Transport. *Id.*

Each defendant moved for summary judgment on the ground that any claim of the plaintiff was barred by N.J. STAT. ANN. § 2A: 14-1.1 (West Cum. Supp. 1978-1979). The statute provides that no action for damages shall be brought more than ten years after the completion of construction or improvement to real property. *Id.* The trial court granted the motions for summary judgment and the plaintiff appealed. The appellate division reversed the trial court, stating that improvements to roads or highways were not within the scope of section 2A:14-1.1. 61 N.J. at 194, 293 A.2d at 664. The Supreme Court of New Jersey granted the joint petition for certification of Asphalt Company and Lettieri. *Id.*

Disagreeing with the appellate division, the supreme court, speaking through Justice Mountain, found that section 2A:14-1.1 did contemplate the facts of this case. 61 N.J. at 198, 293 A.2d at 666. The court reasoned that the intent of the legislature was to afford some measure of protection to architects and contractors who were being exposed to greater liability as a result of changes in the "discovery rule" and the nonterminable liability for negligent planning and construction. *Id.* at 195, 197–98, 293 A.2d at 664, 665–66.

Having found this case to be within the scope of the statute, the court then was faced with the plaintiff's argument that section 2A: 14-1.1 was violative of the New Jersey Constitution, and also, of the equal protection and due process clauses of the Federal Constitution. *Id.* at 200, 293 A.2d at 667. Justice Mountain reasoned that the statute did not violate article IV, section VII, paragraph 9 (8) of the New Jersey Constitution for it was not enacted to grant "to any corporation, association or individual any exclusive privilege, immunity or franchise." *Id.* Instead, the court declared that the chief consideration of the legislature was to afford fairness to the defendant in such proceedings. *Id.* at 201, 293 A.2d at 667.

Finally, Justice Mountain stated that section 2A:14-1.1 did not violate due process or equal protection. 61 N.J. at 201, 293 A.2d at 668. With respect to due process and equal protection, he noted that the statute did not bar a valid cause of action as the plaintiff had suggested. *Id.* at 199, 293 A.2d at 667. Instead, he believed that the legislature had retracted the right to a cause of action under these circumstances which it "is entirely at liberty to create . . . or abolish. . . ." *Id.* at 199–200, 293 A.2d at 667. Justice Mountain further declared that the classification set up by the statute offers no exclusion so as to justify a determination that the statute violates any constitutional provision. *Id.* at 201, 293 A.2d at 668.

CONSTRUCTION CONTRACTS—GOVERNMENT CONTRACTS—*Terminal Construction Corp. v. Atlantic County Sewerage Authority*, 67 N.J. 403, 341 A.2d 327 (1975).

The apparent successful bidder for a sewerage treatment plant construction contract wished to avoid its obligation because it miscalculated its cost under the contract by more than six million dollars. 67 N.J. at 407, 341 A.2d at 329. Fears surrounding the loss of its reputation prevented the bidder, Terminal Construction Corp., from bringing suit for relief based on mistake. *Id.* at 408, 341 A.2d at 329. However, it did institute an action against the contracting party, Atlantic County Sewerage Authority, alleging that said party failed to seek the approval of the federal government on its bid pursuant to rules issued in connection to a grant of federal monies for the construction of the treatment facility. Failure to obtain this approval, the complaint asserted, made the award to the plaintiff vary from the material conditions contained in the bidding specifications. *Id.*

Justice Mountain, writing for the full court, held for the plaintiff. *Id.* The court stated that federal approval, identified in the bidding specifications and integral to the release of federal funds, was a material condition which could not be waived. *Id.* The court noted the dilemma to which the defendant was put because of N.J. STAT. ANN. § 40A: 11-24 (West 1979). 67 N.J. at 409, 341 A.2d at 330. This statute requires contracting units to make award within thirty days of the receipt of all bids. This time limit, however, is usually far shorter than the period within which the federal government grants its approval on any submitted bid. The contracting unit in this instance must award the contract, pursuant to section 40A:11-24 (West 1979), and then hope for federal approval. *Id.* at 409, 341 A.2d at 330.

In light of the lack of the harmony between the aforementioned statute and the federal funding scheme, Justice Mountain opted for an alternative approach designed to harmonize the legislative intent of section 40A:11-24 with the federal requirements. The court ruled that contracting units should make their awards within the statutory period, but specify clearly that it is conditioned upon a later grant of federal approval. This, as Justice Mountain stated,

> would appear to eliminate all likelihood that a state regulation would impede any hoped for influx of federal funds, and it would conform to what we believe to be sound legislative judgment.

67 N.J. at 416, 341 A.2d at 334.

COOPERATIVES—CONTRACTS—*Lambert v. Fishermen's Dock Cooperative, Inc.*, 61 N.J. 596, 297 A.2d 566 (1972).

In 1957, William Lambert joined the Fishermen's Cooperative Association by purchasing two shares of stock for $125. 61 N.J. at 599, 297 A.2d at 568. At that time, the by-laws of the association stated that upon termination of membership, a member was entitled to receive the "fair book value" of his or her shares. *Id.* However, in 1962, this by-law was amended to provide that upon termination of membership, instead of "fair book value," a retiring member would receive a return of the original price paid for his stock. *Id.* Then, in July, 1965, based upon another by-law, Lambert's interest in the association was terminated and he received his original outlay of $125. *Id.* Lambert then brought this action, contending that he did not receive the amount to which he was justly entitled. *Id.*

The trial court found the amended by-law which altered the consideration to be received upon redemption of terminated association interests, to be "invalid as violating a contract, infringing upon a vested right, and exceeding such authority as was bestowed upon the majority . . . to amend [the] by-laws." *Id.* at 600, 297 A.2d at 568. The appellate division reversed, holding that the right to amend by-laws, which was reserved to the majority, was sufficient to support the questioned amendment. *Id.*

Justice Mountain, writing for a unanimous supreme court, stated that the general law is that any reserved right to amend by-laws of an association is a limited right rather than an absolute one. *Id.* He further reasoned that any such right may not be extended so as to destroy or impair a "contract or vested right." *Id.* Finally, Justice Mountain viewed a right to amend as generally being limited to matters touching the administrative policies and affairs of the association. *Id.* at 600, 297 A.2d at 568–69. Accordingly, he held that the by-law adopted in 1962 was ineffective to divest the plaintiff of his right under the original by-laws. *Id.* at 604, 297 A.2d at 571.

In finding that the plaintiff was entitled to the fair book value of the shares at termination of his interest, the court was compelled to define the term "fair book value." *Id.* Justice Mountain stated that the proper determination of fair book value was the value of the defendant's assets less its liabilities divided by the number of shares. *Id.* at 605, 297 A.2d at 571. The court then remanded the case for a full evidentiary hearing with regard to the determination of book value. *Id.* at 607, 297 A.2d at 572.

COURTS—RULE-MAKING POWER—*Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973).

The validity of N.J.R. 4:4-42-11(b), authorizing prejudgment interest in tort actions, was at issue in this case, 63 N.J. at 355, 307 A.2d at 573. The rule was purportedly adopted pursuant to the supreme court's rule-making power on December 21, 1971. *Id.* at 351, 307 A.2d at 571. In answering the charges of having "trespassed upon the legislative domain" of substantive law, Chief Justice Weintraub, writing for the majority, suggested that "it is not our power to act that is questioned; it is the method we chose to exercise that power." *Id.* at 355, 358, 307 A.2d at 573, 575. Turning to the merits, N.J. R.4:42-11(b) was held to be appropriate, since heretofore, delay in the disposition of tort litigation was almost encouraged, due to the fact that most claims were paid by insurance companies who were in no rush to give up a source of investment income. *Id.* at 359, 307 A.2d at 475. The court hoped that the adoption of this rule would encourage prompt settlements, a desirable goal for both litigants and the judiciary. *Id.* at 359–60, 307 A.2d at 576. The usual rule of applying judge-made law retrospectively was also followed in this case as the court remarked that "plaintiffs merely receive[d] what in justice is their due, and defendants are required to turn over a gain they received at the plaintiffs' expense." *Id.* at 360–61, 307 A.2d at 576.

After setting forth the obvious merits of the rule, the court addressed the question of "proper judicial performance" in adopting the rule. *Id.* at 361, 307 A.2d at 577. It was noted that "[t]he constitutional grant of rule-making power as to practice and procedure is simply a grant of power" and should not be read as containing inherent restrictions which would consequently deprive the judicial branch of flexibility in matters of substantive law. *Id.* at 363, 307 A.2d at 577. In every case, there is leeway as to how extensively an issue will be dealt with, or, whether an issue will be raised at all. The court agreed with the defendants when they referred to the admonition in Winberry v. Salisbury, 5 N.J. 240, 248, *cert. denied*, 340 U.S. 877 (1950), that "[the courts] are not to make substantive law *wholesale* through the exercise of the rule-making power." 63 N.J. at 364, 307 A.2d at 578.

In his dissent, Justice Mountain disagreed with the majority that N.J.R. 4:42-11(b) represented a proper exercise of the court's rule-making power. "I . . . am convinced that it transcends this power, and should not be allowed to stand as an ongoing rule of court." *Id.* at 385, 307 A.2d at 589 (Mountain, J., dissenting). While citing the

New Jersey Constitution as authority for the limitation of the court's rule-making power to areas of practice and procedure, Justice Mountain also relied on the court's decision in *Winberry v. Salisbury*. *Id.* at 386–87, 307 A.2d at 590–91. For all the flexibility it allowed the court, Justice Mountain maintained that there was nothing in *Winberry* to justify the majority's decision. *Id.* at 386–87, 307 A.2d at 590–91. He remarked that the decision effects a change in the law of damages which is a field of substantive rather than procedural law. *Id.* at 388, 307 A.2d at 591. Justice Mountain further stated that while "judge-made law, adopted in the course of adjudicating controversies, is at all times subject to legislative supervision and change" this was not the case "as to rules properly promulgated pursuant to the rule-making power of the Supreme Court." *Id.* at 394, 307 A.2d at 594. For this reason especially, Justice Mountain felt that N.J.R. 4:42-11(b) exceeded the constitutional powers of the court. *Id.* at 395, 307 A.2d at 594.

CRIMINAL LAW—INSTRUCTIONS TO JURIES—*State v. Bonano*, 59 N.J. 515, 284 A.2d 345 (1971).

Arturo Bonano, angered by his wife's attendance at a party without his permission, " 'smacked' her in the face" upon her return. His step-daughter ran off to alert her Uncle Carlos, who approached the Bonano home wielding a knife. Witnesses' accounts agreed that Carlos mounted the porch steps and drew the knife while uttering verbal threats, whereupon Bonano fired a revolver, fatally wounding Carlos. 59 N.J. at 517, 284 A.2d at 346.

At trial, the defense attorney requested an instruction to the effect that a " 'man doesn't have to run from his own home.' " *Id.* at 521, 284 A.2d at 348. The trial judge exercised his discretion in omitting the instruction and the defendant was found guilty of second degree murder. The appellate division affirmed the conviction and the supreme court subsequently granted the defendant's petition for certification. 113 N.J. Super. 210, 273 A.2d 392 (App. Div. 1971).

The Supreme Court of New Jersey, speaking through Justice Mountain, held it was reversible error to have omitted an instruction of this nature in the jury charge. The jury ought to have been instructed that if it believed from the evidence that the defendant was standing at his doorway as the homicide victim approached with a knife and reasonably believed he was in danger of suffering serious bodily harm, he was under no duty to retreat but might resist attack, even to the extent of using deadly force. 59 N.J. at 521, 284 A.2d at 348.

Justice Mountain noted that New Jersey law has always recognized that a plea of self-defense as justification for a killing may serve to negate fully any finding of guilt; however, it may be successfully invoked only where the killing is necessary or reasonably appears so to preserve the defendant's life or protect him from serious bodily harm. A further qualification to a successful plea of self-defense requires that before a threatened party employ deadly force, he retreat from his assailant wherever a safe means of escape is possible and he is consciously aware of this fact. *Id.* at 518, 284 A.2d at 346–47. While the retreat doctrine is well-established law in New Jersey, Justice Mountain observed that the supreme court had never previously determined whether a threatened defendant has a duty to flee from his own home. *Id.* at 519, 284 A.2d at 347. In adopting the rule which excepts one's dwelling house from the general doctrine of retreat, the court restricted its holding to situations where the defendant is actually in his dwelling house, but included within the definition of "dwelling house" a porch or similar appurtenance. *Id.* at 520, 284 A.2d at 347.

In rejecting the prevailing view in this country which defines parameters of a "dwelling" as "anywhere within the 'curtilage' of a man's home," *id.*, Justice Mountain criticized this characterization as ambiguous and arbitrarily dependent upon the outcome of a potential boundary dispute. Adopting what it considered to be the better view, the Supreme Court of New Jersey limited its holding to include a house and porch-like structure, but left to future disposition whether any additional property might also fall within the exception to the retreat rule. *Id.*

CRIMINAL PROCEDURE—EVIDENCE—*State v. Wilkerson*, 60 N.J. 452, 291 A.2d 8 (1972).

Donald Wilkerson and four accomplices participated in the armed robbery of a bank, during which an off-duty corrections officer was shot and killed by one of Wilkerson's companions. In the course of his flight from the scene of the robbery, Wilkerson encountered two bystanders, one a gardener named Franklin, and the other a truck driver who gave Wilkerson a ride to an adjoining town. Wilkerson was arrested within two hours of the robbery. The arresting officers then drove him over to the place where Franklin was still working, whereupon Wilkerson was positively identified by Franklin as one of the group of men whom he had encountered earlier that morning. Later that day, at the police station, Wilkerson was recognized

by the truck driver "who happened, apparently by chance, to be also walking along the same corridor." 60 N.J. at 458, 291 A.2d at 11.

Wilkerson was convicted of murder in the first degree and sentenced to death. An appeal was taken to the New Jersey supreme court. Justice Mountain, writing for the majority, affirmed the judgment of the trial court but modified the death sentence to life imprisonment in accordance with State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972), which in following the mandate of the United States Supreme Court, had held the New Jersey death penalty statute to be unconstitutional. Justice Mountain further found that the identification of Wilkerson by Franklin "occurred about 90 minutes after he had first observed defendant. The case comes well within the exception to the *Wade* rule which sanctions one-on-one identifications made at the scene of the initial observation." 60 N.J. at 461, 291 A.2d at 12. Similarly, the spontaneous identification of the defendant by the truck driver at the police station was found not to "come within the strictures of the *Wade* rule." *Id.* at 462, 291 A.2d at 13. Justice Mountain further noted that these identifications were not necessary to secure the conviction since the defendant had given detailed confessions to two different police officers after being arrested and booked. Therefore, even if error had been found in the identifications, it would be harmless error and as such would not be a basis for reversal. *Id.* at 462–63, 291 A.2d at 13.

CRIMINAL PROCEDURE—JURY CHARGE—*State v. Lewis*, 67 N.J. 47, 335 A.2d 12 (1975).

Lewis was convicted of second degree murder. 67 N.J. at 48, 335 A.2d at 12. Though the facts conclusively determined that the defendant had committed the killing, the appellate division reversed on the grounds that the trial judge had failed to provide the jury with a definition of the phrase " 'preponderance of the evidence,' " in setting out the standard of proof necessary for a conviction. *Id.* at 48, 335 A.2d at 12. The supreme court granted certification to consider whether the omitted instructions constituted reversible error.

Justice Mountain delivered the unanimous decision overruling the appellate division and holding that the failure of the trial judge to include a definition of the terms " 'preponderance of the evidence' " was not plain error. *Id.* at 48–51, 335 A.2d 12–14. He observed that the phrase was one that was commonly understood and expressed confidence that the average juror was capable of deriving from the words the test that was to be applied to the evidence in the case. *Id.*

at 50, 335 A.2d at 13–14. The court noted that while the preferable practice would be to explain and define the phrase, a reversal in the case "would be tantamount to a determination that a failure to include this definition would almost automatically constitute reversible error." *Id.* at 50, 335 A.2d at 13.

The court paid particular attention to the fact that during the course of summation the defense counsel had accurately portrayed to the jury, in terms of probability, the burden of proof necessary to successfully establish the defense of legal insanity. *Id.* at 50–51, 335 A.2d at 13–14. Justice Mountain recognized that while the jury should receive its instructions from the trial judge, "an appellate court is justified in taking [defense counsel's comments] into account in reaching its decision as to whether an omission on the part of the trial judge may or may not have been plain error and cause for reversal." *Id.* at 51, 335 A.2d at 14.

CRIMINAL PROCEDURE—PLEA BARGAINING—*State v. Thomas*, 61 N.J. 314, 294 A.2d 57 (1972).

On June 5, 1969, Lamont Thomas stole Mrs. Fannie Murray's pocketbook, knocking the 74-year-old woman down in the process. 61 N.J. at 317, 294 A.2d at 58. Following his arrest, Thomas was indicted for atrocious assault and battery, assault with intent to rob, and robbery. *Id.* Thereafter, pursuant to good faith plea bargaining between the defendant and the prosecutor, the defendant pleaded guilty to the atrocious assault and battery offense while the two remaining counts were eventually dismissed. *Id.* Defendant was sentenced to an indefinite term in the Yardville Youth Reception and Correctional Center on December 5, 1969. *Id.*

On January 23, 1970, Mrs. Murray died from the injuries which she sustained as a result of the attack. *Id.* Some ten months later, defendant was charged with the murder of Fannie Murray. *Id.* The trial court denied the defendant's motion to discuss the indictment on the ground of double jeopardy, but at the same time, it refused to permit the state from proceeding upon the theory of felony murder. *Id.* at 316, 294 A.2d at 58.

The New Jersey supreme court, in an opinion authored by Justice Mountain, found that the state had not disqualified itself from indicting and trying the defendant simply because it had accepted his guilty plea to the atrocious assault and battery charge. *Id.* at 319, 294 A.2d at 60. The court specifically noted that "[t]he law is settled that where the chronology of events is (1) assault and battery, (2) convic-

tion of that offense, (3) death of the victim, and (4) indictment for homicide, the defense of double jeopardy is not available." *Id.* at 320, 294 A.2d at 60.

However, Justice Mountain declared that plea bargaining was a "legitimate and respectable adjunct of the administration of the criminal laws." *Id.* at 321, 294 A.2d at 61. He also noted that for plea bargaining "to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either." *Id.* Finally, in dismissing the murder indictment, Justice Mountain concluded that permitting the state to press the murder charge would allow "the State [to do] violence to its agreement, and . . . deprive the defendant of something for which he legitimately bargained." *Id.* at 323, 294 A.2d at 62.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—*State v. Ebron*, 61 N.J. 207, 294 A.2d 1 (1972).

On January 4, 1968, the Newark Narcotics Squad executed a search warrant at 86 West Kinney Street in Newark, which was being occupied by William Ebron. 61 N.J. at 211, 294 A.2d at 3. During the search, the police uncovered heroin, cocaine, methadone, marijuana, a hypodermic needle, a syringe and Tuinal capsules. *Id.* at 211, 294 A.2d at 3. In addition to drug possession charges, Ebron was also charged with a disorderly persons offense arising from the unlawful possession of a hypodermic needle and legend drugs (Tuinal capsules). *Id.* He was acquitted of these latter charges. *Id.*

The trial court convicted the defendant of drug possession, but the appellate division reversed the conviction on the ground that the defendant's pretrial motion to suppress should have been granted. *Id.* at 210, 294 A.2d at 3. The supreme court granted certification, 58 N.J. 333, 277 A.2d 390 (1971). The court subsequently reinstated the trial court's decision on the ground that the record reflected a sufficient basis upon which a warrant could be based. 61 N.J. at 211–12, 294 A.2d at 3–4.

Justice Mountain, speaking for a unanimous court, stated that the magistrate had acted properly in issuing the search warrant. *Id.* at 212, 294 A.2d at 3–4. He reasoned that under the two-tiered *Aguilar-Spinelli* test, the evidence profferred in support of issuing the warrant was sufficiently trustworthy. *Id.* at 211–13, 294 A.2d at 3–4.

Finally, Justice Mountain discounted the defendant's double jeopardy and collateral estoppel arguments. *Id.* at 214–15, 294 A.2d at 5. While noting the merits of such an issue, he stated that in New

Jersey the defendant has the burden of proving that the earlier judgment actually decided the same issues. *Id.* at 215–16, 294 A.2d at 5. Justice Mountain held that the defendant had not met this burden and therefore the court had no basis upon which to make a double jeopardy or collateral estoppel determination in the defendant's favor. *Id.* at 217–18, 294 A.2d at 6–7.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—*State in re H.B.*, 75 N.J. 243, 381 A.2d 759 (1977).

For a discussion of Justice Mountain's concurring opinion, see Chief Justice Hughes' Digests at 167.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—*State v. Wright*, 61 N.J. 146, 293 A.2d 380 (1972).

On September 12, 1969, a search warrant was issued and executed for "203 Spruce Street, top floor, City of Newark." 61 N.J. at 147, 293 A.2d at 381. The grant of the search warrant was based upon information received from reliable informants, and a surveillance conducted by a narcotics agent. *Id.* at 147–48, 293 A.2d at 381. As a result of the evidence found during this search, Wright was convicted of possessing narcotic drugs. *Id.* at 147, 293 A.2d at 381. In an unreported decision, the appellate division reversed the conviction, holding that the affidavit in support of the warrant was insufficient to establish the requisite probable cause to issue such a warrant. *Id.*

The supreme court, hearing the case in conjunction with *State v. Ebron*, 61 N.J. 207, 294 A.2d 1 (1972), held that the affidavit did establish probable cause to such an extent to support the issuance of a search warrant. *State v. Wright*, 61 N.J. at 149, 293 A.2d at 381. Justice Mountain, writing for the court, relied upon his reasoning in *Ebron* as "substantially dispos[ing] of the issues in this case." *Id.* at 148, 293 A.2d at 381.

However, Justice Mountain found it necessary to give "special comment" to two points raised by the defendant. *Id.* First, the court found that it was proper to give appropriate weight to the defendant's known narcotics history in determining probable cause to issue a search warrant. *Id.* Second, the court discounted the defendant's contention that the warrant contained an insufficient description of the premises to be searched. *Id.* at 148–49, 293 A.2d at 381. Justice Mountain found " 'top floor' " to be sufficient, explaining that "[w]hile a search warrant must describe the premises to be searched with reasonable accuracy, pin-point precision is not demanded." *Id.*

DEBTOR & CREDITOR—STATUTE OF FRAUDS—*Howard M. Schoor Associates, Inc. v. Holmdel Heights Construction Co.*, 68 N.J. 95, 343 A.2d 401 (1975).

Howard M. Schoor Associates, Inc. (Schoor) provided engineering and surveying services to Holmdel Heights Construction Company (Holmdel). Subsequently, Holmdel encountered financial difficulties and was unable to make timely payments to Schoor. 68 N.J. at 98, 343 A.2d at 402. The construction company sought additional financing, but securing the financing was dependent upon its continued operation. Holmdel could not continue without Schoor's services. *Id.* at 99, 343 A.2d at 403. Subsequent to a meeting between Schoor and Holmdel, Alan Sugarman, an attorney and eighteen percent stockholder for Holmdel, verbally promised to pay Holmdel's past and future bills if Schoor would continue to provide their services. *Id.* at 98–99, 343 A.2d at 403.

Shortly thereafter, Holmdel went into receivership. *Id.* at 100, 343 A.2d at 403. Schoor alleged that Sugarman had in fact personally undertaken responsibility for Holmdel's debts to Schoor. Sugarman claimed that he did not make the promise, and furthermore that, even if he had, it was not enforceable under the Statute of Frauds. *Id.* at 98, 343 A.2d at 402. The trial judge resolved both issues in favor of Schoor and entered a judgment against Holmdel. The appellate division reversed with one judge dissenting. *Id.*

The New Jersey supreme court resolved the factual issue against Sugarman. *Id.* at 101, 343 A.2d at 404. The remaining question then, was whether the promise fell within the Statute of Frauds. *Id.* The criterion of "leading object" or "main purpose" was utilized by Justice Mountain in the unanimous opinion. The "leading object" or "main purpose" rule states that if the main purpose of an agreement to pay the debts of a third party is to accrue a benefit to the third party, the promise falls within the Statute of Frauds and is not enforceable unless it is in writing. If, however, the main purpose is to render a special benefit to the promisor, the promisor becomes an original debtor and the promise falls outside the Statute of Frauds. *Id.* at 101–02, 105, 343 A.2d at 404–05, 406.

Justice Mountain reasoned that it was highly unlikely that Sugarman would have pledged his personal assets primarily for the benefit of the company. The assets were pledged primarily for his own benefit. Sugarman was, therefore, an original debtor, and his oral promise was not within the Statute of Frauds. The lower court decisions were upheld. *Id.* at 106, 343 A.2d at 407.

DELEGATION OF POWERS—*In re Supervision and Assignment of the Petit Jury Panels in Essex County*, 60 N.J. 554, 292 A.2d 4 (1972).

Early in 1971, a dispute arose between Essex County Assignment Judge James R. Giuliano and County Sheriff John F. Cryan concerning the manner in which petit jury panels were to be summoned, and to whom the power to supervise, care for, and pay jurors was granted, 60 N.J. at 556, 292 A.2d at 5. Each asserted that he had such authority. *Id.* Pursuant to this perceived authority, both Judge Giuliano and Sheriff Cryan appointed persons to assist them in the task of supervising and summoning of the jurors. *Id.* Finally, Judge Giuliano served Sheriff Cryan with "an order to show cause why the latter 'should not be permanently enjoined and restrained from in any way interfering with'" the judge's execution of this supervisory function. *Id.* at 556–57, 292 A.2d at 5.

When Sheriff Cryan appeared to answer the order to show cause, Judge Giuliano presided. *Id.* at 557, 292 A.2d at 5. Sheriff Cryan moved for a change of venue, or in the alternative for Judge Giuliano to disqualify himself, arguing that the hearing should be treated as a plenary proceeding. *Id.* Both motions were denied.

After hearing oral arguments on the validity of the challenged order, the court entered an order enjoining the sheriff from interfering in any way with the court's supervision, process, assignment and selection of petit jurors. *Id.* at 557, 292 A.2d at 6. Sheriff Cryan appealed to the appellate division and the supreme court certified the case on its own motion. *Id.*

Justice Mountain, writing for a unanimous court, affirmed the assignment judge's decisions and thus upheld the validity of the injunction, except for that aspect of the order which attempted to enjoin the sheriff's ability to supervise the payment of the jurors. *Id.* at 562–63, 292 A.2d at 8–9. He noted that while county sheriffs once controlled the jury selection process, such power had subsequently been vested in the supreme court. *Id.* at 561, 292 A.2d at 6; *see* N.J. CONST. art. VI, § II, para. 3. Justice Mountain then observed that the supreme court delegated both the summoning and supervisory powers over petit juries to the assignment judges through Court Rule 1:33-3(a)(2). 60 N.J. at 561–62, 292 A.2d at 8. However, he stated that the intent of the legislature, clearly enunciated in N.J. STAT. ANN. §§ 22A:1-1 to -3 (West 1969 & Cum. Supp. 1978-1979), was that the county sheriff should have sole supervisory power over the execution of payments to the members of the jury panel. 60 N.J. at 563, 292 A.2d at 9.

DIVORCE & SEPARATION—EQUITABLE DISTRIBUTION—*Carlsen v. Carlsen*, 72 N.J. 363, 371 A.2d 8 (1977).

A separation agreement had been incorporated into a judgment for separate maintenance before 1971, the effective date of the equitable distribution statute. 72 N.J. at 365, 371 A.2d at 9. The issue presented to the supreme court was whether this agreement operated to deny equitable distribution to the wife. *Id.* at 365–66, 371 A.2d at 9. The agreement required the husband to establish a $75,000 trust fund, the proceeds of which were to be used for the benefit of their children. *Id.* at 367–68, 371 A.2d at 10.

The court, in an opinion by Justice Mountain, held that the trust fund was primarily a support agreement and, as such, would not present an obstacle to equitable distribution of the marital property. *Id.* at 369–70, 371 A.2d at 11. It was determined that the appropriate point in time for the identification and valuation of the eligible assets should be the point at which the prior consent judgment was entered. *Id.* at 370, 371 A.2d at 12. The cause was remanded accordingly for the purpose of effecting an equitable distribution in light of this decision and the decision in Smith v. Smith, 72 N.J. 350, 371 A.2d 1 (1977). 72 N.J. at 371, 371 A.2d at 12.

DIVORCE & SEPARATION—EQUITABLE DISTRIBUTION—*Di Giacomo v. Di Giacomo*, 80 N.J. 155, 402 A.2d 922 (1979).

In 1965, plaintiff and defendant, Alphonse and Marie Di Giacomo, separated following a violent quarrel. The parties reached an oral agreement covering the division of many of their assets in 1966. A short time thereafter, defendant, Marie Di Giacomo filed an action for separate maintenance and a judgment was subsequently entered, ordering the plaintiff to pay support. In 1975, plaintiff filed for divorce and defendant counterclaimed for equitable distribution of all assets acquired up to the filing for divorce.

The trial judge agreed with defendant's contention and awarded equitable distribution of all property acquired prior to the filing of the divorce action and the appellate division affirmed. Both courts relied on the rule set forth in *Painter v. Painter*, " 'that for purposes of determining what property will be eligible for distribution the period of acquisition should be deemed to terminate the day the complaint [for divorce] is filed.' " 65 N.J. 196, 217–18, 320 A.2d 484, 495 (1975).

The supreme court reversed and remanded the cause for future findings of fact. Justice Mountain, speaking for a unanimous court, distinguished *Painter* on the grounds that the rule announced there

was not meant to be applied rigidly. The court in *Painter* acknowledged that questions would arise in the future concerning what property should be eligible for equitable distribution. 80 N.J. at 158, 402 A.2d at 923. The court also relied on recent decisions which had held that a written separation agreement may act as a bar to equitable distribution if it can be shown to be a fair and equitable agreement. *Id.* at 158–59, 402 A.2d at 923. Finding irrelevant the fact that the agreement in this case was oral, Justice Mountain held that the oral property settlement would serve to bar equitable distribution of property acquired after the agreement, provided that the settlement was fair and equitable and had been fully performed. *Id.* at 159, 402 A.2d at 924.

DIVORCE & SEPARATION—EQUITABLE DISTRIBUTION—*Mey v. Mey*, 79 N.J. 121, 398 A.2d 88 (1979).

Karl Mey's grandfather died in 1961, and by his will, separate trusts were established for the benefit of Karl, his two siblings, and his mother. Karl's mother was named trustee of each trust. The grandchildrens' trusts established that upon reaching the age of twenty-one, each would receive the then accumulated income of the trusts. Between the ages of twenty-one and twenty-five, each grandchild was to receive the income arising from the trust as it accrued. At the age of twenty-five, each grandchild was to receive outright the principal of the trust. In the event that any grandchild died before age twenty-five, the share in the trust was to be paid to his or her issue. If a grandchild died without issue, his or her share was to be divided among the beneficiaries of the other trusts. Other provisions of the trusts, not essential to the holding in this case, were also discussed by the court. 79 N.J. at 123, 398 A.2d at 88.

Karl Mey married Sandra in 1968, shortly before his twenty-first birthday. In 1972, on his twenty-fifth birthday, he received the principal of the trust. In 1974, Sandra initiated an action for divorce which resulted in a judgment for divorce in 1975. Subsequently, the question of equitable distribution was heard and a separate judgment was entered. The trial judge determined that the trust assets received by Karl were eligible for equitable distribution because they had been acquired during marriage. The appellate division affirmed, with one judge dissenting, and the supreme court received the case on appeal as of right. *Id.*

Justice Mountain authored the opinion of a unanimous court. He affirmed the opinion of the appellate division substantially for the

reasons given therein. The disposition of the principal of Karl's trust was solely at issue in the matter *sub judice*; the "susceptibility" to equitable distribution of an income interest was not examined by the court. Resolution of the former issue turned upon the meaning of the words "legally and beneficially," which are contained in the equitable distribution statute, N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1978-1979).

The appellate division had construed these words to mean the acquisition of a title which carries with it the effective power to control or use or enjoy. 79 N.J. at 124, 398 A.2d at 89. The supreme court found that at the time of Karl's marriage, he had no effective power over the asset. This power was dependent upon survival to the age of twenty-five, an event which occurred after he married Sandra. Reiterating its finding in technical terms, the court noted that, at the time of the death of Karl's grandfather, Karl was a vested remainderman whose interest was subject to divestment. On Karl's twenty-fifth birthday, he ceased to hold a future interest and he acquired totally free use of the asset; the asset was then "legally and beneficially acquired." The court therefore agreed that Karl's trust was subject to equitable distribution. *Id.* at 125, 398 A.2d at 89.

DIVORCE & SEPARATION—EQUITABLE DISTRIBUTION—*Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974).

Stephen and Joan Painter were granted a judgment of divorce on March 14, 1972, pursuant to N.J. STAT. ANN. § 2A:34-2 (d) (West 1952 & Cum. Supp. 1979-1980), New Jersey's "no fault" divorce statute. Accordingly, an equitable distribution was made of the marital property under the authority of N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980). 118 N.J. Super. 332, 287 A.2d 467 (Ch. Div. 1972). The supreme court granted certification. 62 N.J. 192, 299 A.2d 726 (1972). The issues presented to the court centered around two constitutional challenges to the "no fault" statute. 65 N.J. at 202, 320 A.2d at 487. A third constitutional challenge was argued, but was considered and decided in Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974), a companion case.

The first challenge was that the statute embraced more than one object, thus violating article IV, section 7, paragraph 4 of the New Jersey Constitution. 65 N.J. at 202, 320 A.2d at 487. Justice Mountain rejected this attack, noting that the purpose of the constitutional requirement that every law shall only embrace one object was to prevent the difficulties which might flow from a misleading or deceptive

title. *Id.* at 206, 320 A.2d at 489. Here, the statute was challenged for failure to expressly refer to the equitable distribution provision in the title of N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980). 65 N.J. at 206, 320 A.2d at 489. Justice Mountain reasoned that there are few, if any, divorces that do not involve such distributions, and thus the possibility of fraud emanating from the title of the statute is minimal. Accordingly, the statute was not found defective on this ground. 65 N.J. at 208, 320 A.2d at 490.

The second constitutional challenge averred that N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980) was impermissibly vague and uncertain, that the term "equitable" was imprecise as a guide to a trial judge, and that the statute failed to demonstrate sufficient legislative intent as to what property is eligible for distribution. 65 N.J. at 208, 320 A.2d at 490. In addressing these issues, Justice Mountain found that the term "equitable" merely related to the time honored judicial concern of fairness to the parties involved, within the circumstances of a particular case. *Id.* at 209, 320 A.2d at 490.

Taking this opportunity to further construe N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980), Justice Mountain established guidelines to be followed by the matrimonial bench in determining appropriate distributions of marital assets. 65 N.J. at 211–12, 320 A.2d at 452. In classifying property eligible for distribution, Justice Mountain deemed all property acquired during the marriage to be included. *Id.* at 217, 320 A.2d at 495. The period of acquisition is terminated on the date the divorce action is filed. *Id.* at 218, 320 A.2d at 495. However, such property as may be owned by each party prior to the marriage shall be ineligible for distribution as well as increases in the value of such property, and income or property derived from a sale or exchange of such property that is traceable to pre-marriage assets. *Id.* at 214, 320 A.2d at 493.

Finally, Justice Mountain recognized that these criteria can realistically provide only the framework for guidance. He further noted that the court sought only to implement the legislature's intent so as to remove the most obvious barriers to implementation. *Id.* at 218 n.7, 320 A.2d 495 n.7.

DIVORCE AND SEPARATION—EQUITABLE DISTRIBUTION—*Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).

Irene Rothman was granted a divorce from George Rothman on grounds of adultery. 65 N.J. at 221, 320 A.2d at 497. The trial judge,

in an unreported opinion, provided for an allowance of alimony and equitable distribution of the marital assets. *Id.* at 222, 320 A.2d at 498. Both parties appealed from the judgment of the trial court, and the supreme court granted certification on motion, prior to a hearing before the appellate division. 63 N.J. 505, 308 A.2d 670 (1973).

Justice Mountain, continuing his constitutional analysis of the parameters of N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979–1980) which he began in *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), artfully dealt with two major issues that could have become stumbling blocks in the administration of New Jersey's equitable distribution statute. The court rejected the defendant's argument that N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980) should be applied in a prospective manner only. 65 N.J. at 223, 320 A.2d at 498. The court was "unable to believe that the Legislature intended . . . [the statute] to apply solely to property acquired on or after the effective date of the act." *Id.* at 223, 320 A.2d at 498. Moreover, the determination and valuation of marital assets required to effectuate such a policy of prospective application would prove to be a Gordian knot for the judiciary to wrestle with. Thus, the court held that all property acquired during the marriage was available for equitable distribution. *Id.* at 224–25, 320 A.2d at 495.

The defendant also asserted that N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980) if applied to assets which had been acquired prior to its effective date should be stricken since it would result in an unconstitutional deprivation of property without due process of law. *Id.* at 223, 320 A.2d at 498. Justice Mountain declared the statute to be free from such a constitutional infirmity. *Id.* at 232, 320 A.2d at 503. He focused on the exercise of the state's police power, in furtherance of public policy, to authorize the courts to equitably divide marital assets upon divorce. *Id.* at 228–32, 320 A.2d at 501–03. Such use of the police power to regulate social relationships has consistently been upheld as a valid regulator of an individual's rights and conduct by both state and federal courts. *Id.* at 228, 320 A.2d at 501. Thus, the constitutional challenge was addressed directly, and Justice Mountain found no offense to due process protections. *Id.* at 232, 320 A.2d at 503.

DIVORCE AND SEPARATION—EQUITABLE DISTRIBUTION—*Smith v. Smith*, 72 N.J. 350, 371 A.2d 1 (1977).

In 1965, husband and wife entered into a separation agreement. 72 N.J. at 353, 371 A.2d at 2. After the 1971 amendments to the

divorce laws, the husband sought a no-fault divorce. *Id.* The wife counterclaimed for divorce on grounds of adultery. *Id.* The trial court granted the divorce to the wife and refused the husband his no-fault divorce. *Id.* However, the trial court also determined that the separation agreement was binding and, therefore, equitable distribution was not available. *Id.* at 353, 371 A.2d at 2–3. The wife sought and was granted a new trial on the issue of equitable distribution due to recent decisions construing the statute. *Id.* at 353, 371 A.2d at 3. The husband was denied an interlocutory appeal from this order by the appellate division but was granted leave to appeal by the supreme court "in order to clarify the circumstances under which a separation agreement entered into before passage of the new divorce law may affect a spouse's later claim to equitable distribution." *Id.* at 353–54, 371 A.2d at 3.

"Since September 13, 1971, any litigant in a divorce action has been entitled to seek an equitable distribution of marital assets incident to the granting of a divorce." *Id.* at 357, 371 A.2d at 4; N.J. STAT. ANN. § 2A:34-23. (West 1952 & Cum. Supp. 1979–1980). The supreme court, in an opinion by Justice Mountain, held that a prior separation agreement does not act as a bar to equitable distribution under N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980) unless "it can qualify as a property settlement, and can likewise be shown to have been fair and equitable." 72 N.J. at 358, 371 A.2d at 5. Justice Mountain determined that the agreement in the instant case was merely a support agreement. *Id.* Therefore, since Mrs. Smith's right to equitable distribution did not exist at the time of the agreement, she cannot be deemed to have released that right. *Id.* at 359, 371 A.2d at 5–6. The remaining question was the date on which "assets available for equitable distribution should be identified and valued." *Id.* at 360, 371 A.2d at 6. After examining the nature of the marital contract and the public policy consideration that equitable distribution is an attempt to distribute assets acquired by the combined efforts of the spouses, Justice Mountain determined that the date of the agreement was the appropriate one for identification and valuation. *Id.* at 361, 371 A.2d at 6–7. The order for a new trial was affirmed. *Id.* at 363, 371 A.2d at 8.

DIVORCE AND SEPARATION—EQUITABLE DISTRIBUTION—*Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

Susanne Stern was granted a divorce from Milton Stern on the grounds of adultery. The trial court awarded the plaintiff alimony and

child support, and effected an equitable distribution of property in accord with N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980). This decree was affirmed by the appellate division. 128 N.J. Super. 198, 319 A.2d 722 (App. Div. 1974). Upon application of the defendant, the supreme court granted certification. 65 N.J. 568, 325 A.2d 702 (1974).

The defendant was a partner in a well-known and quite successful law firm. He conceded that his partnership interest was an asset eligible for equitable distribution. However, he questioned the valuation of the partnership assets used by the trial court in effecting a distribution, and he also contested the inclusion of his earning capacity as a separately identifiable item of property, which made it eligible for division pursuant to N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1979-1980).

Justice Mountain, writing for a unanimous court, first recognized that placing a valuation upon an interest in a professional partnership is no easy matter. However, referring to the sections of the partnership agreement that pertain to a retired or deceased partner, he found the agreement sufficient to constitute an effective method of valuation when used in conjunction with the partnership books and schedules relating to the capital account of each partner. Thus, the court found that a distribution made with reference to these provisions would be a fair valuation of the defendant's assets. 66 N.J. at 345–46, 331 A.2d 260–61.

The second point of error raised by the defendant, that his earning capacity, even when aided or enhanced by his spouse, should not constitute "a separate, particular item of property within the meaning of *N.J.S.A.* 2A:34-23," 66 N.J. at 345, 331 A.2d at 260, found support with the court. Justice Mountain believed that although earning capacity is a definite factor to be considered in the determination of equitable distribution, it should not be included as a property within the meaning of the statute. *Id.*

EMINENT DOMAIN—*State v. Willett Holding Co.*, 62 N.J. 59, 298 A.2d 69 (1972).

Defendant landowner was constructing a nursing home on certain land when the premises became the object of a condemnation proceeding by the state. 62 N.J. at 60, 298 A.2d at 70. Both the state and the defendant appealed the transportation commissioner's award. A jury trial in the law division resulted in an award to the defendant of $634,500. *Id.* This judgment was appealed to and affirmed by the appellate division. *Id.*

The issue presented on appeal to the supreme court was whether the trial judge erred in allowing testimony as to the defendant's expenses in making and completing its necessary financial arrangements. *Id.* at 61, 298 A.2d at 71. The defendant urged that such arrangements increased the value of the property by at least the value of the amount expended. *Id.* The government, however, contended that such expenses are non-compensable. *Id.*

In affirming the appellate division, the supreme court, speaking through Justice Mountain, based its conclusion on slightly different reasoning. *Id.* at 62, 298 A.2d at 71. Justice Mountain stated that under the circumstances, reproduction cost was the most sensible method of arriving at a condemnation award figure. *Id.* He further posited that there was no reason why such a reproduction cost method should not have included the necessary costs incurred in effecting the financial arrangements. *Id.* The court viewed the expenses as not only customary, but totally necessary to enable the defendant to begin construction. *Id.* at 63, 298 A.2d at 72.

EMINENT DOMAIN—*Township of Millburn v. Pitt*, 68 N.J. 424, 346 A.2d 601 (1975).

South Mountain Realty Company divided a tract of land into smaller parcels and conveyed same to various grantees. Each parcel was restricted for residential purposes. In 1955, the Township of Millburn acquired a section of this land which was originally intended for off-street parking use. However, in 1973, the township decided to construct a library on the site, and adopted an ordinance authorizing bonds for that purpose. The township instituted the instant condemnation action to acquire the defendants' interest in the premises. The defendants traced their chain of title back to the common grantor, South Mountain Realty Company, and claimed an interest under the restrictive covenant, "in the nature of an equitable servitude." 68 N.J. at 426, 346 A.2d at 602.

The township claimed a right to any land, free from encumbrances, which land had become unsuited for the purpose under which it was originally acquired. N.J. STAT. ANN. § 40A:12-5(b) (West 1979) provided for the conversion of land from one use to another, but proposed no formal procedural requirements for such an action. Authoring a unanimous opinion, Justice Mountain agreed with the township's contention that this conversion was appropriate under the statute, regardless of whether or not an enabling ordinance had

been enacted. 68 N.J. at 427–28, 346 A.2d at 602–03. He deemed the township's actions to be proper in all respects, and thus affirmed the trial court's decision with orders to proceed with the condemnation proceedings. *Id.* at 428–29, 346 A.2d at 603.

EMINENT DOMAIN—*Village of South Orange v. Alden Corp.*, 71 N.J. 362, 365 A.2d 469 (1976).

The Village of South Orange condemned a part of the property owned by Alden Corporation (Alden) with the intention of constructing a municipal parking lot. The condemned area included a large parcel that had served as a private parking area for employees and customers of a bank that had rented a building on the property. The elimination of the convenient private parking facilities would, presumably, decrease the value of the remainder of the property. This potential decline in property value was questionable, however, since the Village planned to erect public parking facilities on the condemned lot. *Id.* at 364–66, 365 A.2d at 470–71.

A commissioner's award was made from which both parties appealed and the case was tried without a jury in the law division. The defendant appealed from the trial judge's findings and the appellate division affirmed. *Id.* at 365, 365 A.2d at 470.

The specific issue considered by the supreme court on appeal was the extent to which evidence of the intended use of condemned property may be introduced in making a determination of severance damages with regard to that portion of the defendant's property which was not condemned. 71 N.J. at 364, 365 A.2d at 470. The court, speaking through Justice Mountain, held that evidence of the intended purpose for which the condemned property is to be used is admissible on the issue of the condemnation award. *Id.* at 368, 365 A.2d at 472–73. However, the municipality was not required to actually implement its intention and therefore, no guarantee of actual use or duration of the particular use existed. *Id.* at 366, 365 A.2d at 471. As a result, Justice Mountain ruled that the trial judge should explain to the jury that the intended use is only probable and evidence of the real nature and probable duration of the intended use should be admissible. *Id.* at 368, 365 A.2d at 473.

The decision of the appellate division was reversed and the case remanded to the law division for a redetermination of the amount of severance damages. *Id.* at 369, 365 A.2d at 473.

EMINENT DOMAIN—*Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975).

In 1963, the city of Trenton commenced the first phase of a large downtown renewal project. Condemnation of the area surrounding this initial area was anticipated. In 1967, this area was declared to be blighted, but the city was to condemn and acquire the land gradually by small segments. In 1973, however, redevelopment priorities changed and the project was abandoned. Plaintiff's property, a large office building, was situated within the area declared to be blighted, but the property had never been condemned nor was it ever taken by the city. Plaintiff alleged that a taking had in fact occurred because subsequent to the initial plans for a renewal project, they lost the beneficial use of their property. No long-term tenants could be found, thus reducing the income from rentals. In addition, the surrounding area deteriorated, which caused a decrease in the value of their property. 68 N.J. at 110–12, 343 A.2d at 409–10.

The trial judge granted a motion for summary judgment in favor of the city of Trenton. The lower court interpreted New Jersey law to indicate that there could be no taking "absent a physical invasion or direct legal restraint on use." *Id.* at 113, 343 A.2d at 411. The supreme court granted certification of the case due to the importance of the questions involved. *Id.* at 110, 343 A.2d at 409.

Justice Mountain, writing for the court, focused upon the constitutional meaning of the phrase "taking of property." He held that such a taking can be found "where planning for urban redevelopment is clearly shown to have had such a severe impact as substantially to destroy the beneficial use which a landowner has made of his property." *Id.* at 110, 343 A.2d at 409. In developing the rationale for this holding, Justice Mountain drew upon past cases and legislation, analogizing the instant situation to other fact patterns where relief was granted absent physical invasion.

The court determined that damages, rather than condemnation, was the appropriate remedy should the plaintiff prove his allegations upon remand. The measure of damages would be the difference between the speculated value of the land at the time of the hypothetical taking, had the declaration of blight and ensuing city actions not occurred, and the value of the property at a time "somewhat subsequent" to the announcement of abandonment, in order to allow for settling of the market. *Id.* at 124, 343 A.2d at 416–17. Damages would also include interest on the value of the land at the time of taking, less any excess of rental receipts over the actual amount expended in maintenance of the property.

ESTATE TAX—INHERITANCE ESTATE AND GIFT TAXES—*In re Estate of Romnes*, 79 N.J. 139, 398 A.2d 543 (1979).

Haakon Romnes died in 1973, and the executors of his estate filed a transfer inheritance tax return with the New Jersey Transfer Inheritance Tax Bureau. Listed among the decedent's assets was a survivor's annuity that was part of an employee benefit plan provided by Romnes' employer. The annuity provided for annual fixed income payments to Romnes' widow. The executor of the estate claimed a right to reduce the value of the annuity for inheritance tax purposes. It was asserted that this reduction should equal the commuted value, as of the date of Romnes' death, of all estimated federal income taxes that the decedent's widow would be likely to pay upon the annual receipt of the annuity payments. The tax bureau denied the executors the right to take such a reduction. The appellate division agreed and the supreme court granted certification. 79 N.J. at 141–42, 398 A.2d at 544.

Writing for a majority of the court, Justice Mountain opened his lengthy opinion with a clarification and restatement of the executors' contention. In essence, the executors argued that Romnes' widow should not be required to pay an inheritance tax upon that portion of annuity payments which must be devoted to paying income taxes since that portion of the annuity payments would never be beneficially enjoyed by her. *Id.* at 143, 398 A.2d at 545. While Justice Mountain conceded that the argument was plausible, he specified why it was untenable.

The only issue in this case was what value should be given to the annuity for state inheritance tax purposes. Both parties agreed that determination of the "clear market value" of the asset would provide the answer. The court stated that an "[o]*bjectively determined clear market value is the proper measure of the beneficial interest subject to tax.*" *Id.* at 148, 398 A.2d at 547 (emphasis in original). Applied to the case at hand, the proper valuation of the annuity should have been determined without any consideration accorded to the potential tax liability of the decedent's widow. Neither a hypothetical seller nor a buyer would consider the tax liability relevant to the price of the annuity. The court also suggested that there was no possibility that Romnes' widow would accept, as a purchase price for the annuity, the amount which she asked the state to accept as the value of the asset. *Id.* at 148–49, 398 A.2d at 548.

Although Justice Mountain based the decision in this case primarily upon the issue of market value, he discussed the broad implications that acceptance of the executors' contention would have. A

hypothetical example was constructed by Justice Mountain to demonstrate the disparate treatment that would result from the executors' plan. Recipients of income interests like that of Romnes' widow would be benefitted while conventional tenants would not. Yet, if all were accorded the treatment suggested by the executors, diminution of the state's tax revenues would result. Another inequitable result would stem from acceptance of the plan proffered by the executors—the rich would pay less in tax than the less affluent. All of these results would be contrary to legislative intent. *Id.* at 149–53, 398 A.2d at 549–50. An additional problem with the executors' position was its speculative nature. Changes either in the tax laws or the circumstances of the taxpayer could result in calculated tax liability that would "far transcend the bounds of speculation to be found in any acceptable tax structure." *Id.* at 154, 398 A.2d at 550. For the foregoing reasons, Justice Mountain affirmed the judgment of the appellate division denying the executors' claim.

FREEDOM OF INFORMATION—*Irval Realty, Inc. v. Board of Public Utility Commissioners*, 61 N.J. 366, 294 A.2d 425 (1972).

On May 5, 1969, a gas explosion occurred on property owned by Irval Realty, Inc., in Washington Township, New Jersey. 61 N.J. at 369, 294 A.2d at 426. A similar explosion occurred in Newfield, New Jersey, on July 30 of the same year. *Id.* In both instances, the gas was being supplied by South Jersey Gas Company (Gas Company). *Id.* Pursuant to N.J. Administrative Code § 14:11-5.4, reports concerning the accidents were filed with the Board of Public Utility Commissioners (Board) by both the Gas Company and the Board itself. 61 N.J. at 370, 294 A.2d at 427. Plaintiff, Irval Realty brought a damages action against the Gas Company and in due course made application with the Board to inspect and copy these reports. *Id.* These requests were denied and plaintiff instituted this action asserting their right of access to the reports under the Right to Know Law, N.J. STAT. ANN. §§ 47:1A-1 to -4 (West Cum. Supp. 1978-1979). 61 N.J. at 370, 294 A.2d at 427. The trial court granted the plaintiff's motion for summary judgment and ordered production of the reports. The appellate division affirmed. 115 N.J. Super. 338, 279 A.2d 866 (App. Div. 1971).

The New Jersey supreme court, speaking through Justice Mountain, reasoned that, under the common law right of public record inspection and the statutory inspection rights granted by the Right to Know Law, the board wrongly denied the plaintiff access to the rec-

ords and reports. 61 N.J. at 372–74, 294 A.2d at 428–29. In so holding, Justice Mountain discounted the Board's argument that under the Right to Know Law and an executive order issued by then Governor Hughes, it could exclude records from the public domain. *Id.* at 374, 294 A.2d at 429. Contrarily, he stated that the statute did not grant the Board unlimited power to exclude records from public inspection. *Id.* Such a power "was intended to be exercised only when necessary for the protection of the public interest." *Id.* Finally, Justice Mountain viewed the interest of the plaintiffs in examining these records as outweighing the interest of the public in maintaining their confidentiality. *Id.* at 375, 294 A.2d at 430. He stressed that the Board had not sustained the burden of showing the public need for keeping these records confidential. *Id.*

GAMBLING—DEBTS—*Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 307 A.2d 85 (1973).

The Caribe Hilton, a hotel located in San Juan, Puerto Rico, instituted a suit in the law division of the superior court of New Jersey to recover a gambling debt owed by Toland, a New Jersey resident. The defendant, who contracted the gambling debt while in plaintiff's gambling rooms in San Juan, pretended to pay the indebtedness by drawing checks on his New Jersey bank, but stopped payment before the checks cleared. 63 N.J. at 302, 307 A.2d at 85–86.

The gambling transactions, though legal in Puerto Rico, would have been illegal in New Jersey, and the defendant contended that the debts were unenforceable as being contrary to the public policy of New Jersey. The trial court agreed with Toland, concluding that New Jersey would not entertain a suit as a matter of public policy to enforce a gambling debt that would have been illegal if contracted in New Jersey. *Id.* at 302–03, 307 A.2d at 86. Prior to argument in the appellate division, Hilton's petition for certification was granted by the supreme court. *Id.*

In a unanimous opinion delivered by Justice Mountain, the supreme court reversed and remanded, holding that the disposition of the issue of the gambling debt contract's legality should be governed solely by Puerto Rico law. Furthermore, the court stated that New Jersey could no longer refuse to entertain these types of actions based on public policy grounds. *Id.* at 303–07, 307 A.2d at 86–89.

The court specifically addressed the issue of the repeated refusal of New Jersey courts to entertain suits instituted for the purpose of

recovering gambling debts contracted legally in other jurisdictions. In his analysis of the judicial attitude adopted in these cases, Justice Mountain discussed public policy considerations from an historical perspective. *Id.* He also referred to recent legislative enactments, specifically, amendments enacted to allow possession of New York lottery tickets, and the State Lottery Law, N.J. STAT. ANN. §§ 5:9-1 to -25 (West 1973 & Cum. Supp. 1979-1980) to support his conclusion that gambling was not so offensive to the public policy of New Jersey "as to justify our courts in continuing to deny relief." 63 N.J. at 307, 307 A.2d at 88. In Justice Mountain's opinion the more contemporary attitude was not one of condemnation of gambling per se but rather "one of carefully regulating certain permitted forms of gambling while prohibiting all others entirely." *Id.* While Justice Mountain emphasized the importance of requiring proof that the debt was legally contracted, he rejected the trial court's reasoning because he was unable to "discern any interest that New Jersey seeks to protect that will be impaired by our recognition and enforcement of this claim." *Id.* at 309, 307 A.2d at 89.

INSTRUCTIONS TO JURIES—*State v. Lair*, 62 N.J. 388, 301 A.2d 748 (1973).

Thomas Lair was indicted for having allegedly committed the crimes of rape and sodomy. 62 N.J. at 390, 301 A.2d at 750. At trial, the defendant based his defense of the rape charge upon consent of the victim and the sodomy charge upon several constitutional grounds. *Id.* at 391, 301 A.2d at 750. He was tried before a jury and convicted of both offenses. *Id.* On appeal, the appellate division affirmed the conviction for sodomy. However, the court reversed the conviction for rape on the basis that the trial judge never instructed the jury that evidence introduced pertaining to the defendant's prior convictions may only be considered with respect to the defendant's credibility and for no other purpose. *Id.*

Speaking for the supreme court, Justice Mountain, with Chief Justice Weintraub concurring, affirmed the appellate division's decision concerning the sodomy conviction but reinstated the rape conviction. *Id.* at 398, 301 A.2d at 754. Justice Mountain perceived the issue of the trial judge's instructions to the jury as being either plain error, " 'clearly capable of producing an unjust result,' . . . or . . . harmless error, lacking the capacity to prejudice the defendant." *Id.* at 392, 301 A.2d at 750–51. He stated that after a careful study of the record, the failure to instruct the jury could not be viewed as rever-

sible error. *Id.* He further remarked that no real prejudice to the defendant was shown which would warrant a reversal.

Concerning the defendant's arguments against the sodomy charge, Justice Mountain discounted that there was any constitutional infirmity with respect to the statute. *Id.* at 393–95, 301 A.2d at 752. He found that the statute was not unconstitutionally vague, and that there was no equal protection violation as proffered by the defendant. *Id.* at 394–96, 301 A.2d at 752–54.

INSURANCE—*DiOrio v. New Jersey Manufacturers Insurance Co.*, 63 N.J. 597, 311 A.2d 378 (1973), *rev'd on rehearing*, 79 N.J. 257, 398 A.2d 1274 (1979).

Generoso DiOrio was the named insured of an automobile insurance policy issued by the defendant insurance company. His insurance policy covered the operations of his own automobile and that of a " 'non-owned automobile' " used by himself or a resident of his household. For purposes of coverage under the policy, the clause " 'non-owned automobile' " was defined as a vehicle " *'not owned by or furnished for the regular use of either the named insured or any relative.'* " 63 N.J. at 599, 311 A.2d at 380 (emphasis in original). DiOrio's son, Gennaro, was injured in an accident while driving a car owned by a partnership in which his father was a general partner. The automobile involved in the accident had been used primarily for non-business purposes by Generoso, *i.e.*, daily travel to and from work, and by Gennaro who had borrowed the car for personal use several times each week. *Id.* at 599–600, 311 A.2d at 379–80.

In a declaratory judgment action to recover on the policy, the trial court found that the partnership automobile did not fall within the policy's coverage. In the court's view, the car had been furnished for the regular use of DiOrio's son. The appellate division affirmed the trial court decision and the supreme court granted certification. *Id.* at 599, 311 A.2d at 379.

In its opinion, the majority held that the car had not been furnished for the regular use of the son, Gennaro DiOrio, and at best was only used occasionally. *Id.* at 605, 311 A.2d at 383. However, it found that there was a lack of testimony as to the extent of DiOrio's personal use. The case was remanded to determine whether the automobile was furnished for the regular use of the father, Generoso, and whether excess coverage was denied to *all* insureds if the vehicle was furnished for the regular use of *any* insured.

In a persuasive dissenting opinion, Justice Mountain pointed out that the case before them could have been decided without remand by simply following the earlier New Jersey supreme court decision in Rider v. Lynch, 42 N.J. 465, 201 A.2d 561 (1964). In a similar fact situation, the *Rider* court had specifically held that where the automobile was furnished for the regular use of Tomiko Lynch, it did not qualify for coverage under the "non-owned automobile" clause, and that Tomiko's father did not have coverage for an accident which occurred while he was driving the car. *Id.* at 474, 201 A.2d at 566. Furthermore, Justice Mountain felt the purpose of the exclusion, *i.e.*, to prevent an insured from obtaining coverage for some or all cars regularly used or owned by the insured by merely listing only one automobile on the family policy and paying a premium calculated upon the risk created by only that one automobile, was both reasonable and wholly legitimate. 63 N.J. at 613–14, 311 A.2d at 387–88.

After rehearing the DiOrio case in 1978, the supreme court reversed itself and adopted the position expressed by Justice Mountain in his dissenting opinion in DiOrio I. 79 N.J. 257, 398 A.2d 1274 (1979).

INSURANCE—AUTOMOBILE COVERAGE—*Hartford Insurance Co. v. Allstate Insurance Co.*, 68 N.J. 430, 347 A.2d 353 (1975).

Joseph Yuhas was injured in an automobile accident while a passenger in a car insured by the Allstate Insurance Company. Yuhas himself was insured by the Hartford Insurance Company. Pursuant to the requirements of N.J. STAT. ANN. § 17:28-1.1, each of the policies contained " 'uninsured motorist endorsements.' " Allstate paid Yuhas the full statutory minimum of its uninsured motorist coverage. Since this amount did not compensate for his expenses, Yuhas sought additional payments from Hartford. 68 N.J. at 431, 347 A.2d at 353. Hartford denied payment "on the ground that its policy provision limited its obligation to those occasions where the amount required by statute—$10,000—was not available to the claimant under any other policy." *Id.* at 431–32, 347 A.2d at 354. Yuhas brought an action for a declaratory judgment against Hartford and the trial court held in his favor. The appellate division reversed. *Id.* at 432, 347 A.2d at 354.

The Yuhas case was argued before the appellate division at the same time as another case involving the same legal issue. Subsequent to the appellate division's rulings in favor of the insurers in both cases, the claimant in the unrelated case, Phillips, filed a timely ap-

peal and the supreme court reversed the decision of the appellate division. Yuhas made a deliberate choice to forego an appeal when the time was appropriate for such an action. He claimed, in the case at bar, a right to a rehearing by the appellate court. *Id.*

The supreme court, Justice Mountain speaking for the majority, affirmed the appellate division's refusal to rehear the case. *Id.* The court held that Yuhas' claim was void of any factual relationship with the Phillips case and that "[t]his circumstance afford[ed] no rational basis upon which to rest a decision granting the extraordinary relief . . . sought." *Id.* at 435, 347 A.2d at 355. Thus, the mere simultaneous timing of argument was deemed to be an insufficient nexus upon which to found a contrary decision. Justice Mountain stated that any other conclusion would fail to provide a "discernible basis for drawing any line in time between those to be barred and those to be relieved." *Id.*

INSURANCE—AUTOMOBILES—*State Farm Mutual Automobile Insurance Co. v. Zurich American Insurance Co.*, 62 N.J. 155, 299 A.2d 704 (1973).

On March 16, 1969, three teenage friends, Thomas Busby, Steven Johns, and A. Rodman Kay stopped at a "7-11" shop for a soda. Busby and Johns arrived in Busby's Thunderbird and Kay was driving his own car. While at the shop, Busby asked for and was given permission by Kay to drive the latter's automobile. Shortly after Busby departed, Johns, who was not licensed to drive, and Kay, decided to go for a ride in Busby's car. While driving Busby's car, Johns collided with another auto, injuring both himself and Kay. 60 N.J. at 161–62, 299 A.2d at 707–08.

The issues presented at trial involved whether the omnibus clause of the insurance policy held by Busby, and issued by plaintiff "State Farm," and the nonowned automobile clause of the policy held by Johns' father which was issued by defendant "Zurich," were subject to the coverage claims of Johns and Kay. The omnibus clause in the Busby policy provided coverage for "'[a]ny other person while using the owned automobile . . . with permission of the named insured,' " while the Johns policy included as an insured, with respect to a nonowned automobile, " '[a]ny relative, . . . provided his actual operation . . . is with the permission, or reasonably believed to be with the permission, of the owner.' " *Id.* at 162, 299 A.2d at 707–08.

After the presentation of evidence, the trial court found that neither insurance policy covered Johns as an insured and entered

judgment accordingly. *Id.* at 161, 162–63, 299 A.2d at 707–08. On appeal the appellate division upheld the trial court's final determination stating, however, that the language within the Johns policy concerning the "reasonably believed" clause should have been given an interpretation allowing for broader coverage than that afforded by the trial court. *Id.* at 163–64, 299 A.2d at 708.

The Supreme Court of New Jersey affirmed the appellate division opinion with respect to the Busby policy, but reversed and remanded the case for a further factual determination of whether Johns could have "reasonably believed" that he had Busby's permission to operate the latter's automobile. *Id.* at 172, 299 A.2d at 712–13. The court based their decision on the belief that broader coverage was intended by the language of the nonowned automobile clause in contrast to the standard omnibus clause. Pointing out that the principles of contract construction as well as the special rule for favorable interpretation of insurance coverage supported this position, the court found that the Johns policy provided a more liberal interpretation through use of the " 'reasonably believed' language." *Id.* at 169, 299 A.2d at 711. The court further stated that the factual issues should include consideration of whether the party claiming the permission in using another's automobile reasonably believed he had the owner's permission rather than the "willing state of mind" of the permitter. *Id.* at 171, 299 A.2d at 712. In this instance, the court stated that the " 'reasonable man' " test suggested by the trial court should reflect the reasonable conduct of Johns due to his "age, personality and social milieu." *Id.* at 172, 299 A.2d at 712.

Justice Mountain, in a separate opinion, concurred with the majority that the trial court had ruled correctly upon the question of coverage under the Busby policy. *Id.* at 182–83, 299 A.2d at 718–19. He also agreed that the Johns' policy language should have been given a broader interpretation than was given by the trial judge. *Id.* at 183, 299 A.2d at 719. However, Justice Mountain maintained that there was no factual basis in the record to support the argument that Johns reasonably believed he had permission to operate Busby's car. *Id.* Accordingly, Justice Mountain would have affirmed the decision rendered by the appellate division.

JUDGMENTS—*E & K Agency, Inc. v. Van Dyke*, 60 N.J. 160, 286 A.2d 706 (1972).

Defendants Van Dyke and Sofield owned stock in several corporations. The corporations owned valuable waterfront land which the

defendants listed for sale with the plaintiff realtor in March, 1965. A commission agreement was signed by the plaintiff and the defendants and in August of 1965 a conditional contract to sell the land was executed with two prospective purchasers. The commission agreement had provided for a fee of $19,125 payable to the plaintiff " 'on closing of title,' " however, performance of the sales contract was expressly made contingent upon the sellers satisfactorily resolving a tidelands title dispute with the State. The title problem was never settled and the contract of sale never carried out. 60 N.J. at 161, 286 A.2d at 707.

The plaintiff filed suit for recovery of its commissions fee in June, 1966. Summary judgment was granted in plaintiff's favor in August, 1967. Defendant Van Dyke filed a timely notice of appeal from the summary judgment ruling but "[t]hrough inadvertence or a misunderstanding," Sofield failed to appeal. Sofield, apparently, only learned of the appeal when plaintiff sought to satisfy its judgment against him. Upon hearing this information, Sofield requested permission from the appellate division for leave to join in Van Dyke's challenge—permission was granted over plaintiff's protests. The appellate division reversed the summary judgment that had been entered and, upon retrial, the plaintiff's complaint was dismissed as to both defendants. *Id.* at 162, 286 A.2d at 707.

On appeal to the supreme court from affirmance of the trial judge's ruling by the appellate division, the plaintiff argued that, even if the dismissal of the complaint was correct as decided at trial, the dismissal should have had no effect on the plaintiff's summary judgment verdict against Sofield since Sofield failed to file a timely notice of appeal after entry of the summary judgment. Justice Mountain, writing for the court, affirmed the dismissal of the complaint against both defendants, holding that "where reversal of a judgment eliminates all basis for recovery against a nonappealing party, as well as against the party who has appealed, the benefit of the judgment will be made available to all alike." *Id.* at 163, 286 A.2d at 708. The court followed a common law principle that extended the benefit of a judgment reversal to nonappealing judgment debtors "where a judgment was *jointly* binding upon several persons." *Id.* at 164, 286 A.2d at 708.

Justice Mountain, however, was not content to rest his conclusion on a common law rule alone; he noted that an appellate court had both the power and the duty to decide each case with a view toward justice to all persons affected by the court's ruling. A decision which would allow a plaintiff to recover a judgment against a defend-

ant after the courts had determined the theory of recovery to be groundless "would indeed be a travesty of justice." *Id.* at 165, 286 A.2d at 709.

JUDGMENTS—*Kingsley v. Wes Outdoor Advertising Co.*, 59 N.J. 182, 280 A.2d 168 (1971).

Wes Outdoor Advertising Co. (Company) was found to have violated N.J. STAT. ANN. § 54:40-54 (West 1960), the Outdoor Advertising Act, by erecting, maintaining, and refusing to remove several outside signs. A judgment for $59,230, more than $58,000 of which was penalty, and costs was entered against the Company by the Ocean County District Court. Although not contesting the factual basis for the judgment, the Company challenged the District Court's jurisdiction to enter a judgment in excess of $1,000. In affirming, the supreme court said that the county court did have the required jurisdiction. 59 N.J. at 184, 280 A.2d at 170.

The Ocean County sheriff, executed a levy upon property allegedly owned by the Company. The parties subsequently consented in a judgment substituting Wesley K. Bell, the Company's actual owner, for Wes Outdoor Advertising Co. as the judgment debtor. *Id.* at 185–86, 280 A.2d at 170–71.

Bell then moved for an order directing his commitment to the Ocean County jail for a period not to exceed thirty days. This commitment was to be made pursuant to N.J. STAT. ANN. § 54:40-67 (West 1960), which provides that a defendant who refuses to pay the judgment amount be jailed for a period not exceeding thirty days, and upon his release, the debtor is entitled to have the judgment declared satisfied. The plaintiff Attorney General moved to have Bell jailed, as he requested, but for thirty days for each of the 572 violations, for a total of about forty-seven years. 59 N.J. at 186–87, 280 A.2d at 171.

When the trial judge denied both motions, Bell appealed to the appellate division and the supreme court granted certification. For the first time, Bell challenged the factual basis of the judgment. The court, speaking through Justice Mountain, rejected the collateral attack because of the absence of a showing of fraud, lack of jurisdiction, or other equitable considerations. The court also disagreed with Bell's interpretation of N.J. STAT. ANN. § 54:40-67 (West 1960), holding that the penalty to be exacted was to be determined by the enforcing agency, and ultimately the courts, and not by the offender. Therefore, Justice Mountain stated that Bell could not demand to serve a

thirty-day jail term in lieu of paying the fine. Finally, the court declared that it had the power to modify the amount of the penalty, which it decided was "disproportionate" to the offense, and reduced the county court's judgment from $59,230 to $10,000. 59 N.J. at 188–89, 280 A.2d at 171–72.

LANDLORD AND TENANT—*Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

In September, 1968, the plaintiff rented from the defendant a four-room furnished apartment in Elizabeth, New Jersey. No written lease was executed but the parties agreed that rent for the apartment would be $35 per week, with all utilities supplied. The plaintiff testified that at the time the terms of the arrangement were agreed upon, the apartment was in deplorable condition but that the defendant promised he would make the premises "livable," and also make other specific repairs. 63 N.J. at 463, 308 A.2d at 18.

In June, 1970, the landlord brought a summary dispossess action against the tenant alleging non-payment of rent. The court found that there had been a breach of the landlord's express warranty of habitability and reduced the rent to $75 a month, retroactive to February 23, 1970, the date on which the tenant ceased paying rent. This reduced sum was apparently paid by the tenant at that time, but nothing was thereafter paid and on November 14, 1970 the tenant quit the premises. *Id.* at 463–64, 308 A.2d at 18–19.

The plaintiff subsequently instituted this action seeking to recover the difference between the rent actually paid and an amount calculated at the rate of $75 a month from the commencement of the tenancy until February 23, 1970. The landlord counterclaimed for the rent remitted by the court. The relief sought by the plaintiff-tenant was granted at the trial level, 114 N.J. Super. 124, 274 A.2d 865 (Law Div. 1971), but the decision was reversed on appeal. 119 N.J. Super. 332, 291 A.2d 577 (App. Div. 1972). The supreme court granted certification. 62 N.J. 67, 299 A.2d 65 (1972).

Justice Mountain, writing for the majority, reversed the judgment of the appellate division and reinstated the judgement of the trial court as amended. 63 N.J. at 461, 308 A.2d at 18. After reviewing the applicable state landlord-tenant law, Justice Mountain noted that historically a lease carried with it no implied warranty of habitability or fitness and that the doctrine of *caveat emptor* applied. *Id.* at 465, 308 A.2d at 20. He stated, however, that this doctrine was being widely and forcefully attacked as inadequate to meet modern condi-

tions. *Id.* Justice Mountain relied on Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), to conclude that nowadays in any residential lease, be it oral or written, there will be implied a covenant or warranty of habitability for the duration of the term. 63 N.J. at 467, 308 A.2d at 20–21.

Marini, however, held that a tenant suing for breach of a lease was limited to two alternative remedies—either the tenant could make essential repairs and file a claim for the expense or he/she could move from the premises on constructive eviction grounds and bring an action for breach of the lease, 56 N.J. at 146–47, 265 A.2d at 535. Justice Mountain noted that historically, leasehold covenants were considered independent of each other and, therefore, a cause of action had previously not been allowed for a reduction in rent due to a landlord's breach of a covenant in the lease. 63 N.J. at 469, 308 A.2d at 21. Justice Mountain acknowledged that, if the court were to follow the literal position taken in *Marini,* the plaintiff would be without a remedy in this case. *Id.* at 468–69, 308 A.2d at 21. Such a result was viewed to be clearly inequitable, and accordingly, the court thought it appropriate to use its creative powers to reach a fair decision. Justice Mountain held that the covenant on the part of a tenant to pay rent, and the covenant, whether express or implied, on the part of the landlord to maintain the demised premises in a habitable condition are for all purposes mutually dependent. *Id.* Hence, the court concluded that a tenant may initiate an action against his landlord to recover either part or all of the rent paid during the term, where he alleges the lessor has broken his covenant to maintain the premises in a habitable condition. *Id.* As a prerequisite to maintaining such an action, the tenant must give the landlord positive and seasonable notice of the alleged defect, must request its correction and must allow the landlord a reasonable period of time to effect the repair. *Id.*

Justice Mountain stressed that the rule espoused by the court was in accord with the prevailing legislative point of view. *Id.* at 471, 308 A.2d at 23. In 1971, the legislature enacted N.J. STAT. ANN. §§ 2A:42-85 to 97 (West Cum. Supp. 1979–1980) to meet the precise problem the court considered here. This statute, Justice Mountain noted, although not available to the plaintiff in this case, will in the future afford a further remedy to tenants in substandard dwellings. 63 N.J. at 473, 308 A.2d at 24.

LEGAL ETHICS—*In re Callan,* 66 N.J. 401, 331 A.2d 612 (1975).

An attorney's duty to the client and duty to the court can occasionally conflict with each other. Such was the case in *In re Callan,*

66 N.J. 401, 331 A.2d 612 (1975). A tenants' association withheld rent pending adjudication of defects in their apartments and maintained control over the retained funds. *Id.* at 403, 331 A.2d at 613–14. The case held against the tenants. Anticipating a court order to surrender the funds to the landlord, the association voted to return the funds to the tenants. *Id.* at 404, 331 A.2d at 614. The money was redistributed prior to a final hearing on the subject. *Id.* The primary issue in the instant case was whether or not the tenants' attorney, after vigorously warning the association to refrain from redistribution, had a duty to warn the court of the imminent action. *Id.* at 406–07, 331 A.2d at 615. The majority decided that although the attorney exhibited poor judgment, there was no quality of contempt in his actions. *Id.* at 407, 331 A.2d at 616. They felt he should have warned the court, but could not be cited for contempt for a failure to do so. *Id.*

Justice Mountain concurred with the contempt decision, but was uncertain whether the attorney had a duty to abandon his client and warn the court. He would have gone "further along the road of exculpation" than did the majority. *Id.* at 410, 331 A.2d at 617. The choice is difficult and cannot always be resolved in favor of the court. *Id.* At times favor must fall to the client and Justice Mountain felt that this was such a case. *Id.* He emphasized the importance of the adversary system and the underlying trust and confidence between an attorney and his client. *Id.* at 408, 331 A.2d at 617. In Justice Mountain's opinion, if an attorney has knowledge that the client is preparing to commit a crime or perpetrate a fraud on the court, the privilege must give way; however, neither of these exceptions applied to this matter. *Id.* at 409, 331 A.2d at 417.

MOTOR VEHICLES—NARCOTICS—*State v. DiCarlo*, 67 N.J. 321, 338 A.2d 809 (1975).

An erratic driver was arrested, and blood and urine samples were subsequently taken. The urine sample revealed the presence of a drug known as methaqualone. The trial court convicted the driver for "operating a motor vehicle 'while under the influence of intoxicating liquor, [or a] narcotic, hallucinogenic or habit-producing drug.' " 67 N.J. at 323, 338 A.2d at 810. The appellate division reversed because methaqualone was not included within the definition of "narcotic drug" in the Controlled Dangerous Substances Act, N.J. STAT. ANN. § 24:21-2 (West Cum. Supp. 1978-1979). An alternative ground for reversal was that there was insufficient evidence submitted at the trial to justify classification of methaqualone as a narcotic. 67 N.J. at 324, 338 A.2d at 810–11.

Speaking for the court, Justice Mountain reversed the appellate division and reinstated the conviction. The two statutes utilized by the lower appellate court were found to have dissimilar goals. Justice Mountain declared that while one seeks to suppress drug traffic, the other seeks to prevent driving by those with impaired faculties. He then noted that since the statutory purposes were not the same, the rule of *in pari materia* cannot be used to construe similarly the word "narcotic" as it appears in both statutes. The legislature did not intend that the two be read together. *Id.* at 325–26, 338 A.2d at 811–12.

Although the expert witness did not testify at the trial that methaqualone was a narcotic drug, he did state that it impaired judgment. *Id.* at 328, 338 A.2d at 812. According to Justice Mountain, this testimony, along with the statements of the arresting officer, was sufficient to establish beyond a reasonable doubt that "methaqualone may produce a narcotic effect on a person so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway." *Id.* at 328, 338 A.2d at 812–13.

MUNICIPAL CORPORATIONS—*Jones v. Buford*, 71 N.J. 433, 365 A.2d 1364 (1976).

A tenant who resided in a Newark apartment building was receiving no heat or hot water due to a broken boiler. 71 N.J. at 435, 365 A.2d at 1366. The landlord had attempted to repair the boiler but vandalism and lack of rental income had rendered this task financially impossible. *Id.* at 435–6, 365 A.2d at 1366. Subsequently, the tenant commenced this action seeking to compel the Director of the Newark Department of Health and Welfare to perform the function of a statutory agent for the landlord, in accordance with the provisions of N.J. STAT. ANN. § 26:3-11(p) (West 1964). 71 N.J. at 435, 365 A.2d at 1366.

The issue presented here was a determination of whether N.J. STAT. ANN. § 26:3-31(p) (West 1964) was enabling or self-executing. 71 N.J. at 436, 365 A.2d at 1366. Justice Mountain concluded that the statute was an enabling one. In so holding, Justice Mountain defined the term "enabling" as "a grant of an optional or elective power." *Id.* He further stated that action by the local authority is required to trigger an enabling statute. *Id.* at 436–37, 365 A.2d at 1366–67. Contrarily, self-executing legislation "bestows a power, or in

some cases an obligation, directly upon the local agency of government." *Id.* at 437, 365 A.2d at 1367.

Justice Mountain based his determination upon the language contained within the statute, and also upon public policy considerations. *Id.* at 439–40, 365 A.2d at 1368–69. This conclusion required that the plaintiff be denied relief in the absence of specific municipal action. *Id.* at 440–41, 365 A.2d at 1369.

MUNICIPAL CORPORATIONS—*Smith v. Township of Hazlet*, 63 N.J. 523, 309 A.2d 210 (1973).

The governing body of the township of Hazlet (defendant) adopted certain resolutions which provided that police sergeants are to be assigned such duty as the township committee may direct and that in the absence of such direction they are to be assigned as the Chief of Police may designate. 63 N.J. at 525, 309 A.2d at 211. The resolutions further placed other restrictions on the Chief of Police. The resolutions were adopted to implement a plan restructuring the police department that the township had been considering for some time. *Id.* The Chief of Police of Hazlet (plaintiff) subsequently instituted this action in lieu of prerogative writ challenging the validity of the resolutions. *Id.* The plaintiff maintained that the resolutions trespassed upon prerogatives inherent in his office. *Id.* The trial court granted defendant's motion for summary judgment. The appellate division affirmed in an unreported opinion, and the supreme court granted certification. 62 N.J. 81, 299 A.2d 78 (1972).

The New Jersey supreme court, speaking through Justice Mountain, held that, apart from the powers derived from the township governing body, the plaintiff had no powers of which to be deprived. 63 N.J. at 526, 309 A.2d at 212. Justice Mountain stated that under N.J. STAT. ANN. § 40A:14-118 (West 1979), the plaintiff's powers are derivative in nature, having their basis in the ordinances, resolutions, rules and regulations adopted and promulgated by the governing body in the exercise of its broad statutory responsibility. *Id.* at 526–27, 309 A.2d at 212.

Accordingly, he discounted the plaintiff's argument that N.J. STAT. ANN. § 40:107-1 (West 1979), which provided that the chief of police shall hold office for a term of three years and have the responsibility of its efficiency, was applicable to the instant issues. 63 N.J. at 527, 309 A.2d at 212. Furthermore, the court held that the statute

applied only to cities having a population of more than 12,000 and could not be extended to effect the police departments of townships. *Id.* Justice Mountain noted that these two comprehensive statutes were enacted by the same legislative body in the same year and that it was permissible to infer that the distinction in the police chiefs' authority was a purposeful one. *Id.* He noted that prior cases have insisted upon strict compliance with statutory grants of power where the issue has concerned the regulation or control of the police department or police personnel. *Id.* at 528, 309 A.2d at 212.

Justice Mountain also rejected the plaintiff's contention that the action of the governing body offended the constitutional doctrine of the separation of powers. *Id.* at 530, 309 A.2d at 214. He stressed that this doctrine is applicable to our federal and state governments and generally has no applicability to municipalities. *Id.*

MUNICIPAL CORPORATIONS—BONDS—*Dolan v. Borough of Tenafly*, 75 N.J. 163, 380 A.2d 1119 (1977).

The Borough of Tenafly enacted an ordinance which authorized the acquisition of a 294 acre tract of land under the Green Acres Land Acquisition Program. This program was designed to preserve currently undeveloped land for parks and recreation purposes. The purchase was to be funded by the issuance of bonds. 75 N.J. at 166, 380 A.2d at 1121. Due to an unexpectedly high condemnation award involving the property representing the bulk of the acquisition, it became necessary for the borough to enter into negotiations with various parties. These negotiations resulted in a settlement under which the borough would acquire 250.5 acres outright with the remainder being held by several groups having similar open recreational purposes. The construction of a private recreational center was allowed on a small portion of one of the tracts. *Id.* at 168, 380 A.2d at 1121. The original ordinance was altered by the adoption of a resolution to reflect these modifications to the original plan. A group of Tenafly taxpayers challenged the validity of the alteration of the original bond ordinance by resolution and asserted that only a subsequent ordinance could amend the original ordinance. *Id.* at 166, 168, 380 A.2d at 1121, 1122. It was further asserted that the acquisition of the last large residential tract in the borough was contrary to the intent of the decision in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975). The trial court granted the Borough of Tenafly's motion for summary judgment and

certification was granted while the appeal was pending unheard in the appellate division. 71 N.J. 517, 366 A.2d 673 (1976).

The supreme court, speaking through Justice Mountain, held "that an amendment to a bond ordinance which does not substantially alter required provisions of the ordinance may be effected by resolution." 75 N.J. at 171, 380 A.2d at 1123. The court also found that the acquisition of land for the preservation of open spaces was not contrary to the decision in *Mount Laurel*, and noted that projects such as this one "received the strongest kind of support from both the legislative and executive branches of government." *Id.* at 175, 380 A.2d at 1125. The critical inquiry concerning the appropriateness of the resolution process vis à vis an amended ordinance centered upon whether there had been a substantial change in the purposes, estimated amount or total cost of the project, all of which were statutorily required in a bond ordinance under N.J. STAT. ANN. § 40A:2-12 (West 1979). The facts at hand were found not to constitute such a substantial alteration of these factors as to require amendment by ordinance. 75 N.J. at 169–71, 380 A.2d at 1122–23.

Judge Conford, temporarily assigned, dissented on the issue of whether the adoption of the various alterations of the original plan constituted a substantial modification of the original ordinance, concluding that an amending ordinance should have been required. *Id.* at 180, 380 A.2d at 1128.

MUNICIPAL CORPORATIONS—CONTRACTS—*In re Application of the Borough of Saddle River*, 71 N.J. 14, 362 A.2d 552 (1976).

The Borough of Saddle River (Borough) had contracted with a local scavenger for solid waste disposal service. 71 N.J. at 18, 362 A.2d at 554–55. Upon passage of the Solid Waste Utility Control Act of 1970, N.J. STAT. ANN. §§ 48:13A-1 to -13 (West Cum. Supp. 1979-1980), the Borough filed the contract as required by the legislation. 71 N.J. at 18–19, 362 A.2d at 555. Subsequently, the Borough applied to the Board of Public Utility Commissioners (PUC) for approval of the contract. The Borough also sought a declaratory ruling that scavengers are a public utility and, as such, are not subject to the requirement of competitive bidding as set forth in N.J. STAT. ANN. § 40:66-4 (West 1967). 71 N.J. at 17–19, 362 A.2d at 554–55.

The PUC declined to issue the declaratory ruling, holding that N.J. STAT. ANN. § 40:66-4 (West 1967) had not been repealed by implication. 71 N.J. at 20, 362 A.2d at 555. Furthermore, the PUC recommended that clarifying legislation be enacted stating unequivo-

cally that competitive bidding is required for contracts with solid waste collection utilities. *Id.* The appellate division upheld the PUC's decision in an unreported opinion. The supreme court subsequently granted certification. 68 N.J. 165, 343 A.2d 453 (1975).

The court, speaking through Justice Mountain, held that public policy and the legislative intent strongly favor competitive bidding in the solid waste disposal area. 71 N.J. at 24, 362 A.2d at 558. Although scavenger service had been denominated a public utility and placed under the control of the PUC, a thorough review of the statutory scheme revealed that there was no intent to exempt this service from competitive bidding. *Id.* at 27–29, 32, 362 A.2d at 559–60, 562. The PUC does have the authority to designate franchise areas for solid waste disposal utilities; however, it has not elected to exercise this power. *Id.* at 31–32, 362 A.2d at 562. Until such time as this election is activated, solid waste disposal is still subject to competitive bidding requirements. *Id.*

MUNICIPAL LAW—*Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978).

The Borough of Deal constructed the Deal Casino, a recreational complex on a municipally owned section of ocean beachfront property. The Casino membership was restricted to residents or property owners in Deal. The beach area immediately bordering the high water mark was open to the public for swimming, fishing and recreation. The area fifty feet inland from the high water was roped off and restricted for use by casino members only. 78 N.J. at 176, 393 A.2d at 572.

An action was brought by the state Public Advocate against the Borough of Deal charging that the operation of the casino facility illegally discriminated against non-residents. The chancery court, on the basis of equal protection and municipal power, ruled that membership in the casino and use of the whole expanse of beach must be made available to non-residents and residents equally. 139 N.J. Super. 83, 352 A.2d 599 (Ch. Div. 1975). The appellate division reversed, holding that the classification for the use of residents only was reasonable and, therefore, did not violate equal protection. 145 N.J. Super. 368, 367 A.2d 1191 (App. Div. 1976). In addition, the open public access to the portion of the beach fifty feet above the high water line was sufficient to satisfy the public trust doctrine. Certification was granted. 74 N.J. 262, 377 A.2d 667 (1977).

The supreme court reversed the appellate division's decision to the extent that "the municipally owned beach in front of the Deal Casino must be opened to the general public." 78 N.J. at 181, 393 A.2d at 574. The public trust doctrine as set forth in Borough of Neptune v. Borough of Avon-by-the Sea, 61 N.J. 296, 294 A.2d 47 (1972), was determined by the majority to be applicable in this factual situation. Finally, the court held that the municipally owned upland island area adjacent to the tidal waters must be open to all on equal terms and without preference. 78 N.J. at 179, 393 A.2d at 573.

Justice Mountain dissented. He expressed serious reservations concerning the majority's expansion of the public trust doctrine. He further noted the general uncertainty as to its scope and the ramifications of its application to the beaches currently owned by New Jersey municipalities. Justice Mountain posed the question of whether there was, in fact, a taking of property by operation of the doctrine for which there should be compensation provided. He felt "that no more land or water should be found to come within the ambit of the public trust until such time as the scope and contours of this doctrine are made clear." *Id.* at 189, 393 A.2d at 579 (Mountain, J., dissenting). He further observed that it was unclear as to what role the legislature would play in determining the boundaries and application of the public trust doctrine in New Jersey.

MUNICIPAL LAW—ZONING—*Deerfield Estates, Inc. v. Township of East Brunswick*, 60 N.J. 115, 286 A.2d 498 (1972).

Plaintiff owned a tract of land in the defendant Township which he intended to develop. The Township's Planning Board approved plaintiff's development plan on condition that he install or guarantee the installation of water mains to the municipally owned water utility. The plaintiff subsequently agreed to the condition. Four months later he wrote to the Township demanding that the municipality install the water mains. The Township refused the demand and litigation ensued. The trial court granted summary judgment for the defendant which was affirmed by the appellate division. Plaintiff appealed to the supreme court alleging that the case involved a substantial question arising under the Constitutions of the United States and of the State of New Jersey. 60 N.J. at 118, 286 A.2d at 499.

Rejecting plaintiff's constitutional challenge, the supreme court agreed to hear the case because of its general public importance. *Id.* at 121, 286 A.2d at 500. The court, speaking through Justice Mountain, held that under New Jersey law a municipality which has

created a planning board and adopted an adequate subdivision ordinance, may require that water mains be installed as a condition of subdivision approval under authority of N.J. STAT. ANN. § 40:55-1.21 (West 1967) (repealed 1976). 60 N.J. at 122, 286 A.2d at 502. The court further posited that a municipality "may" impose the cost of installation upon the developer in an appropriate case. *Id.* at 123, 286 A.2d at 502. Justice Mountain stated that the general rule requires that "municipalit[ies] must treat persons who are similarly circumstanced within the community served or to be served by the utility equally. . . ." *Id.* at 128, 286 A.2d at 506. Municipalities are given the discretion to determine the means by which they will pursue the permissible goal of imposing proportionate expenses upon those who benefit from an extension of municipal services. *Id.* at 130, 286 A.2d at 506. Among the possible means available to a municipality is to require a developer to install water mains at his own expense so long as appropriate local legislation permits such means and that it is fair and equitable to do so. *Id.* at 131, 286 A.2d at 507.

Finally, Justice Mountain stated that the above rule must be applied pragmatically, taking into account prior municipal patterns of extension, the need to meet altered circumstances, permissible differentiation between individuals and developers, or the public interest. The court thus unanimously decided to vacate and remand the case for further proceedings. *Id.* at 133, 286 A.2d at 508.

NEGLIGENCE—RES IPSA LOQUITUR—*Anderson v. Harold Somberg, Inc.*, 67 N.J. 291, 338 A.2d 1 (1975).

Dr. Somberg had operated on Mr. Anderson for a back problem. 67 N.J. at 294, 338 A.2d at 3. During the course of this operation the tip of a forceps-like instrument broke off and remained lodged in Anderson's spinal canal, requiring further surgery. *Id.* Anderson suffered severe and permanent physical injury as a result of this incident. *Id.* at 295, 338 A.2d at 3.

Anderson sued Somberg for medical malpractice, the hospital for negligence, the supplier on a warranty theory, and the manufacturer on strict liability. *Id.* The case was tried to a jury which returned a finding of no cause as to each defendant. *Id.* at 297, 338 A.2d at 4. The appellate division reversed and remanded, and the New Jersey supreme court granted certification. 63 N.J. 586, 311 A.2d 8 (1973).

The majority affirmed the order of a new trial, reasoning that one of the four co-defendants had to be liable and this could only be determined at a new trial. *Id.* at 298, 338 A.2d at 4. They went on to

reason that in a case involving a helpless, unconscious plaintiff, the burden rests with those who owed a duty of care to such person to prove nonculpability or else incur liability for injuries suffered. *Id.* at 298, 338 A.2d at 5.

Justice Mountain took exception to the majority's analysis in his dissent. He argued that the court's presumption that one of the parties liable for the injury was, of necessity, before the court was not supportable in light of the fact that the instrument in question had been used by other surgeons on numerous prior occasions. *Id.* at 306, 338 A.2d at 9. While he felt that the application of the doctrine of *res ipsa loquitur* was applicable to Somberg and the hospital, *id.* at 309, 338 A.2d at 10, he would have limited it to requiring such defendants to show by a preponderance of the evidence their lack of fault. *Id.* at 310, 338 A.2d at 11. He refused to join the majority's rationale that the rule can have the effect of placing such defendants in a group from which "one or more *must* be singled out" as liable. *Id.* at 311, 338 A.2d at 11 (emphasis in original). He especially objected to instructing the jurors that they must find against at least one defendant. Justice Mountain found this order totally lacking in rationality and in conflict with the requirement that liability be determined by a preponderance of the evidence. *Id.* at 311, 338 A.2d at 10–11.

NEGLIGENCE—SUMMARY DISPOSITIONS—*Rose v. Port of New York Authority*, 61 N.J. 129, 293 A.2d 371 (1972).

Edward Rose was injured when he started to pass through a set of mechanical doors at J.F.K. Airport and either walked into or was struck by the doors. 61 N.J. at 132, 293 A.2d at 372. He subsequently brought an action for damages, alleging negligence on the part of the Port of New York Authority, the manufacturer and the distributor of the mechanical doors. *Id.* At the close of the plaintiff's case each defendant moved, pursuant to N.J.R. 4:37-2(b), for involuntary dismissal of the claims against them on the basis that the plaintiff failed to prove a prima facie case. 61 N.J. at 132, 293 A.2d at 372. These motions were held in abeyance until after the defendants presented their testimony, at which time two of the defendants were dismissed as per their motions, while defendant Port Authority's case was submitted to the jury. *Id.* The jury returned a verdict for plaintiff Rose in the sum of $12,000. *Id.*

Defendant Port Authority appealed and the appellate division, in an unpublished decision, reversed the trial court. *Id.* at 132, 293 A.2d at 373. Plaintiff successfully petitioned the Supreme Court of

New Jersey for certification. 59 N.J. 362, 283 A.2d 106 (1971). The supreme court reversed the appellate division decision, stating that it was not absolutely necessary for the plaintiff to prove a specific mechanical failure in order to establish a prima facie case. 61 N.J. at 136, 293 A.2d at 374–75. In an opinion authored by Justice Mountain, with Justice Hall concurring in the result, the court noted that where motions for involuntary dismissal are made, the test becomes whether the sum total of the evidence, taken together with all legitimate inferences which can be drawn therefrom, could sustain a judgment for the party opposing the motion. *Id.* at 133, 293 A.2d at 373; *see* Dolson v. Anastasia, 55 N.J. 2, 258 A.2d 706 (1969). If so, the motion must be denied. Justice Mountain found that the occurrence indicated negligence, and in such a situation the plaintiff should not have to prove any actual operational failure. *Id.* at 136–37, 293 A.2d at 375. Accordingly, Justice Mountain reasoned that since the instrument was under the defendant's control, the plaintiff need only raise an inference of negligence which would then place the burden of explanation upon the defendant. *Id.*

Finally, the court reasoned that while the accident occurred in New York, it was appropriate to apply New Jersey law in deciding the case. *Id.* at 139–40, 293 A.2d at 376–77. Justice Mountain declared that this state uses a "flexible doctrine that applies the law of that jurisdiction having the most significant relationship and closest contacts with the occurrence and the parties." *Id.* at 140, 293 A.2d at 376–77.

NEWSPAPERS—*City of Plainfield v. Courier-News*, 72 N.J. 171, 369 A.2d 513 (1976).

The *Courier-News* had moved its place of business from Plainfield to Bridgewater Township. 72 N.J. at 174, 369 A.2d at 514. This action was brought to determine whether the city of Plainfield could continue to utilize the *Courier-News* for publication of its official notices. *Id.* The applicable statutory provision requires that an official newspaper must be published in the municipality, if available, or in the county. *Id.*, N.J. STAT. ANN. § 40A:2-19 (West 1979). The lower courts had decided that the *Courier-News* was published in Plainfield and, therefore, met the statutory standard. 72 N.J. at 174, 369 A.2d at 514. The supreme court reversed, basing its decision on both statutory language and legislative intent. *Id.* at 175, 369 A.2d at 515.

The basic issue in this case was the situs of publication of the *Courier-News*. *Id.* at 182, 369 A.2d at 519. After examining a series

of related cases, the court, speaking through Justice Mountain, held that the *Courier-News* had only one place of publication and that place was its home office. *Id.* at 184–87, 369 A.2d at 520–21. Justice Mountain did note that a newspaper could have more than one place of publication. *Id.* at 187–88, 369 A.2d at 521. However, certain factors such as separate editions, national circulation, and more than one editorial office must be shown before a determination of more than one place of publication could be reached. *Id.* at 188, 369 A.2d at 521–22. The *Courier-News* did not fit this description and, therefore, did not qualify as the official newspaper of Plainfield. *Id.* at 188, 369 A.2d at 522.

ORDINANCES—*New Jersey Builders Association v. Mayor of East Brunswick*, 60 N.J. 222, 287 A.2d 725 (1972).

The Township of East Brunswick, in an effort to remedy conditions that were perceived by the municipality as injurious to the public health, safety, and welfare, adopted an ordinance amending the existing building code. 60 N.J. at 224, 287 A.2d at 726. The regulatory device was precipitated by the failure of building contractors to comply with the requirements of the code and their frequent financial irresponsibility in correcting violations, which resulted in considerable losses to the purchasers of property. *Id.* Among the ordinance's requirements was a provision that, prior to the issuance of a building permit, a builder must register with the appropriate agency and for each "property offered for sale, the contractor must . . . provide a one-year maintenance bond . . . in favor of the purchaser in an amount equal to fifteen (15%) per cent of the sales price, 'covering any defect . . . in violation of the Building Code.' " *Id.* at 224–25, 287 A.2d at 726.

The plaintiff's initiated a declaratory judgment proceeding challenging the regulation immediately after its adoption. *Id.* at 224, 287 A.2d at 726. The trial court concluded that the ordinance was invalid since the township lacked the authority to promulgate the regulation. An appeal was taken to the appellate division, and prior to oral argument, the supreme court granted the township's motion for certification. *Id.*

The Supreme Court of New Jersey affirmed the trial court decision on other grounds. *Id.* at 235, 287 A.2d at 732. Justice Mountain, in delivering the opinion of the court, initially found that it was within the public interest to provide protection from "unscrupulous and unqualified persons purporting to have the capacity, knowledge

and qualifications of a contractor." *Id.* at 226, 287 A.2d at 726–27. Therefore, "the occupation of building contractor may, by an appropriate exercise of the public power, be made subject to reasonable regulation." *Id.* at 226, 287 A.2d at 727. However, the court found the ordinance, in application, to be fatally deficient.

Justice Mountain observed that the validity of the regulation's deposit requirement was questionable in view of the plaintiff's claim that it was an unreasonable financial burden. The court saw no need to remand for a determination of the issue, however, since the entire ordinance was found invalid. *Id.* at 232, 287 A.2d at 730. Justice Mountain noted that the ordinance left for speculation a variety of determinations of significant consequence, such as: whether it called for a surety bond as opposed to an individual bond of the builder; its specifications and conditions of the proposed bond; and, to whom the bond was to be delivered. *Id.* at 232–33, 287 A.2d 730–31. Furthermore, the court found the ordinance's usage of the term "builder" to be so encompassing that it was left vague and meaningless with respect to whom the ordinance applied. *Id.* at 233–34, 287 A.2d at 731. In conclusion, Justice Mountain stated that these obscurities, as well as others inherent in the ordinance's construction, "should be made clear and exact. In its present form . . . the ordinance must fall. We do not think it fair to builders that they be required to submit to regulations so vague and imprecise." *Id.* at 234, 287 A.2d at 731.

PARTITION—*Newman v. Chase*, 70 N.J. 254, 359 A.2d 474 (1976).

Howard Newman brought an action seeking partition of his interest in property owned by Arthur and Dorothy Chase as tenants by the entirety. 70 N.J. at 257–58, 359 A.2d 474, 476. Arthur Chase became bankrupt and Newman purchased his interest from the trustee in bankruptcy. *Id.* Partition was sought for the joint lives of the husband and wife. *Id.* at 258, 359 A.2d at 476. The trial court granted the relief requested and the supreme court granted certification while the appeal was pending in the appellate division. The court held that partition was not available, *id.* at 262, 359 A.2d at 478, but that the plaintiff was entitled to an accounting for half the rental value of the property. *Id.* at 266, 359 A.2d at 480–81. Justice Mountain, speaking for the majority, held that spouses may not be awarded partition of property held as tenants by the entirety. *Id.* at 260–61, 359 A.2d at 477. As a result of the bankruptcy sale, plaintiff and defendant-wife were deemed tenants in common. *Id.* at 261, 359 A.2d at 477. Normally, tenants in common are entitled to partition.

However, public policy and equitable considerations combined to convince the court that partition should not be an absolute right of tenants in common. *Id.* at 264–65, 359 A.2d at 479–80.

The right to an accounting arises from the defendant-wife's denial of access to the property to the plaintiff, thus constituting an ouster. *Id.* at 266–67, 359 A.2d at 480. In such a case, the cotenant who is denied possession is entitled to one-half of the imputed rental value offset by mortgage payments and maintenance expenses paid by the defendant-wife. *Id.* at 267–68, 359 A.2d at 480–81.

PHYSICIANS AND SURGEONS—*Guerrero v. Burlington County Memorial Hospital*, 70 N.J. 344, 360 A.2d 334 (1976).

Two physicians were denied the right to practice general surgery at a satellite hospital of Burlington County Memorial Hospital (Hospital). 70 N.J. 344, 348–49, 360 A.2d 334, 336. This decision was based on the size of the present staff, community needs and the number of available hospital beds. *Id.* A hearing was conducted by the Joint Conference and Credentials Committee of the Hospital at which time the denial of admission to the medical staff was affirmed. *Id.* at 349, 360 A.2d at 336.

The physicians subsequently instituted action, seeking admission to the medical staff of the hospital. The trial court granted such relief, holding that the denial of admission was arbitrary. The appellate division affirmed in an unreported opinion, and the supreme court granted certification. 68 N.J. 168, 343 A.2d 456 (1975).

The Supreme Court of New Jersey, Justice Mountain writing for the majority, upheld the decision of the Hospital Board of Trustees. 70 N.J. at 349, 360 A.2d at 336. The court first reviewed the criteria and decision-making process employed by the hospital. Justice Mountain then held that since the denial of privileges is an area within the discretion of the Board of Trustees, the judicial inquiry must be limited to the determination of whether the decision is "arbitrary or capricious." *Id.* at 356, 360 A.2d at 340. Finding no unreasonable exercise of discretion, the court upheld the decision of the Board of Trustees. *Id.* at 360, 360 A.2d at 342.

PHYSICIANS AND SURGEONS—MALPRACTICE—*Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973).

Following a radical mastectomy, Maria Lopez was directed by her personal physician to consult Dr. Alfred J. Swyer, a radiologist,

for radiation therapy. 62 N.J. at 270, 300 A.2d at 565. Dr. Swyer proceeded to administer x-ray treatments for about five weeks. *Id.* at 270–71, 300 A.2d at 565. Mrs. Lopez's reaction to this therapy could fairly be characterized as " 'dramatically calamitous.' " The treatment produced severe pain and nausea, necrotic ulcers, x-ray burns, radiation fibrosis of lung and spontaneous rib fractures. *Id.* However, Mrs. Lopez never thought these reactions might be the result of Dr. Swyer's negligence until 1967, when she overheard another doctor's conversation to that effect. *Id.* Mrs. Lopez then commenced this negligence suit against Dr. Swyer, his associates, and her personal physician. *Id.*

The defendant moved for summary judgment, which was granted by the trial court. *Id.* at 270, 300 A.2d 564. The appellate division reversed the decision, and remanded the case for trial. Subsequently, defendant Swyer appealed. *Id.*

The major issue as perceived by the supreme court was whether the personal injury statute of limitations was applicable to the plaintiff's claim. *Id.* at 271, 300 A.2d at 565. The question was whether the general two-year statute of limitations was the proper standard or if the so-called "discovery rule" was available to the plaintiff. *Id.* at 271–72, 300 A.2d 565.

The supreme court, through Justice Mountain, affirmed and modified the appellate division's decision. *Id.* Justice Mountain stated that the determination of when the "discovery rule" is applicable in a given case is a matter of law to be decided by the court rather than a jury. *Id.* at 272, 300 A.2d at 566. He further explained that such a rule cannot be an automatic one. Rather, it must be invoked only after all "the equitable claims of opposing parties [have been] identified, evaluated and weighed." *Id.* at 274, 300 A.2d at 567. Due to the nature of such considerations, Justice Mountain posited that such a determination should be made at a preliminary hearing, out of the presence of the jury. *Id.* at 275, 300 A.2d at 567. Finally, he stated that some of the considerations for the trial court might include the nature of the alleged injury, the availability of witnesses and written testimony, the length of time that has elapsed since the alleged wrongdoing, and whether the delay has been to any extent deliberate or intentional. *Id.* at 276, 300 A.2d at 568.

PROPERTY—*Palamarg Realty Co. v. Rehac,* No. A-95 (Sup. Ct. N.J. June 27, 1979).

The plaintiffs brought suit to quiet title to two tracts of land in Burlington County. Defendants, Joseph Rehac and Alexander

Piatkowski, claimed title to one tract, and defendants, David Worth and Ezra Sharp, claimed title to the other tract. Slip op. at 1–2.

The chains of title for both parties began with a common grantor, the Asbury Company (Asbury). *Id.* at 3. On February 12, 1913, Asbury conveyed both properties in question to Appleby Estates (Appleby). The deed was recorded on February 18, 1913. *Id.* However, on February 15, 1913, Asbury also conveyed the land in question to Robert E. Taylor by warranty deed. This deed was recorded on April 25, 1913. *Id.* at 3–4.

Plaintiff's chain of title continued with a 1924 reconveyance back to Asbury by Appleby. The description contained an exception of 429 acres to Robert E. Taylor, purportedly conveyed to him by Appleby. In fact, the original conveyance to Taylor was made by Asbury Company. *Id.* J. Randolph Appleby was present and majority stockholder in both Asbury and Appleby, and, as such, executed the 1913 conveyance from Asbury to Appleby, as well as the 1924 reconveyance. *Id.* at 7.

On August 15, 1966, Asbury, Appleby, and Appleby and Wood Co. conveyed by quitclaim deed all of their property in Burlington County to Anthony J. Del Tufo Agency, Inc. *Id.* at 5. Plaintiffs were successors in title, through mesne conveyances to the Del Tufo Agency. *Id.* at 6.

The defendants' chain of title continued from the Taylor deed of 1913 through a series of mesne conveyances until September 13, 1971 when the Kupire Corporation conveyed one of the disputed tracts to defendants Worth and Sharp and the other to Rehac and Piatkowski on November 21, 1973. *Id.* at 2. The former deed was recorded on September 14, 1971 and the latter on November 26, 1973. *Id.*

Both parties moved for summary judgment. The trial court denied plaintiff's, and granted defendants' motion. *Id.* The appellate division reversed and entered judgment for plaintiffs. *Id.* The supreme court granted defendants' petition for certification. *Id.*

Justice Mountain, writing for a unanimous court, vacated the decision of the appellate division and remanded the case to the trial level. *Id.* at 7–8. He noted that the underlying purpose of the recording system is to enable purchasers for value to rely on the record, so that one who purchases and records a land sale will prevail even over an earlier purchaser, so long as there is no actual notice of the earlier sale. *Id.* at 8–9; *see* N.J. STAT. ANN. §§ 46:21-1, 46:22-1 (West 1940 & Cum. Supp. 1979-1980). Since a subsequent purchaser is bound only to complete a "reasonable" search of the record, Del Tufo would not have record notice of the Taylor deed because the original deed from Asbury to Appleby was recorded prior to recordation of the

Taylor deed. Slip op. at 12–13; *see* Glorieux v. Lighthipe, 88 N.J.L. 199 (E. & A. 1915).

The Justice stated that since the case was decided on a motion for summary judgment, the question of actual notice by Del Tufo and subsequent purchasers should be left for remand. Slip op. at 14, n.6. While reserving final judgment, he also noted that the exception of 429 acres to Robert Taylor in the 1924 deed of reconveyance to Asbury would probably not constitute actual notice to subsequent purchasers in plaintiff's chain of title, *id.* at 15, and that the doctrine of estoppel by deed is not applicable to a subsequent purchaser for value without notice. *Id.* at 16–17.

PROPERTY TAXES—*City of Bayonne v. Port Jersey Corp.*, 79 N.J. 367, 399 A.2d 649 (1979).

In the years 1972 and 1973, the city of Bayonne taxed as realty three very large construction cranes owned by the Port Jersey Corporation and operated by Global Terminal and Container Services, Inc. 79 N.J. at 369, 399 A.2d at 649. The cranes themselves are mounted on railroad-type tracks, and are readily movable. *Id.* Bayonne assessed a tax under N.J. STAT. ANN. § 54:4-1 (West 1960 & Cum. Supp. 1979-1980), which allows real property to be taxed by the local taxing district. 79 N.J. at 369, 399 A.2d at 649–50. The Hudson County Board of Taxation, however, disagreed with the city, and held the cranes were personal property. The State Division of Tax Appeals affirmed, but the appellate division reversed, holding these 1,000,000 pound, $1,000,000 cranes to be real property. *Id.* at 369–70, 399 A.2d 649–50. The taxpayers' petition for certification to the New Jersey supreme court was subsequently granted. 75 N.J. 533, 384 A.2d 513 (1977).

The supreme court, per Justice Mountain, reversed the appellate division and reinstated the judgment of The State Division of Tax Appeals. In ruling that these cranes were personal property, Justice Mountain found the cranes did not fall within the exception to the Business Personal Property Tax Act, N.J. STAT. ANN. §§ 54:11A-1 to 21 (West Cum. Supp. 1979-1980), and were therefore taxable under that statute as personal property. 79 N.J. at 380–81, 399 A.2d at 655–56. The exception referred to is contained in N.J. STAT. ANN. § 54:11A-2(2) (West Cum. Supp. 1979-1980) which states in pertinent part, that personal property shall not include "goods and chattels so affixed to real property so as to become part thereof and not to be severable or removable without material injury thereto." The appel-

late division had relied on the "material injury" test as applied under the superceded Uniform Conditional Sales Act. The test under that Act was not one of physical injury to the property but rather a test of functional or economic injury to the owner. 79 N.J. at 375, 399 A.2d at 653. In disagreeing with this interpretation, Justice Mountain held the state's adoption of the Uniform Commercial Code in 1961 changed the meaning of the phrase "material injury." It is now construed to mean "only those chattels the removal of which will do irreparable or serious physical injury or damage to the freehold." *Id.* at 378, 399 A.2d at 654. This interpretation, combined with a legislative intent "to create in New Jersey a fiscal climate that will contribute to the attraction of industry," led to the court's conclusion that the cranes were personal property and therefore not subject to local taxation. *Id.* at 380, 399 A.2d at 655.

PUBLIC FINANCE—BONDS—*Holster v. Board of Trustees of Passaic County College*, 59 N.J. 60, 279 A.2d 798 (1971).

This case presented the supreme court with the opportunity to review a trial court's determination that the County College Bond Act, N.J. STAT. ANN. §§ 18A:64A-22.1 to -22.8 (West Cum. Supp. 1979-1980), was unconstitutional. The County College Bond Act supplements earlier legislation which provided for the creation of county colleges. The Act deals with the issuance by a county of bonds, the proceeds of which are used to make up the state's share of the cost of the county college's capital outlay. Interest payments are to be made by the state appropriations as will the principal of the bonds at their maturity. The Act also provides that notes or bonds issued pursuant to the statute shall not constitute debts or liability of the state but are dependent for repayment upon appropriations. 59 N.J. at 62–65, 279 A.2d at 798–800.

The plaintiff contended that this legislation violated article VIII, section 2, paragraph 3 of the New Jersey Constitution, generally referred to as the debt limitation clause. This clause prohibits the legislature from creating a debt or liability which, together with previous liabilities, exceeds one per centum of the total amount appropriated by the general appropriation law for a fiscal year. *Id.* at 65 & n.1, 279 A.2d at 800 & n.1.

The supreme court concluded that the County College Bond Act was not violative of the debt limitation provision of the constitution. Justice Mountain, writing for a unanimous court, initially observed that the legislation in issue contains an "apparent internal inconsis-

tency" in that it provides for the payment of county bonds by means of state appropriation while disavowing any state obligation in the nature of a debt or liability. *Id.* at 66, 279 A.2d at 801. The trial court had interpreted the Act as requiring the state to fulfill the payment obligation. Justice Mountain, however, found that in light of the principle of statutory interpretation which holds that legislation should be read so as to sustain its constitutionality, a different interpretation was required. Specifically, he held that "the bonds do not become the obligations of the State and that the statute does not impose upon the State a legally binding or enforceable obligation to pay them or to reimburse the county upon its making payment." 59 N.J. at 66, 279 A.2d at 801. Justice Mountain concluded that, despite the language of the legislation, the bonds do not constitute obligations of the state, but only of the counties that issue them.

PUBLIC LANDS—*Hyland v. Borough of Allenhurst*, 78 N.J. 190, 393 A.2d 579 (1978).

The Borough of Allenhurst (Borough) includes a 300-foot section of ocean beach which is suitable for swimming and recreation. The Borough owns and maintains a beach club adjacent to the bathing beach which includes toilet facilities, bathhouses, pools and cabanas. Membership in the beach club is open to residents and nonresidents although nonresidents must pay higher fees. The club's operating losses are financed by general borough tax revenues. 78 N.J. at 194 n.1, 393 A.2d at 581.

In an unreported opinion, the trial court held that club membership fees must be equal for residents and nonresidents and provision must be made for daily admission to the facilities. The appellate division, 148 N.J. Super. 437, 372 A.2d 1133 (App. Div. 1977), sustained the trial court ruling that all dry beach areas must be open to all persons on equal terms, but reversed the ruling that required equal beach club fees be charged to residents and nonresidents, noting that the operating deficit was covered by borough tax revenues. 78 N.J. at 194 n.1, 393 A.2d at 581. One appellate division judge dissented on the issue of whether changing and toilet facilities must be made available to all without discrimination. The attorney general appealed as of right.

Justice Sullivan, writing for the majority, upheld the findings of the appellate division except on the issue raised by the dissenting judge below, holding that "where municipal toilet facilities exist adjacent to a public beach area, it would be an abuse of municipal power

and authority to bar the users of the public beach from access to this basic accommodation." 78 N.J. at 196, 393 A.2d at 582. It was specifically noted by Justice Sullivan that this holding was not grounded upon an application of the public trust doctrine.

Justice Mountain, dissenting, urged full affirmance of the appellate division judgment. N.J. STAT. ANN. § 40: 61-22.20 (West 1967 & Cum. Supp. 1978-1979) was construed to be "a delegation by the Legislature to the governing body of each municipality which owns a beach bordering on the Atlantic Ocean, of total and *exclusive* control of the beach area." 78 N.J. at 198, 393 A.2d at 583 (Mountain, J., dissenting). Accordingly, Justice Mountain characterized the action of the majority as "simply altering a perfectly acceptable and valid legislative scheme to conform to what is no more than a judicial preference." *Id.*

PUBLIC LANDS—*LeCompte v. New Jersey*, 65 N.J. 447, 323 A.2d 481 (1974).

Ramon LeCompte submitted several applications to the Natural Resource Council in the Department of Environmental Protection, pursuant to N.J. STAT. ANN. § 12:3-10 (West 1979), to purchase certain riparian lands from the state. LeCompte filed these applications after the discovery by state officials that he had already encroached upon these lands through the development of adjacent properties. The Council gave tentative approval to the applications, and fixed a price for the lands. In addition to the sales price, a so-called "'use and occupancy assessment,'" was imposed and made a condition to the sale. 65 N.J. at 449, 323 A.2d at 482.

The plaintiff instituted a declaratory judgment suit in the chancery division to seek a ruling on the validity of these assessments. The State counter-claimed for damages arising from plaintiff's trespass and for an order to compel the plaintiff to vacate and return the lands in controversy to their former condition. The judge entered an order *sua sponte*, transferring the suit to the appellate division pursuant to N.J.R. 2:2-3(a)(2), but retained jurisdiction of the defendant's counter-claim. The appellate division held that the Council lacked authority to impose use and occupancy assessments, and remanded the suit to the chancery division. 128 N.J. Super. 552, 310 A.2d 876 (App. Div. 1973). The supreme court granted the defendant's petition for certification. 64 N.J. 496, 317 A.2d 709 (1974).

Justice Mountain, writing for the majority, reversed the judgment of the appellate division. The issue was whether the Council,

acting on behalf of the state, could require payment of an additional sum over and above the stated consideration for the lands. The holding of the majority turned upon the characterization of the payment as a proper consideration for the past use and occupancy of the land, rather than a use and occupancy assessment. *Id.* at 451–52, 323 A.2d at 482–83. Justice Mountain held that the Council had no authority to impose a governmental charge or duty on the sale of land. *Id.* Finally, the court viewed this additional payment as merely an ingredient of the purchase price, thus finding the Council's actions well within its statutory grant of power. *Id.* at 451–52, 323 A.2d at 483.

PUBLIC OFFICIALS AND EMPLOYEES—*Township of Springfield v. Pederson*, 73 N.J. 1, 372 A.2d 286 (1977).

Police officer Pederson sustained a knee injury in April, 1972. After hospitalization he returned to light duty until April, 1973, when he was ordered to undergo therapy and placed on mandatory sick leave during which time he received disability benefits in lieu of salary. In August, 1973, on his personal physician's advice, he refused to return to active duty despite an order issued pursuant to a police doctor's examination. He was subsequently disciplined and dismissed by order of the township committee. The county court reversed the dismissal and ordered reinstatement at full pay as well as payment of full back salary from August, 1973. In an unreported opinion the appellate division affirmed. Certification was granted. 69 N.J. 447, 354 A.2d 644 (1976).

The supreme court, Justice Mountain writing for a unanimous court, held that "where a municipal official has been denied compensation because of a suspension or dismissal judicially determined to have been illegal, he will become entitled to receive from the municipality exactly the amount of remuneration . . . as he would have received but for the improper conduct on the part of his employer." 73 N.J. at 7, 372 A.2d at 289. It was noted that N.J. STAT. ANN. § 40A:14-151 (West 1979) was enacted to modify the harsh common law rule which denied public officers compensation lost due to an illegal suspension or dismissal. The facts of the case put in issue whether the officer should be entitled to recover full salary or only the amount of compensation, *i.e.* insurance benefits, he would have received but for the dismissal. Justice Mountain examined the legislative purpose of the statute and the public interest in conserving public funds and determined that it was not consistent to allow windfall recoveries where the official would not have been entitled to full sal-

ary during the period of his illegal suspension or dismissal. The case was remanded to the trial court for determination of the amount of compensation which officer Pederson would have been entitled to but for the illegal dismissal. 73 N.J. at 7, 372 A.2d at 289.

PUBLIC SCHOOLS—TERMINATION OF EMPLOYMENT—*Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236, 320 A.2d 857 (1974).

Mary C. Donaldson, plaintiff, was a teacher employed by the Board of Education of North Wildwood. In January, 1969, she was informed by the Superintendent of Schools that she would not be rehired for the 1969-1970 school year. The school board refused to give her any reasons for her termination. Plaintiff filed a petition with the State Commissioner of Education. The Commissioner dismissed the petition. The State Board of Education affirmed the dismissal. The Appellate Division in turn, affirmed the decision of the State Board, 65 N.J. at 239, 320 A.2d at 858.

Plaintiff's petition for certification was granted to decide the issue of "'whether a non-tenure school teacher is entitled to a statement of reasons for her non-retention by a school board.'" *Id.* The supreme court, speaking through Justice Jacobs, held that Ms. Donaldson was entitled to a statement from the Board of Education detailing the reasons why she was not rehired. *Id.* at 245, 320 A.2d at 861–62.

Justice Mountain filed a dissenting opinion in which he stated that he did not disagree on policy grounds with the majority holding. *Id.* at 249, 320 A.2d 864 (Mountain, J., dissenting), but rather, he believed that sections 18A:27-10 to -13 of the New Jersey Statutes Annotated controlled the issue. *Id.* at 249–51, 320 A.2d at 864–65 (Mountain, J., dissenting). Under this statute, a nontenured teacher who is not rehired need only be given written notice of termination; nothing is said about giving reasons for nonrenewal.

Justice Mountain then examined the legislative history of the statute to determine the intent of the legislators. *Id.* at 251–53, 320 A.2d at 865–66. When the bill was originally introduced in the State Senate, it provided for the giving of reasons and for a hearing before the Board of Education. *Id.* at 251–52, 320 A.2d at 865–66. These provisions were deleted prior to the legislation's passage. *Id.* at 253, 320 A.2d at 866. Hence, Justice Mountain believed that the intent of the legislature was made clear. He noted that "[e]xamination of the legislative history of this enactment reveals an unequivocal repudia-

tion by the upper branch of the Legislature of the requirement that reasons be given to a nontenure teaching staff member upon the nonrenewal of his or her contract. This Court should defer to this clear expression of legislative intent and accept it as binding." *Id.* at 254–55, 320 A.2d at 867.

REAL PROPERTY—*Conklin v. Davis*, 76 N.J. 468, 388 A.2d 598 (1978).

The Conklins (sellers) contracted to sell and convey a residential property in Ridgewood to the Davis' (purchasers). 76 N.J. at 470, 388 A.2d at 600. The Davis', as purchasers refused to complete the sale alleging defects in title and misrepresentation on the part of the sellers. *Id.* at 470–71, 388 A.2d at 600. Apparently, the Conklins based the validity of the title to a portion of the premises on a claim of adverse possession. *Id.* at 472, 388 A.2d at 600. The purchasers argued that the sellers should have perfected the title prior to the date of closing and since they did not, the purchasers were justified in repudiating the contract. *Id.* at 472, 388 A.2d at 600.

The sellers instituted the suit asking for specific performance while the purchasers counterclaimed for rescission of the contract. *Id.* at 471, 388 A.2d at 600. The sellers then dropped their claim of specific performance and the case was argued solely on the issue of rescission. *Id.*

The trial court granted the sellers' motion for judgment at the conclusion of the purchasers' argument but on appeal the appellate division reversed the trial court's decision in an unreported opinion. *Id.* When the appellate division ordered that judgment be entered for the purchasers rather than remanding for a new trial, the sellers moved for a rehearing pointing out that they had never presented a defense to the purchasers' claim of rescission since judgment was granted at the trial level at the conclusion of the purchasers' arguments. This motion for rehearing was denied. *Id.*

The supreme court reversed the appellate division decision and remanded for a new trial. *Id.* Justice Mountain noted that had the trial judge denied the sellers' motion, then the sellers could have offered evidence to support their position. *Id.* The appropriate rule, N.J.R. 4:40-1 (1979), cited by Justice Mountain, stated that "[i]f the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserved the right to do so." Additionally, Justice Mountain noted that "[t]he vendors cannot be denied this right simply because the adverse rul-

ing emanated from an appellate court rather than the trial court." 76 N.J. at 472, 388 A.2d at 600 (emphasis omitted).

Justice Mountain found both courts, trial and appellate division, to be in error. *Id.* at 477, 388 A.2d at 603. Instead of granting a judgment for either party on the basis of only the purchasers' evidence, the Justice remanded the case to the superior court for a new trial so that all of the evidence is heard. *Id.* Furthermore, he stated that once the purchaser has proved that the record title is outstanding in someone other than the seller, the burden of proof then shifts to the seller to establish his title by adverse possession. *Id.*

RENTS AND RENT CONTROL—*Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978).

The Borough of Fort Lee enacted a rent control ordinance in 1974, which generally allowed rent increases equal to the rise in the Consumer Price Index (CPI). A 2.5% ceiling, however, was imposed upon all rent increases. Increases in real estate taxes could be automatically passed through under the plan. The ordinance further provided for specific hardship relief through an unpaid board which could grant greater increases under the appropriate circumstances. These hardship exceptions to the rent ceiling would lapse automatically after one year. In 1976, Fort Lee enacted a revised rent control plan which keyed the Maximum Annual Percentage (MAP) to increases in real estate taxes and applicable components of the CPI. This plan specifically repealed the automatic passthrough of real estate tax increases of the 1974 ordinance and was to become effective upon the final disposition of litigation pending which concerned the validity of the 1974 Rent Control Plan.

This decision represents a consolidation of three cases, one challenging the validity of the 1974 rent control ordinance and two challenging the 1976 revision. The trial court upheld the constitutionality of the 2.5% limitation, but issued a temporary restraining order against its enforcement and allowed the landlords to collect rent increases in excess of 2.5%, requiring that the excess be escrowed pending the outcome of the appeal. 78 N.J. at 205–06, 394 A.2d at 67. The appellate division affirmed the trial court decision. As per the challenges to the 1976 ordinance, the trial court held that the clause repealing the tax passthrough provision was valid, but that all other provisions of the ordinance were deemed invalid due to the effective date which was contingent upon the outcome of the litigation on the first ordinance. The New Jersey supreme court granted certification

on all three cases. The judgments were vacated and the cases were consolidated and remanded for a plenary hearing to take evidence on the issue of a just and reasonable return. On remand, the trial court determined on the basis of the evidence that the Fort Lee rent control ordinance was confiscatory and thus invalid.

The unanimous supreme court opinion, authored by Justice Mountain held that: (1) the provision of the 1974 ordinance which imposed a 2.5% ceiling on rent increases without providing for "prompt and efficacious relief from widespread confiscatory effects of the 2.5% limitation" was unconstitutional; 78 N.J. at 233, 394 A.2d at 81; (2) the tax passthrough repeal section in the 1976 ordinance was invalid; and (3) "[t]he contingent effective date did not render any portion of [the 1976 ordinance] invalid." *Id.* at 237, 394 A.2d at 83.

Justice Mountain examined the practicability of various methods which have been put forth to determine what constitutes a just and reasonable return. In the situation of an efficient landlord under a rent control statute, it was determined that an analysis of the impact of the ordinance upon the net operating income (NOI) would be most practicable, although other methods were not foreclosed. On the basis of the evidence adduced at the plenary hearing, it was determined that "the unrelieved operation of the 2.5% automatic increases can be expected to diminish NOI steadily. . . ." 78 N.J. at 222, 394 A.2d at 75. This steady decline in income would eventually become confiscatory by denying the landlord's constitutional right to a just and reasonable return. This confiscatory potential became an unconstitutional burden when the court looked at the administrative relief procedures provided for in the ordinance and found them to be too slow and cumbersome to provide effective hardship relief. Although the Fort Lee ordinance containing a 2.5% ceiling was thus found to be unconstitutional, Justice Mountain pointed out "that a municipality can constitutionally enact rent control ordinances with stringent controls like Fort Lee's. If it does so, however, it must be prepared to protect landlords' interests by providing prompt, fair, and efficacious administrative relief." 78 N.J. at 242, 394 A.2d at 85–86. The section of the 1976 ordinance which repealed the automatic passthrough of real estate tax increase was found to be invalid for essentially similar reasons as the 2.5% ceiling provision of the 1974 ordinance. The final finding was that the effective date of the 1976 ordinance which was contingent upon the final resolution of the litigation over the 1974 ordinance did not render that ordinance invalid.

RIOTS—*City of Newark v. County of Essex*, 80 N.J. 143, xxx A.2d xxx (1979).

On September 1, 1974, during a festival in Branch Brook Park, Newark, New Jersey, attended by large numbers of Hispanic-Americans and Puerto Rican-Americans, violations of Essex County Park regulations were observed by park police. Altercations between the police and those violating park regulations escalated into incidents of such severity that the Newark police were called in. The crowd, which then numbered about 1,000 persons, marched en masse to the City Hall in response to the mayor's offer to meet with a representative delegation. Further incidents occurred at City Hall, and general unrest continued until September 14, 1974. Due to this unrest, and the threat it posed to lives and property in the city, police and fire personnel were placed on overtime shifts, and all leaves and holidays cancelled. 144 N.J. Super. 566, 570–72, 366 A.2d 727, 729–30 (Essex County Ct. 1976).

The city of Newark brought suit against the county, pursuant to N.J. STAT. ANN. §§ 2A:48-1 to -7 (The Mobs and Riots Act) (West 1976 & Cum. Supp. 1978-1979) to obtain reimbursement for overtime payroll expenses incurred during this period. 80 N.J. at 145, xxx A.2d at xxx.

The trial court found for the city, and awarded judgment in the amount of $425,511.67. 144 N.J. Super. 566, 366 A.2d 727. The county appealed to the appellate division which reversed and held that the city had failed to establish a cause of action. 160 N.J. Super. 105, 388 A.2d 1311 (App. Div. 1978). The supreme court granted certification to review this interpretation of The Mobs and Riots Act. 78 N.J. 333, 395 A.2d 201 (1978).

The supreme court, per Justice Mountain, affirmed the judgment of the appellate division, holding that the statute had limited application. In the court's opinion, the fundamental purpose of The Mobs and Riots Act is to provide reimbursement from the public treasury for damage to individually owned property, resulting from riots. 80 N.J. at 145, xxx A.2d xxx. Justice Mountain pointed to the short statute of limitations for filing a claim and to the limited amount ($10,000) recoverable under the Act as indicative of the Act's narrow scope. *Id.* at 146, xxx A.2d at xxx.

In its argument in favor of reimbursement, the city had relied on language contained in N.J. STAT. ANN. § 2A:48-4 (West 1976 & Cum. Supp. 1978-1979) which directs the mayor to take all necessary legal action to protect property attacked or threatened by mob violence. It further states that any such expenses incurred in the performance of this duty be paid by the county treasurer. *Id.* at 147, xxx A.2d at xxx. Justice Mountain interpreted this statute as requiring that there be some direct, ascertainable link between the expenses incurred by the

city and a *particular piece of property*. The court rejected a construction of the statute which would have required a county to reimburse a municipality for all of the expenses of quelling a riot. Justice Mountain concluded that only a special expense incurred to protect specifically identifiable property requires county reimbursement under N.J. STAT. ANN. § 2A:48-4 (West 1976 & Cum. Supp. 1978-1979). *Id.* at 147–48, xxx A.2d at xxx.

SECURITIES—STATE REGULATION—*Data Access Systems v. State*, 63 N.J. 158, 305 A.2d 427 (1973).

Data Access Systems, Inc. (Data) is a New Jersey based corporation involved in the assembly of communications equipment in the computer field. In the early part of 1971 Data proposed to issue additional shares of its stock and filed a registration statement with the Securities and Exchange Commission (SEC) in accordance with the Securities Act of 1933, 15 U.S.C. § 77 a to 77 aa (West 1971). 63 N.J. at 160–61, 305 A.2d at 429. Copies of the statements and prospectus were filed with the New Jersey Bureau of Securities whose functions were subsequently transferred to the Division of Consumer Affairs by terms of the Consumer Affairs Act of 1971, N.J. STAT. ANN. § 52:17B-125 (West Cum. Supp. 1979–1980). 63 N.J. at 160–61, 305 A.2d at 429. The Division issued a cease and desist order concerning the sale or issuance of the stock within New Jersey. *Id.* at 161–63, 305 A.2d at 429–30. The agency's decision was based on the applicability of the New Jersey Uniform Securities Law, N.J. STAT. ANN. § 49:3-47 to -76 (West 1970 & Cum. Supp. 1979-1980). The Division found that the offering by Data was a violation of N.J. STAT. ANN. § 49:3-64(a)(vi) due to "unreasonable amounts of promoters' participation." 63 N.J. at 162, 305 A.2d at 429–30.

The agency's ruling was affirmed by the appellate division, 117 N.J. Super. 95, 283 A.2d 750 (App. Div. 1971) and the supreme court granted a petition for certification presented jointly by Data and the Securities Industry Association. 60 N.J. 283, 288 A.2d 25 (1972).

In an opinion delivered by Justice Mountain, the supreme court reversed the judgment of the appellate division. 63 N.J. at 168, 305 A.2d at 433. In viewing the issue as one of statutory interpretation, Justice Mountain rejected the lower court's reasoning by concluding "that where securities have been registered under the Securities Act of 1933 they may, without more, be offered or sold within this State and . . . there need be no separate registration here." 63 N.J. at 164, 305 A.2d at 430.

SEPARATION OF POWERS—*In re Salaries for Probation Officers*, 58 N.J. 422, 278 A.2d 417 (1971).

A labor contract dispute arose between the judges of the Bergen County Court (Judges) and the probation officers whom they employed. After prolonged negotiations between representatives of the two groups, the Judges entered an order fixing the terms of employment for the officers. The governmental body which would have been required to supply the funds for the new contract, the Board of Freeholders of Bergen County (Board) appealed the Judges' order, and the supreme court certified the case on its own motion. 58 N.J. at 424, 278 A.2d at 418.

Justice Mountain, writing for a unanimous court, proceeded to dispose of the Board's contentions. The Board's principal contention was that the statutorily mandated method by which probation officers were appointed and their salaries fixed by judges of the county court was illegal because it improperly interfered with the exercise of the Judges' judicial duties. Justice Mountain conceded that the disputed activities were not purely judicial acts. However, "the doctrine of the separation of powers was never intended to create . . . utterly exclusive spheres of competence." *Id.* at 425, 278 A.2d at 418.

According to the court, the Judges were acting as legislative agents, a role which was supported by long usage. The judiciary would not be required to accept this delegation of power in cases where it would be "incongruous or unduly burdensome." *Id.* at 426, 278 A.2d at 419. No such objection was extant in this case. The existence of statutory provisions providing for the county to have input into decisions regarding appointment of, and salaries for the officers also blunted the Board's argument questioning the propriety of having judges determine labor contract provisions. *Id.* at 426, 278 A.2d at 419. Judges in other states, which states did not possess the statutory authority of New Jersey, were found to possess inherent power to appoint and pay personnel necessary to the proper administration of justice. *Id.* at 426–27, 278 A.2d at 419.

The Board's second major argument was that if it agreed to expend funds for the retroactive salary increases which had been approved by the Judges, they would be violating the local budget law. This law forbids the expenditure of money for which no appropriation has been made. Justice Mountain suggested that an emergency appropriation by the Board would alleviate any problem in this regard. *Id.* at 427, 278 A.2d at 420.

Lastly, the court upheld specific provisions of the county officers agreement which were attacked as exceeding the Judges' statutory authority to fix salaries and provide for reasonable expenses. Examination of the legislative intent behind several statutes enabled the court to refute the County's contentions. The court accordingly held that the agreement negotiated by the Judges was proper in all respects and it was thus affirmed. *Id.* at 430, 278 A.2d at 421.

SEX CRIMES—*State v. Dorsey*, 64 N.J. 428, 316 A.2d 689 (1974).

Richard Dorsey and Michael Watts were engaged in the solicitation of professional photographs to be taken in the home. While interviewing a prospective female subject, Watts allegedly commented on the young lady's figure and placed his hand under her dress on her upper thigh. As the woman protested and moved away, Dorsey proceeded to unbutton her dress and placed his hands on her breasts, abdomen, and thighs. The woman then fled to another room, and the men departed. 64 N.J. at 430, 316 A.2d at 690.

Dorsey and Watts were indicted under N.J. STAT. ANN. § 2A:115-1 (West 1969), for committing private acts of lewdness. At trial, Dorsey was convicted, but on appeal, the appellate division reversed, finding that while the acts may serve as the basis for a charge of assault and battery or assault with intent to commit rape, they did not support a conviction under N.J. STAT. ANN. § 2A:115-1 (West 1969). 64 N.J. at 430, 316 A.2d at 690.

Writing for a unanimous court, Justice Mountain affirmed the judgment of the appellate division. The court, while recognizing the difficulty of formulating a definition of lewdness, found at least two acts that did fall within the ambit of the statute. Acts of indecent exposure, and acts that corrupt the morals of a minor have been held to be included within the meaning of this statute; however, the facts here placed the case outside the scope of the statute. *Id.* at 433, 316 A.2d at 692.

Looking forward to the adoption of the proposed New Jersey Penal Code, Justice Mountain noted that the section entitled "Sexual Assault" is specifically designed to include this type of reprehensible conduct. He further suggested that under this provision, section 2C:14-4, the defendant would be found guilty of a disorderly persons offense. *Id.* at 434, 316 A.2d at 692.

SURETYSHIP AND GUARANTY—*Langeveld v. L.R.Z.H. Corp.*, 74 N.J. 45, 376 A.2d 931 (1977).

L.R.Z.H. Corporation executed a promissory note on March 10, 1972, of which Higgins was a guarantor. The note was delivered to Langeveld and was secured by a mortgage for an amount equal to the promissory note. This mortgage was subordinate to two previous mortgages on the same land. 74 N.J. at 50, 376 A.2d at 933. The note became due on February 15, 1973, and was not paid. It was then discovered that the mortgage securing the note had not been recorded by Langeveld, and that in the interim, two mechanics liens and another mortgage had been recorded as liens against the same collateral. *Id.* The Langeveld mortgage was finally recorded on March 1, 1973, and Langeveld instituted this suit against Higgins, the guarantor of the promissory note. At trial, summary judgment for the entire amount of the note, $57,500, was entered against Higgins. The appellate division affirmed the trial court's award.

This case presented an important commercial law question regarding the interpretation of N.J. STAT. ANN. § 12A:3-606 (West 1962 & Cum. Supp. 1978-1979). Justice Mountain held that the guarantor had established a prima facie case to support the application of the rule that the impairment of the collateral by the "improper action or inaction on [the creditor's] part, will extinguish the obligation of the surety, at least to the extent of the value of the security released or impaired." 74 N.J. at 50–51, 376 A.2d at 934. Langeveld's failure to record the lien in a timely fashion allowed other liens to gain superior position. Such failure was deemed to constitute unjustifiable impairment of the collateral. The extent of the impairment was to be determined on remand by the chancery division.

Justice Mountain formulated the impairment determination as encompassing two situations. First, the impairment of collateral would be measured in monetary terms. If this is feasible, "the calculated amount of the impairment will ordinarily measure the extent of the surety's discharge." *Id.* at 56, 376 A.2d at 937. The second situation occurs when a surety can establish "that he has sustained prejudice, but be unable to measure the extent of the prejudice in terms of monetary loss." *Id.* at 56–57, 376 A.2d at 937. In such a situation, the surety will generally be completely discharged. The rights and obligations were to be determined at the time of the maturation of the note when the guarantor was entitled to exercise his rights of subrogation afforded by his position as a surety.

TAXATION—INHERITANCE, ESTATE AND GIFT TAX—*In re Estate of Lingle*, 72 N.J. 87, 367 A.2d 878 (1976).

The testator, Lingle, had left his entire estate to his second wife in violation of the terms of a separation agreement with his first wife. 72 N.J. at 91, 367 A.2d at 878–80. After considerable negotiation, a settlement was reached and payment was made. *Id.* at 91, 367 A.2d at 880. The issue in this case was whether or not the sums disposed of via the settlement are subject to the inheritance tax. *Id.* at 91, 367 A.2d at 879–80.

The transfer inheritance tax return which was filed by Lingle's second wife claimed the amounts of the settlement as a deduction. *Id.* at 92, 367 A.2d at 880. The supreme court, through Justice Mountain, held that a contract, such as the separation agreement, to make a testamentary disposition is a transfer " 'intended to take effect . . . at . . . death' " and is, therefore, subject to a tax imposed by N.J. STAT. ANN. § 54:34-1(c) (West 1960). 72 N.J. at 93, 367 A.2d at 881.

In reaching this conclusion, Justice Mountain noted that the interest conveyed by the separation agreement was an interest in the decedent's estate. Furthermore, had the terms of the separation agreement been fulfilled, the sums received would have been includable in the gross estate for tax purposes. *Id.* at 95–97, 367 A.2d at 882. Since the original agreement was to make a testamentary disposition, the decedent had retained complete control during his lifetime. The estate thus received no consideration, and accordingly, the amount of the settlement was declared to be subject to the inheritance tax. *Id.* at 96–98, 367 A.2d at 882–83.

TAXATION—INHERITANCE, ESTATE AND GIFT TAX—*In re Estate of Widenmeyer*, 70 N.J. 458, 360 A.2d 396 (1976).

The Division of Taxation (Division) promulgated a regulation which governed the deductibility of the costs of the administration of an estate under the Transfer Inheritance Tax Act, N.J. STAT. ANN. §§ 54:34-1 to -13 (West 1960 & Cum. Supp. 1978-1979). 70 N.J. at 460, 360 A.2d at 397. The administrator's or executor's commission is allowable as a deduction in computing the tax. *Id.*; N.J. STAT. ANN. § 54:34-5c (West 1960 & Cum. Supp. 1978-1979). The tax bureau in this case refused to permit the inclusion of specifically devised real estate in determining the commission and, consequently, the allowable deduction. 70 N.J. at 461, 360 A.2d at 398.

On appeal, the appellants challenged the validity of the Division's regulation. The appellate division sustained the regulation. 134 N.J. Super. 307, 340 A.2d 676 (App. Div. 1975). The supreme court granted certification, 69 N.J. 80, 351 A.2d 10 (1975), but limited their review to determining the validity of certain portions of the aforementioned regulation.

The supreme court, speaking through Justice Mountain, deemed the regulation valid. The court further held that real estate specifically devised does not "come into the hands of the executor" as required by N.J. STAT. ANN. § 3A:10-2 (West 1953 & Cum. Supp. 1978-1979). 70 N.J. at 461, 360 A.2d at 398. Exceptions to this general rule occur when it is necessary for the executor to sell real estate to pay debts, funeral expenses or administration costs, or to pay a monetary legacy conditioned upon the real estate. *Id.* at 462, 360 A.2d at 398. Since these exceptions were not present in this case, the commissions were denied. *Id.* at 464, 360 A.2d at 399–400.

WILLS—*Engle v. Siegel*, 74 N.J. 287, 377 A.2d 892 (1977).

The individual wills of Albert and Judith Siegel contained common disaster clauses which left one-half of their individual estates to their own mothers and one-half to their respective mothers-in-law in the event of a common accident in which the testator, spouse and children all were killed. In September, 1973, such an accident occurred when the entire Siegel family perished in a hotel fire. 74 N.J. at 289, 377 A.2d at 893. The husband's mother had died some six years prior to the fatal fire. *Id.* The trial court, in an unreported opinion, construed the will to require that the entire residuary estate should pass to the single living beneficiary, Ida Engle, mother of Judith Siegel, by operation of N.J. STAT. ANN. § 3A:3-14 (West 1953 & Cum. Supp. 1978-1979). The appellate division affirmed and certification was granted by the New Jersey supreme court. 71 N.J. 527, 366 A.2d 682 (1976).

The supreme court, Justice Mountain writing for the majority, held that the doctrine of probable intent would require that one-half of the residuary estate would pass to the husband's family, namely his surviving brother and sister, and the other half would go to the named beneficiary, Ida Engle. 74 N.J. at 295–96, 377 A.2d at 896. The court strongly advocated the doctrine of probable intent to rule in will construction cases where competent extrinsic evidence of the testator's actual intent at the time of execution is admitted to construe uncertain or ambiguous portions of the will. *Id.* at 295, 377 A.2d at

896. Justice Mountain stated that "[w]e are no longer limited simply to searching out the probable meaning intended by the words and phrases in the will." *Id.* at 291, 377 A.2d at 894. He further stated that "[r]elevant circumstances, including the testator's own expressions of intent . . . must also be studied, and their significance assayed." *Id.* (citation omitted).

The decision to apportion one-half of the estate to the husband's family was influenced by crucial evidence given by the drafting attorney who testified that the husband and wife intended to split the estate so that each family would get one-half. The attorney then advised them against the use of the broad term, "family," whereupon the wills were altered to show the names of the respective mothers as representatives of each family. On the basis of this evidence and the application of the doctrine of probable intent, the estate was divided with one-half going to the brother and sister of the husband and one-half to the wife's mother, Ida Engle.

WILLS—*In re Estate of Ericson*, 74 N.J. 300, 377 A.2d 898 (1977).

A will which was submitted to probate contained a clause which, according to the "uncontroverted extrinsic evidence," was inadvertently included in the will without the knowledge of the testator. The effect of the clause in question was contrary to the expressed intent of the testator, which was to maximize his wife's marital deduction under federal estate tax law, and his implied intent to minimize estate taxes. The chancery division excised the contrary clause from the will in order to give full effect to testator's intent. 152 N.J. Super. 250, 377 A.2d 946 (Ch. Div. 1974). The appellate division reversed, giving full effect to the clause. 152 N.J. Super. 169, 377 A.2d 904 (App. Div. 1976).

The supreme court, Justice Mountain writing for the majority, held that where a clause was included in the will through unexplained inadvertence, and that clause was contrary to the intent of the testator, the clause should be excised from the will. The court expressed strong support of the doctrine of probable intent which allows the admission of extrinsic evidence to support a finding as to the testator's true intent at the time of execution of the will. 74 N.J. at 305–07, 377 A.2d at 901–02. The testimony of the testator's trust officer and the attorney who drafted the will clearly established that the unexplained presence of the contradictory clause was not requested by or known to the testator at the time of the execution of the will. Justice Mountain noted that the doctrine of probable intent requires

that this extrinsic evidence be given such weight as will give effect to the testator's intent. Accordingly, the court found that elimination of the contradictory clause would serve to provide for the surviving spouse the maximum marital deduction and reduce the estate tax by $285,000 and thus give effect to the testator's probable intent. *Id.* at 310–11, 377 A.2d at 903–04.

WORKER'S COMPENSATION—*Panzino v. Continental Can Co.*, 71 N.J. 298, 364 A.2d 1043 (1976).

On September 14, 1972, Louis Panzino filed a claim for Worker's Compensation for an employment-related hearing loss. 71 N.J. at 301, 364 A.2d at 1044. This hearing loss was not determined to be work-related until six years after termination of employment. *Id.* at 300–01, 364 A.2d at 1044. At the time of filing of the complaint, the relevant limitation statute would have barred recovery. *Id.* at 301, 364 A.2d at 1044. However, an amendment to the limitation statute eliminating all time restrictions, except a two-year from date of discovery provision, became effective two months before this cause was heard. *Id.* The issue presented was the applicability of the amendment to this particular situation. *Id.* at 303, 364 A.2d at 1045.

The Supreme Court of New Jersey, speaking through Justice Mountain, held that the amendment was intended to have retroactive effect and that Panzino was entitled to recover. *Id.* at 306–07, 364 A.2d at 1047. In reaching this conclusion, the justice examined the legislative intent. Abrogation of the harsh results of an arbitrary limitations period was found by the court to be the dominant purpose. *Id.* at 302–03, 364 A.2d at 1044–45. Accordingly, Justice Mountain declared that the plaintiff would be entitled to take advantage of the amendment. *Id.* at 303, 364 A.2d at 1045.

The remaining question to be reviewed by the court was the constitutionality of the retroactive effect of the amendment. *Id.* at 303, 364 A.2d at 1046. The defendant argued that the limitations period constituted a "vested right which could not be lost either by legislative or judicial intervention without impairing due process guarantees." *Id.* at 304, 364 A.2d at 1046. Both the Supreme Court of the United States and the Supreme Court of New Jersey had previously rejected this argument. *Id.* at 304–05, 364 A.2d at 1046. Justice Mountain held, therefore, that the amendment simply enlarged the jurisdiction of the court and did not violate constitutional mandates. *Id.* at 305–06, 364 A.2d at 1047.

WORKER'S COMPENSATION—HUSBAND AND WIFE—*Dawson v. Hatfield Wire & Cable Co.*, 59 N.J. 190, 280 A.2d 173 (1971).

The petitioner, Mamie Dawson, sought benefits under the worker's compensation statute for the death of her husband Willie, which resulted from a work-related accident. 59 N.J. at 191–92, 280 A.2d at 174. At the compensation hearing, the respondent-employer introduced Nellie Mae Dawson, who testified that she had married the decedent in 1942 and that to her knowledge, her marriage had never been dissolved. *Id.* at 192–93, 280 A.2d at 174. This testimony was supported by affidavits from the clerks of the Superior Court of Fulton County, Georgia, and of the state of New Jersey. *Id.* at 193, 280 A.2d at 174. The petitioner pursued her claim of dependency on the basis of a marriage ceremony performed in 1949. The Judge of Compensation found that Mamie was entitled to the dependency benefits. *Id.*

On appeal, the county court reversed, stating that the respondent had successfully rebutted the strong presumption of validity which attaches to a second marriage. *Id.* at 193–94, 280 A.2d at 174–75. The appellate division agreed with this contention but remanded the case to the compensation court on the question of a possible disability on the part of Willie when he married Nellie Mae. *Id.* The compensation court found no disability and the appellate division accepted this finding. *Id.*

The supreme court, speaking through Justice Mountain, reversed, finding that Mamie was the "de facto" wife of Willie and therefore entitled to the benefits under N.J. STAT. ANN. § 34:15–13 (West Cum. Supp. 1979-1980). *Id.* at 196, 280 A.2d at 176. In support of this position, Justice Mountain noted that Mamie had entered into her relationship with Willie in good faith and without any knowledge that Willie had previously been married. *Id.* at 195, 280 A.2d at 175. Furthermore, he observed that she had lived openly with Willie for sixteen years and was in fact economically dependent upon him. *Id.* Additionally, the court found it significant that Mamie and Willie had been joined together in "a *ceremonial* marriage." *Id.* at 196, 280 A.2d at 176 (emphasis in original).

Justice Mountain also stressed that the worker's compensation statute is to be liberally construed in order to effectuate its beneficent purposes, which include support for one who has been economically dependent upon the decedent. *Id.* Accordingly, Justice Mountain stated that "[t]he test of the relationship of husband and wife" for the purpose of worker's compensation should not be the same as in family law matters. *Id.* at 197, 280 A.2d at 176–77.

ZONING—*Berger v. New Jersey*, 71 N.J. 206, 364 A.2d 993 (1976).

A private residence located in the Borough of Mantoloking was conveyed to the New Jersey Department of Institutions and Agencies for the exclusive purpose of establishing a group home for multi-handicapped, pre-school children. 71 N.J. at 210–11, 364 A.2d at 995. Any other use of the premises would result in a reversion to the grantor. *Id.* at 211, 364 A.2d at 995. Neighboring residents of the group home brought an action seeking an injunction against such use of the premises. The relief sought was based upon negative reciprocal covenants, which amounted to a scheme of single family residences, and upon violation of the applicable zoning ordinances. *Id.* at 212, 364 A.2d at 996. The trial court held for the defendant. Certification was granted prior to argument in the appellate division. 68 N.J. 175, 343 A.2d 463 (1975).

The Supreme Court of New Jersey, Justice Mountain writing for the majority, affirmed the lower court opinion. 71 N.J. at 213, 364 A.2d at 996. The court held that restrictive covenants should be construed according to the literal language because the law favors freedom of alienability. Accordingly, the instant covenants were determined to be restrictions on the structures and uses permissible. *Id.* at 214–15, 364 A.2d at 997–98. Moreover, Justice Mountain found this particular home to be a private residence for one family consisting of foster parents and several unrelated children, and therefore, neither the restrictive covenants nor the neighborhood scheme were violated. *Id.* at 215–17, 364 A.2d at 998–99.

The zoning ordinance in question restricted land use to " 'single family dwellings' " occupied by one family. *Id.* at 217, 364 A.2d at 999. The term "family" was defined narrowly in this ordinance and the residents of the group home did not meet this definition; however, Justice Mountain did not feel an injunction should issue on this basis. *Id.* at 217–18, 364 A.2d at 999. Justice Mountain also noted that state agencies are generally immune from municipal zoning ordinances. However, he stated that the scope of the immunity is determined by reference to "legislative intent—*i.e.*, whether the Legislature intended the particular governmental unit to be immune with respect to the particular enterprise." *Id.* at 218, 364 A.2d at 999. An examination of the legislative intent and public policy compelled the conclusion that the state was immune from the Mantoloking ordinance. *Id.* at 218–19, 364 A.2d at 999–1000.

Finally, Justice Mountain examined the zoning ordinance in terms of substantive due process. Although zoning is within the scope

of the police power, the restrictions must be reasonably related to the results sought to be achieved. *Id.* at 223–24, 364 A.2d at 1002. Since the term "family" was found to be defined in an unreasonably narrow manner, Justice Mountain declared that the ordinance was overly restrictive and, therefore, invalid. *Id.* at 224, 364 A.2d at 1003–04.

ZONING—*Dresner v. Carrara*, 69 N.J. 237, 353 A.2d 505 (1976).

Plaintiff-lessor had leased certain business premises for many years, both before and after the adoption of zoning ordinances by the Borough of Montvale. After a six month vacancy period, the plaintiff entered into a lease with a new tenant who intended to use the premises for the same purpose as the previous tenant. Pursuant to a municipal regulation, the owner and tenant applied for a certificate of occupancy prior to possession. The Planning Board informed the plaintiff that prior to the grant of the certificate, the plaintiff would have to provide parking spaces on its land for six automobiles. This demand was made pursuant to a municipal zoning ordinance enacted after the particular use for the building had been in effect. Plaintiffs commenced this litigation challenging the zoning ordinance. 69 N.J. at 238–39, 353 A.2d at 506.

In an unanimous decision, Justice Mountain pointed out that the zoning ordinance mandated the off-street parking facilities only for premises constructed or altered after enactment of the ordinance. *Id.* at 239–40, 353 A.2d at 506. Therefore, the requirement did not apply to the plaintiff's property. Additionally, the continued utilization of the premises was protected as a prior nonconforming use.

The court noted that a municipality may enact zoning requirements pursuant only to a statutory grant from the legislature. *Id.* at 241, 353 A.2d at 507. In the case at bar there was no grant of power to require such alterations absent a request for subdivision or change of use.

ZONING—*Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977).

Citizens and two corporate developers challenged the validity of a zoning ordinance of Madison Township. 72 N.J. at 491, 371 A.2d at 1196. The original 1970 ordinance had zoned the area owned by the plaintiff-developers exclusively for large lot development. *Id.* at 492, 371 A.2d at 1197. Although a 1973 amendment enacted during the course of litigation did allow for smaller lots and some multi-family

development, the lower court held that the ordinance was invalid because it failed to meet the needs of the region. *Id.* at 493, 371 A.2d at 1197.

After extensively reviewing the zoning ordinance and examining the realistic potential for low and middle income housing, the supreme court, in an opinion by Judge Conford, decided that the Township of Madison had not provided for its fair share of the region's low and middle income housing as mandated in Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U.S. 808 (1975). 72 N.J. at 514, 371 A.2d at 1223. In addition, the majority imposed "direct judicial supervision of compliance with the judgment" upon the defendant. *Id.* at 552, 371 A.2d at 1227.

In a concurring and dissenting opinion, Justice Mountain stated that the courts should not go any further than validating or invalidating an ordinance. *Id.* at 625–26, 371 A.2d at 1264–65. He considered any further guidance to be beyond the competence of the courts and should be left to the legislature. *Id.* at 626–27, 371 A.2d at 1265. Although Justice Mountain agreed with the majority concerning the necessity of a remand, he disagreed with the holding that the court should have a supervisory role in the developing of a valid land use program. *Id.* at 630, 371 A.2d at 1267. For a general discussion of the *Madison Township* decision, see Comment, 8 SETON HALL L. REV. 460 (1977).