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Complaint.

(Filed September 2, 1934.)

(Served September 19, 1934.)

Essex County Circuit Court

SARA F. BASEN and GRACE G.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,

Plaintiffs,

vs.

CLINTON TRUST COMPANY, a New
Jersey corporation,

Defendant.

Action at Law.
Complaint.

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Plaintiffs, Sara F. Basen and Grace F. Gros-
man, executrices of the Estate of Abraham
Fishman, deceased, residing in the City of New-
ark, County of Essex and State of New Jersey,
says that:

1. At all the times hereinafter mentioned,
plaintiffs were and still are executrices under the
last will and testament of Abraham Fishman, de-
ceased, late of the City of Newark, County and
State aforesaid.

30

2. At all the times hereafter mentioned, the
defendant, Clinton Trust Company, was and still
is a banking corporation organized under the laws
of the State of New Jersey and carrying on a
banking business in the City of Newark, County
of Essex and State of New Jersey.

40

Complaint.

10 3. On June 18, 1932, Abraham Fishman, who for many years prior and up to the time of his death was a depositor in the bank of the defendant, died, leaving a last Will and Testament under which these plaintiffs were designated as executrices; that they have duly qualified as such in the Surrogate's Court of the County of Essex, State of New Jersey, and are now engaged in the fulfillment of their trust.

4. That prior to July 8, 1932, these plaintiffs, as executrices of said Estate, deposited in a checking account in the name of said Estate with the defendant bank, the sum of approximately \$25,000.00.

20 5. That thereupon, an officer of the said defendant bank communicated with these plaintiffs and informed them that he had seen a copy of the last will and testament of their decedent and was aware of the fact that a trust fund was directed to be established under said last will and testament in the sum of \$50,000.00 and urged these plaintiffs to open a savings account for the purpose of setting up said trust fund in the defendant bank; that these plaintiffs, pursuant to said request, did on July 8, 1932, open a savings account in the name of the Estate of Abraham Fishman, deceased, and did deposit therein the sum of \$5,000.00 with the defendant bank, and did 30 on September 30, 1932, and December 30, 1932, deposit the sums of \$1397.50 and \$1382.50, respectively, which moneys were to be subject to withdrawal by these plaintiffs as executrices as aforesaid on demand.

40 6. That thereafter the defendant bank was closed by order of the Commissioner of Banking

Complaint.

and Insurance of the State of New Jersey, and was placed under restrictions for withdrawal of deposits and no withdrawals or deposits were permitted therefrom by any of its depositors.

7. At the time of the closing of said bank there was in said bank moneys belonging to plaintiffs' decedent's estate the total sum of \$7780.00, together with accrued interest thereon. 10

8. The defendant bank has been reorganized and defendant has reopened and is now conducting its banking business under its original charter and in the same manner and to the same extent as it had done prior to the closing of said bank by the Commissioner of Banking and Insurance as aforesaid.

8. After the reorganization of said bank and the reopening thereof, these plaintiffs were only permitted to withdraw from said account the sum of \$4125.47, leaving a balance of \$4125.47, which was due and payable to these plaintiffs, together with interest, from July 19, 1934. 20

8. Defendant has failed and refused to pay the said moneys or any part thereof to these plaintiffs after demand therefor.

10. By reason of the aforesaid, the defendant is indebted to the plaintiffs in the sum of \$4125.47, together with interest, no part of which has been paid although frequently demanded. 30

WHEREFORE plaintiffs demand damages in the sum of \$4125.47, together with interest and costs of suit to be taxed.

GROSMAN & GROSMAN,
Attorneys of Plaintiffs.

Amended Answer.

((Filed March 4, 1935.))

ESSEX COUNTY CIRCUIT COURT.

10	SARA F. BASEN and GRACE F. GROSMAN, Executrices of the Estate of Abraham Fishman, deceased,	}	Action at Law. Amended Answer.
	Plaintiffs,		
	<i>vs.</i>		
	CLINTON TRUST COMPANY, a New Jersey corporation, Defendant.	}	
20			

The defendant Clinton Trust Company, a trust company incorporated and existing under the laws of the State of New Jersey, having its office and place of business at 505 Clinton Avenue, Newark, New Jersey, says that:

First Defense.

1. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraph 1 of the complaint.

2. Answering paragraph 2 of the complaint it says that it was incorporated as a trust company under and by virtue of an act entitled "An Act concerning trust companies" (revision of 1899), approved March 24, 1899, and the various amendments thereof and supplements thereto, and continued as such trust company until it was closed on or about March 4, 1933, in pursuance of the proclamations of the President of the United

Amended Answer.

States and the Governor of the State of New Jersey more fully set forth in the second defense, and thereafter, and after the approval and going into effect of a plan of reorganization adopted under the provisions of an Act concerning banks, trust companies and savings banks having shares of capital stock, approved April 12, 1933, and the various acts amendatory thereof and supplemental thereto, it continued to and is now operating changed in its corporate organization, all as more fully set forth in the second defense. It admits that at the times mentioned in the complaint it was carrying on a banking business in the City of Newark, in the County of Essex and State of New Jersey, qualified, however, as set forth in the second defense.

3. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraph 3 of the complaint, except that it admits that Abraham Fishman was a depositor with defendant prior to June 18, 1932.

4. It denies the statements contained in paragraph 4 of the complaint, except that it admits that on or about July 8, 1932, plaintiffs had on deposit with defendant in a checking account the sum of \$24,718.66.

5. It denies the statements contained in paragraph 5 of the complaint, except that it admits that on July 8, 1932, plaintiffs opened a savings account with defendant with a deposit of \$5,000., and that further deposits of \$1,397.50 and \$1,382.50 were made in said account respectively on September 30, 1932, and December 30, 1932.

6. It denies the statements contained in paragraph 6 of the complaint, except that it admits

Amended Answer.

10 that the business of the defendant was closed pursuant to proclamations of the President of the United States of March the 6th, a copy of which is annexed hereto, made part hereof, and marked Exhibit 1, and of the Governor of the State of New Jersey of March 4, 1933, a copy of which is
20 annexed hereto, made part hereof, and marked Exhibit 2, and a further proclamation by the President of the United States of March 9, 1933, a copy of which is annexed hereto, made part hereof, and marked Exhibit 3, and in pursuance of an act to amend an act entitled, "An Act in relation to days of recreation and holidays, and fixing the days and parts of days so to be set apart and observed, and regulating the maturity of commercial paper with respect thereto," approved March 6, 1933,
20 and that after the end of the period of absolute suspension it operated under restrictions imposed by the Commissioner of Banking and Insurance acting under the provisions of an act entitled "An Act concerning banks, trust companies and savings banks, approved February 21, 1933," until its reorganization as herein before set forth.

7. It admits the statements contained in paragraph 7.

30 8. Answering the statements contained in the paragraph of the complaint first numbered 8, it says that it admits that it has been reorganized, and it admits that it is now conducting a banking business, but it says that it was permitted by the authorities of the State of New Jersey, and is now permitted by such authorities, to operate only as a result of a reorganization pursuant to which the interests of its depositors, creditors and stockholders were in a fair and equitable manner changed and modified, and pursuant to which
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Amended Answer.

changes investments were made in its capital stock by the Reconstruction Finance Corporation acting pursuant to the laws of the United States and with an amended and altered certificate of incorporation, and defendant says that it opened its banking business unrestricted on or about May 7, 1934, and has since conducted said banking business, but only under and in pursuance of said plan of reorganization and such changed and altered certificate of incorporation. 10

It denies the statements contained in the paragraph of the complaint second numbered 8, except that it admits that on July 19, 1934, plaintiffs withdrew, as permitted by said plan as aforesaid, from said account the sum of \$4,125.47 and received therefor defendant's treasurer's check dated that day and payable to the order of the Lincoln National Bank, Newark, New Jersey. 20

9. It denies the statements contained in paragraph 9 of the complaint, except that it admits that no money other than the sum of \$4,125.47 has been paid to the said plaintiffs since defendant was reorganized.

10. It denies the statements contained in paragraph 10 of the complaint.

Second Defense. 30

1. For some time prior to 1929 business in the United States experienced such an over extension of credit as that in the latter part of 1929 a serious condition was created which resulted in a reduction in the prices at which stocks could be sold, such prices being reduced to but a small proportion of the prices at which they had but recently been sold, and that shortly thereafter prices at which other securities could be sold were simi- 40

Amended Answer.

10 larly affected, and the condition continued to be-
come more acute, involving all classes of prop-
erty, so that by March 1st, 1933, the condition had
become such as that a practical universal bank-
ruptcy faced the country; in various parts of the
country, including the metropolitan area which
includes the City of Newark and the County of
Essex, and including the whole of the State of
New Jersey, there had been numerous failures of
financial institutions, including banks, public and
private, and serious runs upon banks had oc-
curred; credit was destroyed; the financial struc-
ture, including banking institutions, could not
stand the strain; it was impossible for banking
institutions, including defendant, to realize suffi-
cient moneys from the sale of securities owned by
20 it or in any other way to meet the demands of de-
positors; had the securities and other properties
held by banking institutions, including defendant,
been thrown upon the market, the market would
have been unable to absorb them and but little
could have been realized for creditors, including
plaintiffs who were creditors of defendant as it
was then existing.

2. A national and state emergency existed as a
result of which, on the 6th day of March, 1933, the
30 President of the United States issued a proclama-
tion directing a national bank holiday, a true
copy of which proclamation is annexed hereto,
made a part hereof, and marked Exhibit 1, and
on the 9th day of March, 1933, the President of
the United States issued another proclamation
continuing all the terms and provisions of said
proclamation of March 6, 1933, and all regulations
and orders issued thereunder, a copy of which is
annexed hereto, made part hereof, and marked
40 Exhibit 3; on the 4th day of March, 1933, the Gov-

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ernor of the State of New Jersey issued a proclamation, a copy of which is annexed hereto, made part hereof, and marked Exhibit 2; on the 6th day of March, 1933, the Governor approved an act of the Legislature of the State of New Jersey, entitled "An Act to amend an act entitled 'An act in relation to days of recreation and holidays, and fixing the days and parts of days so to be set apart and observed, and regulating the maturity of commercial paper with respect thereto,'" approved March 9, 1891, by which act any day "heretofore or hereafter appointed, ordered or recommended by the Governor of this State, or the President of the United States, * * * as a bank holiday or holidays, shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, maturing after the passage of this act, be treated and considered as the first day of the week, commonly called Sunday * * *." On or about the 10th day of March, 1933, the President of the United States, acting in pursuance of an authority conferred upon him by the Congress, did issue a certain executive order laying down the terms and conditions under which any member bank of the Federal Reserve System, and any other banking institution organized under the laws of the United States, would be permitted to reopen.

3. Defendant was at the time of the so-called bank holiday, and has since continued to be, a member of the Federal Reserve System.

4. After the close of the so-called bank holiday proclaimed as hereinbefore set forth, defendant applied to the federal authorities and to the Com-

Amended Answer.

10 commissioner of Banking and Insurance for permission to reopen, which permission was denied; defendant could not qualify for federal deposit insurance which was required of member banks of the Federal Reserve System; the basis upon which the federal authorities, including the governing authorities of the Federal Reserve System and the Commissioner of Banking and Insurance of the State of New Jersey, refused to permit defendant to reopen its banking business was that its financial condition was such as not to warrant it.

20 5. On or about the 19th day of March, 1933, defendant was permitted by the Commissioner of Banking and Insurance to reopen for restricted business only under authority conferred upon the Commissioner of Banking and Insurance by an act of the Legislature of the State of New Jersey, approved February 21, 1933, entitled "An Act concerning banks, trust companies and savings banks"; the Commissioner of Banking and Insurance, acting under authority of such act, placed such restrictions upon the business of defendant as that, until after the reorganization of defendant, as hereinafter set forth, defendant was not permitted to, and could not pay, any amounts to its depositors, including plaintiffs.

30 6. Many banking institutions were, by reason of the financial condition of the Nation and the collapse of the financial structure, placed in the same situation as was defendant and it was a matter of common knowledge and universally understood that great distress would be occasioned to the public generally and great loss and injury to creditors of such institutions, including plaintiffs,
40 if the assets of such banking institutions, includ-

Amended Answer.

ing defendant, should be liquidated in the ordinary way and it was fully realized that such banking institutions, including defendant, could not be reopened and could not escape immediate liquidation unless aid could be obtained by the advance of capital funds; no advance of capital funds could be obtained upon the then present corporate organization and financial structure of such banking institutions, including defendant, and no funds could be obtained from any source except from the agency established by the Federal Government for the purpose of relief in the national emergency, to wit, the Reconstruction Finance Corporation; thereupon the Legislature of the State of New Jersey, in order that trust companies and banks of the State in the position of defendant would not be required to liquidate and to avoid the loss and injury which would be occasioned to the public generally and to those interested in such financial institutions, passed an act entitled "An Act concerning banks, trust companies and savings banks having shares of capital stock," approved April 12, 1933, which act authorized banks and trust companies, with the approval of the Commissioner of Banking and Insurance, to amend their charters or certificates of incorporation to provide for the issuance of one or more classes of preferred stock and to provide for the rights, including dividends and priorities, of such preferred stock and that any banking institution which had not been permitted or licensed by the Commissioner of Banking and Insurance or by the Secretary of the Treasury, if said banking institution was a member of the Federal Reserve System, to perform all of its usual banking functions, might be reorganized for the resumption of its normal and usual banking business by the issu-

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Amended Answer.

10 ance of preferred stock and that a plan of reor-
ganization might be adopted which would provide
for the issuance of preferred stock to all the de-
positors, and other creditors of the banking insti-
tution and that each depositor must subscribe a
certain percentage of his claim for said stock; and
20 said act further provided, as it was amended by
an act approved June 23, 1933, that a reorganiza-
tion plan should become effective when the Com-
missioner of Banking and Insurance was satisfied
that the plan of reorganization was fair and
equitable as to all depositors, other creditors and
stockholders and was in the public interest and
when, after such notice of reorganization as the
Commissioner of Banking and Insurance might
30 require, the holders of 75% of the total deposits
and other liabilities and the holders of two-thirds
of the stock should have consented in writing to
the plan of reorganization and such statute fur-
ther provided that, if such reorganization plan
was approved and should become effective, all de-
positors and other creditors and stockholders of
such banking institution, whether or not they
should have consented to such plan of reorganiza-
tion, should be fully and in all respects subject to
and bound by its provisions and that the claims
40 of all depositors and other creditors should be
treated as if they had consented to such plan of
reorganization.

7. The Congress of the United States and the
federal authorities, acting in pursuance of au-
thority conferred upon them by the Congress of
the United States by statutes duly enacted and
approved by the President, and recognizing the
national emergency, authorized the Reconstruc-
tion Finance Corporation to invest moneys in pre-
ferred stock of banking institutions similarly

Amended Answer.

situated as was defendant upon such reorganization and readjustment of liabilities as, in the judgment of the federal authorities would place the said banking institutions similarly situated as defendant in a sound financial condition; under authority conferred by the statutes of the United States and federal authorities also required that before any banking institution, a member of the Federal Reserve System, should be permitted to reopen and continue such membership it should become a party to the Federal Deposit Insurance System which required the intervention of the Federal Deposit Insurance Corporation as a guarantor of the deposits in such banking institution to a limited amount. 10

8. After the 19th day of March, 1933, a committee was formed for the purpose of developing a plan, if possible, of reorganizing defendant to the end that it would be placed in a sound financial position and that its creditors and depositors would be saved from the inevitable great loss which would be occasioned if an attempt were made to liquidate the assets of defendant and, after intensive study for a period of weeks, with the aid and counsel of the Department of Banking and Insurance of the State of New Jersey, the Federal Reserve Bank of New York and the Reconstruction Finance Corporation, a plan was developed, a copy of which is hereto annexed and marked Exhibit 4 and made a part hereof; said plan contemplated, among other things, that the depositors with defendant, including plaintiffs, should be paid in cash 50% of their deposits and for the remaining 50% should receive Class B preferred stock to the extent of one-half and a participation certificate in the assets of a company to be organized to hold certain assets of defendant 20 30 40

Amended Answer.

10 which the Federal and State authorities declined to permit to be carried as assets of defendant, for the other one-half; said plan was presented to the Commissioner of Banking and Insurance of the State of New Jersey and was by him approved on or about the 19th day of December, 1933, as fair and equitable as to all depositors, other creditors and stockholders and in the public interest, and this defendant says that in fact said plan was fair and equitable as to all depositors, other creditors and stockholders and in the public interest; said plan was also presented to and approved by the federal authorities, including the Federal Reserve Bank, Reconstruction Finance Corporation and the Federal Deposit Insurance Corporation.

20 9. Thereupon said plan was circulated among all of the depositors, including plaintiffs, other creditors and stockholders of defendant; no depositor (including plaintiffs) other creditors or stockholders protested to the Commissioner of Banking and Insurance against the adoption of the said plan or suggested any amendment of its terms and conditions; all claims of creditors, including plaintiffs, were passed upon and approved by the reorganization committee and the officers and directors of defendant; the books and ac-
30 counts of defendant were open for inspection at all times by any depositor, including plaintiffs, other creditor or stockholder and ample opportunity was given for any protest or objection to the allowance of any claim of any depositor, creditor or stockholder; no objections were made to the action of the Commissioner of Banking and Insurance by any depositor, including plaintiffs, creditor or stockholder against declaring the plan of reorganization fair and equitable as to all deposi-
40 tors, other creditors and stockholders and as in

Amended Answer.

the public interest; no steps were taken by any depositor, including plaintiffs, creditor or stockholder against the making of the said plan effective.

10. The owners of 75% of all deposits and other debts of defendant and the holders of at least two-thirds of its outstanding capital stock consented in writing to the said plan of reorganization and thereupon the necessary steps were taken to carry said plan into effect; the charter of defendant was amended in pursuance of the terms of said plan; the Reconstruction Finance Corporation agreed to advance and did in fact advance, upon the said plan being made effective, the sum of \$250,000.00 for which it took preferred stock as contemplated by said plan; depositors and other creditors and stockholders of said bank surrendered their respective rights and took in exchange therefor the rights and securities to which they were entitled under the terms of the said plan; the capital structure of defendant was completely changed as required by the said plan and the new securities issued; the Federal Deposit Insurance Corporation, relying upon the fact that said plan had been made effective, insured the deposits of defendant in pursuance with the federal deposit insurance plan; the Federal Reserve Bank has from the date that defendant's banking business was opened in pursuance of said plan, recognized defendant as a member of the Federal Reserve System and defendant has had all of the advantages of such membership.

11. On or about the 7th day of May, 1934, defendant's banking business was opened under and in pursuance of said plan and defendant has been since that date operating under and in pursuance

Amended Answer.

10 of said plan and on or about the 7th day of May, 1934, defendant paid to plaintiffs the sum of \$4,125.47 as set forth in the First Defense and charged the account of plaintiffs 50% thereof as required by said plan and issued in plaintiffs' name certificates of shares of its Class B preferred stock and fractions thereof and a participation in the assets transferred to the holding corporation, all in accordance with the provisions of said plan of reorganizaiton.

12. Defendant says that by reason of the facts aforesaid plaintiffs have no cause of action against defendant.

Third Defense.

20 1. Defendant repeats all of the allegations of the Second Defense except those in the last paragraph thereof and says that defendant is not, by reason of the facts, the same corporation with which plaintiffs had their contractual relations and that defendant does not owe the plaintiffs the debt demanded of it by plaintiffs.

Fourth Defense.

30 1. Defendant repeats all of the allegations contained in the Second Defense except those contained in the last paragraph thereof.

40 2. Defendant would have been unable to pay to plaintiffs on or about the 7th day of May, 1934, or at any other time after March 4, 1933, the sum of \$4,125.45 which defendant paid to plaintiffs at the time the banking business of defendant was reopened, as hereinbefore set forth had said reorganization plan not been made effective; that at the time the banking business of defendant was

Amended Answer.

suspended and up to the 7th day of May, 1934, defendant was insolvent; had its assets been liquidated in the ordinary course of events a lesser sum than \$4,125.47 would have been available to plaintiffs in full satisfaction of their claims.

3. That by reason of the facts aforesaid plaintiffs have no remedy against defendant at law and that, if they have any remedy, it is in equity. 10

Fifth Defense.

1. Defendant repeats the allegations of the Second Defense except the last paragraph thereof.

2. Defendant repeats the allegations of the Fourth Defense except the last paragraph thereof.

3. Defendant says that the moneys which made it possible to pay to plaintiffs the sum of \$4,125.47 or any other sum were contributed by the Reconstruction Finance Corporation or were made available by the consent of the other depositors and creditors of defendant to the application of 50% of their deposits to the purchase of Class B preferred stock and a participation in the assets of the holding company hereinabove mentioned and by the consents of the stockholders of defendant as required by the plan of reorganization. 20

4. Defendant says that plaintiffs are estopped from making the claim or demand which they make in their complaint. 30

Sixth Defense.

1. Defendant repeats the allegations of the Second Defense except the last paragraph thereof.

2. Defendant repeats the allegations of the Fourth Defense except the last paragraph thereof. 40

Amended Answer.

3. Defendant says that the plaintiffs, by reason of the facts aforesaid, are barred from maintaining this suit by the statutes of the United States and of the State of New Jersey and by the regulations of the Commissioner of Banking and Insurance adopted and promulgated by virtue of the statutes of the State of New Jersey.

Seventh Defense.

1. Defendant repeats the allegations of the Second Defense except the last paragraph thereof.

2. Defendant repeats the allegations of the Fourth Defense except the last paragraph thereof.

3. Defendant repeats the allegations of the Fifth Defense except the last paragraph thereof.

4. Defendant says that since the 7th day of May, 1934, defendant has been operating as a member of the Federal Reserve System and its deposits have been insured by the Federal Deposit Insurance Corporation and it has been examined by the Commissioner of Banking and Insurance and has made reports to him and that it has been examined by the federal authorities and has made reports to them; that in all such examinations and reports it has been considered that there was no deposit liability of defendant except that provided for by the plan of reorganization; that its financial condition has been made generally public and deposits have been made with defendant by depositors and insured by Federal Deposit Insurance Corporation upon the assumption that defendant was operating under said plan of reorganization and that it had no deposit liability other than that provided for by the plan of reorganization.

Exhibit 1.

5. Defendant says that, to permit a recovery in this suit would be to permit the perpetration of a fraud upon the Reconstruction Finance Corporation, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the other depositors and creditors and stockholders of defendant, this suit not having been commenced until the 18th day of September, 1934, and that by reason of the facts aforesaid plaintiffs are estopped from making the claim and demand which they make by their complaint. 10

BURKE, SHERIDAN & HOURIGAN,
Attorneys for Defendant.

MERRITT LANE,
Of Counsel. 20

Exhibit 1.

BY THE PRESIDENT OF THE UNITED STATES OF
AMERICA A PROCLAMATION

Whereas there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and 30

Whereas continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

Whereas these conditions have created a national emergency; and

Whereas it is in the best interests of all bank depositors that a period of respite be provided 40

Exhibit 1.

with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

10 Whereas it is provided in sections 5 (b) of the Act of October 6, 1917 (40 Stat. L. 411), as amended, "That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * * ; and

20 Whereas it is provided in Section 16 of the said Act "that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; * * * ;

30 Now, therefore, I Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institu-
40 tions and all branches thereof located in the

Exhibit 1.

United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever. 10

During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any and all of such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States. 20 30

As used in this order the term "banking institutions" shall include all Federal Reserve Banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, asking loans, dis- 40

Exhibit 2.

counting business paper, or transacting any other form of banking business.

In witness thereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

10 Done in the City of Washington this 6th day of March—1 a.a. in the year of our Lord One Thousand Nine Hundred and Thirty-three, and of the Independence of the United States the One Hundred and Fifty-seventh.

(Seal) FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

20

Exhibit 2.**Proclamation.**

STATE OF NEW JERSEY,

EXECUTIVE DEPARTMENT.

30 For the protection of the interests of the public, bank depositors and bank stockholders, a legal holiday for all banks in New Jersey is hereby declared by me.

[SEAL] Given under my hand and the Great Seal of the State of New Jersey, this fourth day of March, in the year of Our Lord one thousand nine hundred and thirty-three, and in the Independence of the United States the one hundred and fifty-seventh.

A. HARRY MOORE,
Governor.

40

By the Governor:

THOMAS A. MATHIS,
Secretary of State.

Exhibit 3.**A PROCLAMATION**

BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, or bullion or currency, or speculation in foreign exchange; and 10

WHEREAS, under the Act of March 9, 1933, all proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5(b) of the Act of October 6, 1917, as amended, are approved and confirmed; and 20

WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority vested in me by Section 5(b) of the Act of October 6, 1917 (40 Stat. L., 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President. 30 40

Exhibit 4.

IN WITNESS WHEREOF I have hereunto set my hand and have caused the seal of the United States to be affixed.

10 Done in the District of Columbia, this 9th day of March, in the Year of our Lord One Thousand Nine Hundred and Thirty-three, and of the Independence of the United States the One Hundredth and Fifty-seven.

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

20

Exhibit 4.**Re-organization Plan.**

“1. The depositors of the Clinton Trust Company to have available immediately upon the opening of the re-organized bank, 50% of their deposit.

2. The re-organization of the Clinton Trust Company with a capital structure as follows:

30	Class A Preferred Stock.....	\$250,000.00
	Class B Preferred Stock.....	575,000.00
	Surplus	574,012.00
	Common Stock.....	1.00

3. The assets of the re-organized bank, based on present market value and acceptable to the Federal and State Authorities, total \$3,359,403.18. The deposits will amount to \$1,896,717.15. (This represents the 50% which is available to all depositors.)

40 4. Class B Preferred Stock in the sum of \$500,000 will be issued to depositors, each de-

Exhibit 4.

positor's holdings to be based on amount of deposit waived. It will represent approximately \$50. per share (\$25. par value) and will be retired at exact selling price. It shall have voting power and be entitled to cumulative dividends at the rate of 3% per annum.

10

5. The sale to stockholders of the present bank, and others, of Class B Preferred Stock in the sum of \$150,000.

6. The common stock held by the present stockholders of the Clinton Trust Company will be carried on the books of the re-organized bank at \$1. and shall have no voting power or be entitled to any dividends until all Preferred Stock, with accrued dividends, has been retired.

20

7. All depositors to waive 50% of their deposits, and in exchange to receive Preferred Stock in the re-organized bank equal to approximately one-half of the amount waived, and the balance to be represented by a participation Certificate in the holding company.

8. The Clinton Trust Company will transfer to a holding company, assets amounting to \$980,742.88. Participation Certificates in these assets will be issued to depositors. The Clinton Trust Company will have the right to substitute any of the assets which remain in its possession after the transfer of assets to the holding company. The capital stock of the holding company in the sum of \$1,000. will be held by the Trust Company but carried on the books as of no value.

30

9. The Board of Directors in the re-organized bank and the holding company will be identical as

40

Exhibit 4.

to personnel and will be elected by holders of preferred stock. Federal and State Authorities, however, reserve the right to approve all directors and officers.

10 10. The sale of Class A Preferred Stock in the sum of \$250,000. to the Reconstruction Finance Corporation. Such stock shall be prior in all respects to the Class B stock.

20 11. The collection by the Clinton Trust Company of \$225,000. of collateral loans and the conversion of \$300,000. of building and loan paper into cash, to make possible the paying off of all bills payable amounting to \$537,840.68. (Including the Reconstruction Finance Corporation loan.)

12. The re-organization plan is subject to any changes which may be required by the Federal and State Authorities. The special trust deposits in the Clinton Trust Company will not be affected by this plan.”

30

40

**Notice of Motion to Strike Out Amended
Answer and for Summary Judgment.**

ESSEX COUNTY CIRCUIT COURT,
(Filed March 22, 1935).

To:

BURKE, SHERIDAN & HOURIGAN, Esqs.,
Attorneys for Defendant,
440 Bergenline Avenue,
Union City, New Jersey.

10

MERRITT LANE Esq.,
Of Counsel with Defendant,
Lefcourt Building,
Newark, New Jersey.

JOHN R. HARDIN., JR., Esq.,
Of Counsel with Interested Parties,
744 Broad Street,
Newark, New Jersey.

20

Sirs:

PLEASE TAKE NOTICE that on Wednesday, March 13, 1935, at ten o'clock in the forenoon (E. S. T.), or as soon thereafter as counsel can be heard, at the Court House, High Street and Springfield Avenue, in the City of Newark, Essex County, New Jersey, we shall apply to Hon. William A. Smith, Judge of the Essex County Circuit Court, for an order striking out the paragraphs of the amended answer hereinafter specified, and for summary judgment in favor of the plaintiffs for the following reasons:

30

1. All of the allegations listed under the first defense upon the ground that insofar as the allegations thereof are concerned, they set forth no defense in law, and insofar as the allegations of

40

*Notice of Motion to Strike Out Amended Answer
and for Summary Judgment.*

the complaint referred to therein are denied, the said amended answer is sham.

10 2. On the further ground that they set forth no defense to the complaint and are frivolous and that the allegations of Paragraph 8 of the said First Defense set forth conclusions of law not supported by any facts alleged in said amended answer.

20 3. All of the allegations listed under the Second Defense of the amended answer to the complaint on the ground that they set forth no defense in law, and the said amended answer is sham, and is frivolous since the withdrawal of the moneys by plaintiffs referred to in Paragraph 11 of the Second Defense would have no legal effect upon the rights of the plaintiffs, and plaintiffs were not required by any law to consent or be bound by the reorganization plan mentioned therein, nor were plaintiffs required to protest against said reorganization plan to the Commissioner of Banking and Insurance or any other government agency as is set forth in paragraph 9 of the said second defense. Plaintiffs did, however, protest to the defendant against said reorganization plan and said reorganization plan was adopted and became effective in spite of plaintiffs' protest against the same, and on the further ground that plaintiffs did all that was legally required of them against the making of the said plan or reorganization effective. Paragraph 12 of the said second defense is conclusion, not supported by any facts alleged in said amended answer.

30 4. All of the allegations listed under the Third Defense of the answer to the complaint on the ground that they are sham and set forth no de-
40

*Notice of Motion to Strike Out Amended Answer
and for Summary Judgment.*

fense in law and are not supported by any facts alleged in the said amended answer.

5. All of the allegations listed under the Fourth Defense to the complaint on the ground that said allegations are mere conclusions not supported by any facts alleged in said amended answer and not supported by any facts as they appear of record and in particular Paragraph 3 of the Fourth Defense on the ground that the same is sham and frivolous. 10

6. All of the allegations under the Fifth Defense in said amended answer on the ground that they are sham and frivolous and set forth no defense in law and in particular as to Paragraph 4 of the Fifth Defense on the ground that plaintiffs at all times vigorously opposed the reorganization plan referred to in said amended answer and there is nothing in the conduct of plaintiffs which has estopped them from making the claim or demand which they made in their complaint. 20

7. All of the allegations listed under the Sixth Defense set forth in said amended answer upon the ground that they set forth no defense to the complaint of plaintiffs for reason that Chapter 116 of the Laws of 1933 of the State of New Jersey and Chapter 287 of the Laws of 1933 of the State of New Jersey, insofar as they attempt to bind the plaintiffs in accepting stock in payment of the indebtedness of the defendant to them, violate the provisions of Article 1, Sec. 10, Par. 1 of the Constitution of the United States which provides that no state shall pass any law impairing the obligations of contracts; Article 14, Sec. 1 of the Amendments to the Constitution of the United States, providing that no state shall deprive any 30 40

*Notice of Motion to Strike Out Amended Answer
and for Summary Judgment.*

10 person of property without due process of law;
Article 1, Sec. 8, Par. 4 of the Constitution of the
United States which gives to Congress of the
United States the exclusive power to pass laws on
the subject of bankruptcies throughout the United
States; Article 4, Sec. 7, Par. 3 of the Constitu-
tion of the State of New Jersey which provides
that the Legislature shall not pass any law im-
pairing the obligations of contracts, or depriving
a party of any remedy for enforcing a contract
which existed when the contract was made.

20 8. All of the allegations listed under the Sev-
enth Defense in the amended answer to said com-
plaint on the ground that the allegations therein
set forth are sham and frivolous and do not con-
stitute any defense as to the claim of the plaintiffs,
and any rights which accrued to the Federal agen-
cies referred to in Paragraphs 4 and 5 of said
Seventh Defense are subject to and subsequent
to the rights and the claims of the plaintiffs
against the defendant herein.

In support of said motion we shall rely upon
the following:

30 A. Copy of original certificate of incorporation
of the defendant hereto annexed and made a part
hereof, marked Schedule "A."

B. Copy of amendment to certificate of incor-
poration of the defendant hereto annexed, made
a part hereof and marked Schedule "B."

C. The affidavit of Grace F. Grosman annexed
hereto.

D. All pleadings heretofore filed in the fore-
going cause.

40 Dated: March 6, 1935.

GROSMAN & GROSMAN,
Attorneys of Plaintiffs.

Exhibit "A".

CERTIFICATE OF INCORPORATION
OF
CLINTON TRUST COMPANY

THIS IS TO CERTIFY that we, the undersigned, do hereby associate ourselves into a trust company under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act concerning trust companies (Revision of 1899)", approved March 24, 1899, and the several supplements and amendments thereto, and we do severally subscribe for and agree to take and pay for the number of shares of the capital stock of such trust company set opposite our respective names in Article Sixth of this certificate; and we do further certify:

FIRST: The name of the trust company hereby formed is CLINTON TRUST COMPANY.

SECOND: The place where the business of said trust company is to be carried on is in the City of Newark in the County of Essex in this State, and the location of the office of said company in this State is No. 763 Broad Street, in the City of Newark aforesaid, (Now 505 Clinton Avenue) and the name of the agent therein and in charge thereof upon whom process against said corporation may be served is FREDERIC L. JOHNSON.

THIRD: The purposes and objects of said corporation are to carry on and conduct the general business of a trust company, and to that end to use, employ and exercise all the rights, powers and privileges that are now or may be hereafter granted to trust companies by the laws of the State of New Jersey, including the following rights, powers and privileges, or such of them as

Exhibit "A."

in the judgment of the board of directors may be for the best interests of said Company:

10 (1) To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money;

(2) To transfer, register and countersign certificates of stock, bonds, or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise;

20 (3) To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities;

20 (4) To lease, hold, purchase and convey any and all real property necessary for or convenient in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction or debts due the corporation under sales, judgments, or mortgages, or in settlement or partial settlement of debts due the corporation by any of its debtors;

30 (5) To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and to accept and execute any other municipal or corporate trust not inconsistent with the laws of this State;

40 (6) To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto;

Exhibit "A."

(7) To act, under the order or appointment of any court of record, as guardian, receiver or trustee of the estate of any minor, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party;

10

(8) To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipal or other authority;

(9) To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committee to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committee or transferred to it or vested in it by order of any court of record, or any surrogate, and to receive, and take and hold any property or estate, real or personal, which may be the subject of any such trust;

20

(10) To purchase, invest in, and sell stocks, promissory notes, bills of exchange, bonds and mortgages and other securities; and when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor;

30

(11) To be appointed and to accept the appointment of assignees or trustee, under any assignment for the benefit of creditors of any debtor, made pursuant to any statute or otherwise;

40

Exhibit "A."

(12) To act under the order or appointment of the Court of Chancery or otherwise as receiver or trustee of the estate or property of any person, firm, association or corporation;

10 (13) To be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the committee of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards;

20 (14) To exercise the powers conferred on and to carry on the business of a safe deposit company, to examine and guarantee titles to land, to insure the fidelity of persons holding offices or places of trust or responsibility, and to become sole surety in any case where by law two or more sureties are required;

(15) To collect coupons on or interest upon all manner of securities when authorized so to do by the parties depositing the same;

30 (16) To receive and manage any sinking fund of any corporation, upon such terms as may be agreed upon between said corporation and those dealing with it;

(17) Generally to execute trusts of every description not inconsistent with the laws of this State or of the United States;

(18) To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company.

40 **FOURTH:** The Board of Directors of this corporation, by the affirmative vote of a majority of

Exhibit "A."

the whole board, may appoint an executive committee of three or more directors; whenever the board of directors is not in session, such committee shall have and exercise such powers of the board of directors as may be lawfully delegated unto them by law or by resolution of the board of directors, including the power to cause the seal of the corporation to be affixed to all papers which may require it. 10

FIFTH: The amount of the capital stock of said corporation is one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars each.

SIXTH: The names and residences of the incorporators and the number of shares subscribed by each of them respectively, are as follows: 20

(This information not included, but on file in original certificate.)

SEVENTH: The period of duration of this trust company shall be unlimited.

(Certificate of approval of Commissioner annexed.)

(Certificate of Authority annexed.)

CERTIFICATE OF INCREASE OF CAPITAL STOCK
AND SURPLUS. 30

CLINTON TRUST COMPANY, a corporation of the State of New Jersey, doth hereby certify that, pursuant to the authority of an act of the Legislature of said State, entitled "An Act concerning trust companies (Revision of 1899)," and the supplements thereto and acts amendatory thereof, and with the written approval of the Commissioner of Banking and Insurance, as therein pro- 40

Exhibit "A."

vided, it has increased its capital stock from One Hundred Thousand Dollars to Two Hundred Thousand Dollars and its surplus from Twenty-five Thousand Dollars to Fifty Thousand Dollars, said increase of capital stock and surplus having been declared by resolution (above recited) of the
 10 board of directors of said corporation to be advisable, and having been duly and regularly assented to by the vote of at least two-thirds in interest of the stockholders, at a meeting duly called by the board of directors for that purpose; and that the written assent of said stockholders is hereto appended.

IN WITNESS WHEREOF, the said corporation has caused this certificate to be signed by its president and its corporate seal to be hereto affixed the
 20 sixteenth day of December, A.D., 1919.

(Signed) FRIEDRICH WIEBKE
 President

CHAS G. BAUER
 (SEAL) Secretary

(Certificate of approval annexed.)

CERTIFICATE OF INCREASE OF CAPITAL STOCK.

30 CLINTON TRUST COMPANY, a corporation of the State of New Jersey, doth hereby certify that pursuant to the authority of an act of the Legislature of said State, entitled "An act concerning trust companies (Revision of 1899)" approved March 24th, 1899, and the supplements thereto and acts amendatory thereof, and with the written approval of the Commissioner of Banking and Insurance, as therein provided, it has increased
 40 its capital stock from Two Hundred Thousand

Exhibit "A."

Dollars to Four Hundred Thousand Dollars, to be represented by four thousand shares of the par value of One Hundred Dollars each (it having been understood and agreed by the stockholders and directors in the proposal and making of said change that after the adoption thereof by the stockholders and the written approval aforesaid of said Commissioner the Board of Directors shall by appropriate action declare a stock dividend of One Hundred Per Cent, from the undivided profits of said corporation, one new share of the par value of One Hundred Dollars to be issued for each share now issued and outstanding), said increase of capital stock having been declared by resolution (above recited) of the Board of Directors of said corporation to be advisable, and having been duly and regularly assented to by the vote of at least two-thirds in interest of the stockholders, at a meeting duly called by the board of directors for that purpose; and that the written assent of said stockholders is hereto appended.

IN WITNESS WHEREOF, the said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal to be hereto affixed the fifth day of February, A.D., 1925.

CHARLES KOOS
President.

(L. S.) T. BURTON CRANE
Secretary.

(Certificate of approval annexed.)

*Exhibit "A."*CERTIFICATE OF INCREASE OF CAPITAL STOCK
AND SURPLUS.

10 CLINTON TRUST COMPANY, a corporation of the
State of New Jersey, doth hereby certify that,
pursuant to the authority of an act of the Legis-
lature of said State, entitled "An Act concerning
trust companies (Revision of 1899)," and the
supplements thereto and acts amendatory thereof,
and with the written approval of the Commis-
sioner of Banking and Insurance, as therein pro-
vided, it has increased its capital stock from
Four Hundred Thousand Dollars to Five Hun-
dred Thousand Dollars and its surplus from Two
20 Hundred Thousand Dollars to Three Hundred
and Fifty Thousand Dollars, said increase of
capital stock and surplus having been declared
by resolution (above recited) of the board of di-
rectors of said corporation to be advisable, and
having been duly and regularly assented to by
the vote of at least two-thirds in interest of the
stockholders, at a meeting duly called by the
board of directors for that purpose; and that the
written assent of said stockholders is hereto
appended.

30 IN WITNESS WHEREOF, the said corporation has
caused this certificate to be signed by its president
and its corporate seal to be hereto affixed the
twenty-fourth day of June, A.D., 1926.

(Signed) CHARLES KOOS
President

T. BURTON CRANE
Secretary

Exhibit "A."

CERTIFICATE OF INCREASE OF CAPITAL STOCK
AND SURPLUS.

CLINTON TRUST COMPANY, a corporation of the State of New Jersey, doth hereby certify that, pursuant to the Authority of an act of the Legislature of said State, entitled "An Act concerning trust companies (Revision of 1899)" approved March 24th, 1899, and the supplements thereto and acts amendatory thereof, and with the written approval of the Commissioner of Banking and Insurance, as therein provided, it has increased its capital stock from Five Hundred Thousand Dollars to Seven Hundred Thousand Dollars and its surplus from Three Hundred and Fifty Thousand Dollars to Eight Hundred and Fifty Thousand Dollars, said increase of capital stock and surplus having been declared by resolution (above recited) of the board of directors of said corporation to be advisable, and having been duly and regularly assented to by the vote of at least two-thirds in interest of the stockholders, at a meeting duly called by the board of directors for that purpose; and that the written assent of said stockholders is hereto appended.

IN WITNESS WHEREOF, the said corporation has caused this certificate to be signed by its president and secretary and its corporate seal to be hereto affixed the twenty-fourth day of April A.D., 1928.

(Signed) WILLIAM FREY
President

HENRY F. FREY
Secretary.

Exhibit "A."

CERTIFICATE OF CHANGE IN THE PAR VALUE OF THE
SHARES OF THE CAPITAL STOCK OF CLINTON
TRUST COMPANY.

10 CLINTON TRUST COMPANY, a corporation of the
State of New Jersey, doth hereby certify that,
pursuant to the authority of an act of the Legis-
lature of said State, entitled "An Act concerning
trust companies (Revision of 1899)," approved
March 24, 1899, and the supplements thereto and
acts amendatory thereof, and with the written ap-
proval of the Commissioner of Banking and
Insurance, as therein provided, it has changed
the par value of the shares of its capital stock
from One Hundred Dollars to Twenty-five Dol-
20 lars, said change of par value of the shares of its
capital stock having been declared by resolution
(above recited) of the board of directors of said
corporation to be advisable, and having been duly
and regularly assented to by the vote of at least
two-thirds in interest of the stockholders, at a
meeting duly called by the board of directors for
that purpose; and that the written assent of said
stockholders is hereto appended.

30 IN WITNESS WHEREOF, the said corporation has
caused this certificate to be signed by its presi-
dent and secretary and its corporate seal to be
hereto affixed the Eighth day of January A.D.
1929.

(Signed) WILLIAM FREY
President

HENRY F. FREY
Secretary.

(SEAL)

Exhibit "B".

AMENDMENT TO CERTIFICATE OF INCORPORATION OF
THE CLINTON TRUST COMPANY
Newark, N. J.

It was on motion ordered that the stockholders
adopt the following resolutions which have been
approved and declared advisable by the Board of
Directors at a meeting held February 17th, 1934: 10

RESOLVED,

FIRST: That the capital stock of this Trust Com-
pany be increased in the sum of \$825,000. by the
issuance of \$825,000. of Class A preferred and
Class B preferred stock under the provisions of
an act entitled "An Act concerning Trust Com-
panies (Revision of 1899)", and the several sup- 20
plements and amendments thereto, and by virtue
of Chapter 116 of the laws of 1933, entitled "An
Act Concerning banks, trust companies and sav-
ings banks having shares of capital stock" and
the amendments and supplements thereto, making
the total capital stock of the said trust company
of \$1,525,000.00, of which \$250,000.00 is Class A
preferred, \$575,000.00 is Class B preferred and
\$700,000.00 is common stock. 30

RESOLVED,

SECOND: That the certificate of incorporation
be amended by amending Article Fifth, which
reads as follows:

"Fifth. The amount of the capital stock of
said corporation is one hundred thousand dol-
lars, divided into one thousand shares of the
par value of one hundred dollars each."

to read as follows: 40

*Exhibit "B."**"Fifth. 1—Amount, Classes and Shares of Capital Stock.*

The amount of capital stock of the Trust Company shall be \$1,525,000.00, divided into classes and shares as follows:

10

(a) \$250,000. par value of preferred stock "A" (subject to retirement as hereinafter provided) divided into 25,000 shares of the par value of \$10. each, and

(b) \$575,000.00 par value of preferred stock "B" (subject to retirement as hereinafter provided) divided into 23,000 shares of the par value of \$25. each, and

20

(c) \$700,000.00 par value of Common Stock (subject to increase upon the retirement of preferred stock as provided in the second paragraph of Section 5 of this Article Fifth) divided into 28,000 shares of the par value of \$25. each.

2—Assessability of Stock

The holders of Common Stock, of Preferred Stock "A" and the holders of Preferred Stock "B" shall not be held individually responsible as such holders for any debts, contracts or engagements of the trust company and shall not be liable for assessments to restore impairments in the capital of the trust company.

30

3—Dividends on Preferred Stock "A".

The holders of Preferred Stock "A", in preference to the holders of preferred stock "B" and common stock, shall be entitled to receive, when and as declared by the Board of Directors, out of

40

Exhibit "B."

net profits of the trust company (determined as provided in section 6 of this Article Fifth accruing after February 27th, 1934, (hereinafter called the Recapitalization Date), cash dividends thereon at the rate of 5% per annum of the par value thereof, and no more. Such dividends shall be payable semi-annually on each February 1 and August 1, and shall accrue, as to any given share of such stock, from the date of issuance of such share; provided, however, that, in the case of any share of such stock issued on or after August 1, 1934, such dividends shall accrue on such share from the February 1 or August 1, as the case may be, next preceding the date of issuance thereof. Such dividends shall be cumulative, so that if dividends at the full rate of 5% per annum shall not have been paid upon or declared and set apart from the preferred stock "A", the deficiency shall be fully paid or declared and set apart before any dividend or other distribution, whether in cash, property, stock or otherwise, shall be declared, ordered, set apart, paid or made in respect of the preferred stock "B" of the common stock. Dividends on the preferred stock "A" shall be deemed to accrue from day to day.

4—Dividends on Preferred Stock "B".

Subject to the provisions of sections 3 and 7 of this Article Fifth, the holders of Preferred Stock "B" shall be entitled to receive, when and as declared by the Board of Directors, in accordance with the provisions of this Section 4, out of net profits of the trust company (determined as provided in section 6 of this Article Fifth) accruing after the Recapitalization Date), cash dividends thereon at the rate of 3% per annum of the par value thereof, and no more, but in no event shall

Exhibit "B."

- any such dividends be declared, ordered, set apart, paid or made in respect of preferred stock "B" until all of the issued and outstanding shares of Preferred Stock "A" shall have been retired, except as otherwise hereinabove provided. Such dividends shall be payable semi-annually on each
- 10 February 1 and August 1, and shall accrue, as to any given share of such stock, from the date of issuance of such share; provided, however, that, in case of any share of such stock issued on or after August 1, 1934, such dividends shall accrue on such share from the February 1 or August 1, as the case may be, next preceding the date of issuance thereof. Such dividends shall be cumulative, so that if dividends at the full rate of 3%
- 20 per annum shall not have been paid upon or declared and set apart for the Preferred Stock "B", the deficiency shall be fully paid or declared and set apart before any dividend or other distribution, whether in cash, property, stock or otherwise, shall be declared, ordered, set apart, paid or made in respect of the common stock. Dividends on the preferred stock "B" shall be deemed to accrue from day to day.

5—Dividends on Common Stock.

- 30 So long as any shares of preferred stock "A" or preferred stock "B" are outstanding, no dividends or other distributions, whether in cash, property, stock or otherwise, shall be declared, ordered, set apart, paid or made in respect of the Common Stock.

6—Determination of Net Profits.

- 40 For the purpose of this Article Fifth, the net profits or net loss, as distinguished from the term "profits", as defined in an Act entitled, "An Act

Exhibit "B."

to amend an Act entitled 'An Act concerning banks, trust companies and savings banks having shares of capital stock' approved April twelfth, one thousand nine hundred and thirty-three'', which amendment was approved November 29, 1933, shall be determined for each six months' period ending December 31 or June 30, by deducting from the gross earnings from all sources for such period: 10

(a) All expenses accrued or due for such period;

(b) All interest accrued or due during such period;

(c) All losses realized during such period, and such charge-offs and write-downs of assets for the period and such transfers for the period to reserves (whether from income, undivided profits or surplus) as in each case may be reasonably necessary to make proper provision for doubtful assets, appreciation and unrealized losses, including all charge-offs, write-downs and transfers to reserves requested by the Commissioner of Banking and Insurance during the period, provided, however, that no deduction from gross earnings for the initial six months' period ending June 30, 1934, shall be required by reason of any charge-offs or write-downs of assets or transfers to reserves required by the Commissioner of Banking and Insurance, and made prior to the recapitalization date. 20 30

(d) Provision for all taxes accrued or due for such period.

(e) The net loss, if any, determined in accordance with the provisions of this section 40

Exhibit "B."

6 accrued since the Recapitalization Date, accumulated to and existing at the beginning of such period.

10 All recoveries over net book value on assets previously charged off or written down or against which reserves have been set up, and all transfers from reserves to surplus or undivided profits (other than transfers made to reflect recoveries already treated as gross earnings), shall be considered gross earnings for the respective periods during which such recoveries or transfers are effected.

7.—*Application of Net Profits.*

20 As long as any shares of preferred stock "A" are outstanding, the trust company, on or prior to each February 1 and August 1, shall apply the net profits, of the trust company, as determined in accordance with section 6 of this Article Fifth, for the six months' period ending on the next preceding December 31 or June 30, as the case may be, to the following purposes and in the following order of priority, and not otherwise:

30 (1) One tenth of such net profits for said period shall be carried to a fund to be designated the "surplus fund" until such surplus fund shall amount to 20% of the capital stock of the trust company, and thereafter such surplus fund shall always be equal to 20% of the capital stock of such trust company, and whenever such surplus fund becomes impaired, it shall be reimbursed in the manner provided for its accumulation.

40 (2) To the payment of dividends on the outstanding preferred stock "A" accrued to

Exhibit "B."

such February 1 or August 1, as the case may be; provided, however, that after giving effect to the payment of such dividends, the unimpaired capital of the trust company is not less than the aggregate par value of the preferred stock of all classes at the time outstanding, or the minimum capital required by law, whichever sum is the greater. 10

(3) To the payment into the preferred stock "A" Retirement Fund (referred to in section 9 of this Article Fifth) of a sum equal to 40% of the remainder, if any, of such net profits, provided, however, that the aggregate amount paid into the preferred stock "A" Retirement Fund in any one year need not exceed 5% of the maximum aggregate par value of the preferred stock "A" at any time outstanding, whether or not any such stock shall have been subsequently retired or the aggregate par value thereof reduced in any manner whatsoever; provided, further, however, that unless otherwise elected from time to time, by the trust company by action of its Board of Directors, it shall not be required to make such payment into the preferred stock "A" Retirement Fund except from such net profits as may have accrued from and after December 31, 1935; and 20 30

(4) To such lawful purposes as may be determined by the Board of Directors, subject, however, to the provisions of sections 4, 5 and 8 of this Article Fifth.

After all shares of Preferred Stock "A" shall have been retired, and as long as any shares of preferred stock "B" are outstanding, the trust company, prior to each February 1 and August 1, 40

Exhibit "B."

shall apply such net profits to the following purposes and in the following order or priority, and not otherwise:

10 (1) One-tenth of such net profits of said period shall be carried to a fund to be designated as the "Surplus Fund" until such surplus fund shall amount to 20% of the capital stock of the trust company, and thereafter such surplus fund shall always be equal to 20% of the capital stock of such trust company, and whenever such surplus fund becomes impaired, it shall be reimbursed in the manner provided for its accumulation;

20 (2) To the payment of dividends on the outstanding preferred stock "B" accrued to such February 1 or August 1, as the case may be, provided, however, that after giving effect to the payment of such dividends, the unimpaired capital of the trust company, is not less than the aggregate par value of the preferred stock of all classes at the time outstanding, or the minimum capital required by law, whichever sum is the greater.

30 (3) To the payment into the preferred stock "B" Retirement Fund (referred to in paragraph 9 of this Article Fifth), to a sum equal to 40% of the remainder, if any, of such net profits; provided, however, that the aggregate amount paid into the preferred stock "B" Retirement Fund in any one year need not exceed 5% of the maximum aggregate par value of the preferred stock "B" at any time outstanding, whether or not any such stock shall have been subsequently retired or the aggregate par value thereof reduced in any
40 manner whatsoever, and

Exhibit "B."

(4) To such other lawful purposes as may be determined by the Board of Directors, subject, however, to the provisions of sections 5 and 8 of this Article Fifth.

8—Limitations on Retirement of Stock.

No preferred stock "A" or preferred stock "B" shall be called or purchased for retirement by the trust company unless the then unimpaired capital, surplus and undivided profits of the trust company and the retirement funds provided for herein (after giving effect to the issuance of any stock issued to provide funds for such retirement), exceed \$1,250,000. by an amount at least equal to the sum necessary to effect such retirement, or unless such retirement shall have been approved by the Commissioner of Banking and Insurance. No shares of Preferred stock "A" or preferred stock "B" shall be called or purchased for retirement unless all accrued dividends (whether or not earned or declared) to the dividend payment date next preceding the date of such retirement shall have been paid on all shares of preferred stock of the class so to be retired at the time outstanding. So long as any shares of preferred stock "A" are outstanding, the trust company shall not call or purchase for retirement any shares of preferred stock "B".

9—Retirement of Preferred Stock by Purchase.

Subject to the provisions of Section 8 of this Article Fifth, whenever the balance in the preferred stock "A" Retirement Fund shall amount to as much as \$5,000.00, the trust company shall, (unless the Board of Directors shall elect to use the entire amount of such balance in the preferred stock "A" Retirement Fund for the retirement

Exhibit "B."

of preferred stock "A" by call as provided in section 10 hereof) within ten days thereafter mail, first class postage prepaid, to all holders of record of preferred stock "A" at their respective addresses as shown on the books of the trust company, a notice specifying the balance in such fund and stating that the same is available for the purchase for retirement of preferred stock "A" at the lowest prices (not in excess of the par value thereof and accrued dividends thereon, whether or not earned or declared, to the date of purchase) offered within twenty days after the date of such notice. At the expiration of such twenty days, the trust company shall apply such balance to the purchase for retirement of preferred stock "A", if obtainable, in accordance with the terms of such notice, within ten days after such expiration, subject to the provisions of section 8 of this Article Fifth, the trust company shall call for retirement, in the manner provided in section 10 hereof, the largest number of shares of preferred stock "A" which can be retired from the balance in such Retirement Fund remaining after deducting the amount paid or to be paid for the purchase for retirement of Preferred stock "A" as aforesaid, and shall set aside from such Retirement Fund the sum necessary to effect such retirement. The preferred stock "B" Retirement Fund shall be dealt with in the same manner as the preferred stock "A" Retirement Fund. Subject to the provisions of section 8 of this Article Fifth, at any time and from time to time the trust company may make such lawful transfers from its surplus and/or undivided profits to the preferred stock "A" Retirement Fund, or (after all shares of preferred stock "A" shall have been retired) to the preferred stock "B" Retirement Fund, as the Board

Exhibit "B."

of Directors may determine. All shares of preferred stock "A" or preferred stock "B" purchased for retirement by the trust company, whether from the Retirement Funds or otherwise, shall be cancelled forthwith and shall not be re-issued.

10—*Retirement of Preferred Stocks by Call.* 10
Subject to the provisions of section 8 of this Article Fifth, the Trust Company may at any time, at its election as expressed by resolution of the Board of Directors, retire the outstanding preferred stock "A" or preferred stock "B" or both as a whole, or from time to time, in part, pro rata or in part by lot in such equitable manner to carry out the purposes of this section 10 as the Board of Directors of the trust company in its discretion shall from time to time determine, by paying for each share of preferred stock "A" so to be retired a retirement price equal to the par value thereof plus all accrued dividends thereon, whether or not earned or declared, accrued to the date of such retirement, and for each share of preferred stock "B" so to be retired the sum of \$50.00 plus all accrued dividends thereon, whether or not earned or declared, remaining unpaid, provided, however, that no preferred stock "B" shall be so retired until all of the issued and outstanding preferred stock "A" shall have been retired. At least thirty days' prior written notice of every such retirement, stating the retirement date and the retirement price, and the place of payment thereof, shall be mailed first class, postage prepaid, to the holder of record of each share to be retired, at the address of such holder as shown on the books of the Trust Company. Such notice having been so mailed, each holder of shares so 40

Exhibit "B."

called for retirement shall be entitled upon surrender to the Trust Company on or after the retirement date, at the place designated in such notice, of the certificate or certificates therefor in transferable form, and if required, properly stamped for transfer. In case less than all of the
10 shares represented by such certificate are retired, a new certificate shall be issued representing the unretired shares. From and after the retirement date (unless the Trust Company shall default in payment of the retirement price), all dividends on shares called for retirement shall cease to accrue, such shares shall be deemed to be no longer outstanding, and all rights of the holders thereof as shareholders of the trust company except the
20 right to receive the retirement price, shall terminate. All shares so retired shall be cancelled forthwith and shall not be reissued.

11. Increase or decrease of capital stock; Amendments of Articles of Incorporation, etc.— By the affirmative vote of the holders, voting by classes, of at least two-thirds of the shares of each class of stock at the time outstanding, and not otherwise, and subject to the provisions of the laws of the State of New Jersey and to the
30 approval of the Commissioner of Banking and Insurance.

(a) The capital stock of the Trust Company may be increased at any time and from time through issuing additional shares of preferred stock and/or common stock, and/or through the creation of one or more additional classes of stock; PROVIDED, however, That no vote of the holders of preferred stock shall be required with respect to any issue
40 of additional shares of common stock if the

Exhibit "B."

entire proceeds of such issue are to be used for the retirement of shares of preferred stock;

(b) The capital stock of the trust company may be decreased at any time and from time to time to any amount not below the amount at the time required by law; PROVIDED, however, that no vote of the holders of stock of any class shall be required with respect to the retirement of preferred stock;

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(c) The name of the Trust Company and/or the place where its operations of discount and deposit are to be carried on may be changed, but this clause shall not be construed to abridge the powers of the Board of Directors under applicable law with reference to the establishment or change of lo-

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(d) These Articles of Incorporation may be amended at any time and from time to time preferred stock remains outstanding; in any other respect, but not so as to change the respective voting rights of the preferred stock and common stock so long as any of the preferred stock remains outstanding;

(e) The Trust Company may incur indebtedness maturing more than one year from the creation thereof, but the indebtedness herein referred to shall not be construed to include time deposits, which may continue to be accepted by the trust company under such conditions as may be provided by law;

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(f) The trust company may be consolidated or merged into or with any other trust company;

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Exhibit "B."

(g) All or substantially all of the assets and business of the trust company may be sold or otherwise disposed of;

(h) The trust company may go into voluntary liquidation, and

10 (i) Any plan of reorganization of the trust company may be carried into effect.

20 PROVIDED, however, That if and as long as the voting rights of the preferred stock are increased in accordance with the provisions of sections 12 or 13 of this Article Fifth and the fair value of the assets of the trust company as determined in subparagraph (c) of section 13 hereof shall be less than an amount equal to all of its liabilities, including all capital stock outstanding, any of the actions specified in the foregoing paragraphs (a) to (i) inclusive, of this section 11 may be taken by the affirmative vote of two-thirds of the votes to which the holders of all classes of stock, voting as one class, are at the same time entitled, and not otherwise, except that the trust company may not be put into voluntary liquidation without the approval of the Commissioner of Banking and Insurance.

30 12.—*Voting Rights.*

40 (a) So long as any of the shares of preferred stock "A" or preferred stock "B" are outstanding and unretired, the rights of the holders of the common stock to vote on such stock shall be suspended to the full extent permitted by law, and, during such period of suspension, any holder of common stock, as such, shall not be entitled to vote thereon at any meeting of the stockholders of the trust company.

Exhibit "B."

(b) Except as otherwise provided in Section 13 of this Article Fifth and in this Section 12, each holder of stock of any class shall be entitled to vote on all matters, one vote for each share of stock of any class held by him.

(c) In all elections of Directors each holder of stock of any class then entitled to vote shall have the right to vote the votes allocable to the number of shares then entitled to be voted upon owned by him for as many persons as there are directors, to be elected, or to cumulate such votes and give one candidate as many votes as the number of directors multiplied by the number of votes allocable to his shares shall equal, or to distribute such votes on the same principle among as many candidates as he shall think fit. 10 20

(d) After all of the preferred stock "A" shall have been retired, in no case the common stock shall then be entitled by law to vote on any matter presented at any stockholders' meeting (notwithstanding the restrictions of Paragraph (a) of this Section 12 and as many as two semi-annual dividend payments (whether or not consecutive and whether or not earned or declared) on the preferred stock "B" shall be in arrears (Provided, however, that if the issuance of the preferred stock "B" is made on a date not more than three months prior to any dividend date, the first dividend date immediately following shall not be considered in calculating the number of such defaults), then and until all the arrears of dividends upon the preferred stock "B" shall have been paid and the full dividend on the outstanding preferred stock "B" for the then current semi-annual 30 40

Exhibit "B."

10 dividend period shall have been declared and funds set apart for the payment thereof, the holders of preferred Stock "B" at the time outstanding shall be entitled as a class to vote on all matters on which the common stock shall be entitled by law to vote (notwithstanding the restriction of paragraph (a) of this Section 12 twice the number of votes to which holders of Common Stock, as a class, are at the time so entitled and each holder of preferred stock "B" shall then be entitled to a pro rata share of the votes to which his class is entitled.

20 (e) In case as many as two semi-annual dividend payments (whether or not consecutive and whether or not earned or declared) on the preferred stock "A" shall be in arrears (provided, however, that if the issuance of preferred stock is made on a date not more than three months prior to any dividend date, the first dividend date immediately following shall not be considered in calculating the number of such defaults), then, and until all arrears of dividends upon the preferred stock "A" shall have been paid and the full dividend on the outstanding preferred stock "A" for the then current semi-annual dividend period shall have been declared and funds set apart for the payment thereof, the holders of preferred stock "A" at the time outstanding, shall be entitled, as a class, to vote on all matters twice the number of the votes to which the holders of preferred stock "B" (if the common stock shall be entitled to vote, notwithstanding the restrictions of paragraph (a) of this section 12), and of common stock, as classes, are at the time entitled to a pro

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Exhibit "B."

rata share of the votes to which his class is entitled.

(f) At any time while the votes of the preferred stock "A" and/or of the preferred stock "B" are increased as provided in paragraphs (d) or (e) of this section 12 or in subparagraph (2) of Section 13 of this Article Fifth, any one of more of the directors, officers or employees of the trust company may be removed at any annual or special meeting of the shareholders, for or without cause, and their successors elected, by the affirmative vote of two-thirds of the votes to which the holders of all classes of stock, voting as one class, are at the time entitled. 10

13—*Other Voting Rights.* 20

If at any time while the Reconstruction Finance Corporation shall hold not less than 25% of the total number of shares of preferred stock "A" at the time outstanding.

(a) The trust company shall fail, on any February 1 or August 1, to pay the semi-annual dividend on the preferred stock "A" provided that dividends due within three months of the issuance of preferred stock shall not be considered in computing any such defaults; or 30

(b) The trust company shall fail to pay annually on February 1, 1937, and on each February 1 thereafter into the Preferred Stock Retirement Fund (referred to in section 9 of this Article Fifth), a sum equal to 5% of the maximum par value of the preferred stock "A" at any time outstanding, whether or not 40

Exhibit "B."

any such stock shall have been subsequently retired or the aggregate par value thereof reduced in any manner whatsoever, provided that the trust company shall be given credit on each February 1 for the payment, if any, into the said preferred stock "A" Retirement Fund made on the prior August 1; or

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(c) The fair value of the assets of the trust company as determined by an examination of the trust company by the Reconstruction Finance Corporation (which may be made by the Reconstruction Finance Corporation once in each calendar year if the Reconstruction Finance Corporation shall so elect), or as as determined by the Commissioner of Banking and Insurance, shall be less than an amount equal to all of its liabilities, including all capital stock outstanding; or

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(d) The trust company shall violate or fail to observe any of the terms, provisions or conditions of its Certificate of Incorporation or shall be in default in the due observance or performance of any covenant, agreement or condition on the part of the trust company contained in the application to Reconstruction Finance Corporation for subscription to preferred stock "A".

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then after written notice from the Reconstruction Finance Corporation of the existence of any of said conditions and so long as any of said conditions in (a), (b), (c) and (d) above shall continue;

(1) All directors, officers and employees of the trust company shall receive compensation at rates not exceeding such maximum lim-

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Exhibit "B."

itations as may be fixed by the vote of the holders of a majority of the shares of preferred stock "A" at the time outstanding.

(2) In case Reconstruction Finance Corporation, with the approval of the Commissioner of Banking and Insurance, after hearing before such Commissioner, at any time shall notify the trust company that any director, officer or employee of the trust company is regarded by Reconstruction Finance Corporation as unsatisfactory, and in case such director, officer or employee is not removed from office (and, if requested by Reconstruction Corporation, replaced with a director (1), officer or employee satisfactory to it) within thirty days after receipt by the trust company of such notice, then, and until such removal and replacement shall have been effected, the holders of preferred stock "A" at the time outstanding shall be entitled as a class, to vote on all matters twice the number of the votes to which the holders of preferred stock "B" and of common stock, as classes, are at the time entitled, and each holder of preferred stock "A" shall be entitled to a pro rata share of the votes to which his class is entitled.

(3) The Trust Company shall not directly or indirectly purchase or otherwise acquire any real estate for its own use, or lease any real estate for its own use for a term longer than one year, without in each case the affirmative vote of the holders of a majority of the preferred stock "A" at the time outstanding, or written waiver of voting rights in respect thereto by the holders of such majority of preferred stock.

Exhibit "B."

14—*Rights of Preferred Stock "A" on Liquidation.* In the event of any receivership, conservatorship, liquidation, dissolution, or winding up of the trust company, whether voluntary or involuntary, before any payment or other distribution whether in cash, property or otherwise, shall be made to the holders of preferred stock "B" of common stock, the holders of preferred stock "A" shall be entitled to receive, for each share of such stock held by them, an amount equal to the par value thereof, plus an amount equal to all unpaid dividends thereon, whether or not earned or declared, accrued to the date of payment, but shall not be entitled to any other or further payment.

15—*Rights of Preferred Stock "B" on Liquidation.* Subject to the provisions section 14 of this Article Fifth, in the event of any receivership, conservatorship, liquidation, dissolution, or winding up of the trust company, whether voluntary or involuntary, before any payment or other distribution, whether in cash, property or otherwise, shall be made to the holders of Common Stock, the holders of preferred stock "B" shall be entitled to receive, for each share of such stock held by them, an amount equal to \$50.00 per share, plus an amount equal to all unpaid dividends thereon, whether or not earned or declared, accrued to the date of payment, but shall not be entitled to any other or further payment.

And the following articles shall be added to the present Certificate of Incorporation:

"EIGHTH." *Special Meetings of Shareholders.* Except as otherwise provided by statute, special meetings of the stockholders may be called for any purpose at any time by the Board of Directors or by the holders of at least 10% of the then out-

Exhibit "B."

standing shares of any class. Every such special meeting shall be called by mailing, not less than ten days before the time fixed for the meeting, to all shareholders of record entitled to act and vote at such meeting, at their respective addresses as shown on the books of the trust company, a notice stating the purpose of the meeting. Such notice may be waived in writing. 10

Following this amendment to the certificate of incorporation, there is a statement properly executed by the officers of the Company to the effect that the resolution authorizing the amendment was adopted by more than two-thirds in interest of the stockholders of the Company at a meeting held February 27, 1934, pursuant to a resolution of the Board of Directors passed February 17, 1934 and that the vote for the resolution was 20,175 out of a total number of shares of capital stock of 28,000 and the vote against none, and there is likewise appended the assent of the stockholders in writing; on April 23, 1934, a certificate was filed by the Deputy Commissioner of Banking approving the issuance of preferred stock. 20

On July 5, 1934, a certificate properly authenticated by the officers of the bank, was filed showing that the increase of capital stock to the amount of \$776,979.13 was fully paid either in cash or by offsets against depositors' accounts, and that \$526,979.13 had been paid in in like manner to the surplus additional fund; other papers on file are a petition for the establishment of a branch office at Lyons Avenue and Aldine Street, Newark, N. J., approved by the Department of Insurance April 19, 1927; a certificate filed April 7, 1930, changing the principal place of business to 505 Clinton Avenue, Newark, N. J., subscription agree- 30 40

Affidavit of Grace F. Grosman.

ment between the bank and Samuel F. Wilson, Trustee, regarding holding of stock in escrow for certain subscribers until \$42,000 had been paid in therefor, filed April 13, 1932.

10 I certify that I have caused the records of the Department of Banking and Insurance to be searched with respect to all papers filed in the matter of Clinton Trust Company and that the search discloses that the foregoing is a true and correct transcript of all such papers, with the exceptions as indicated in the foregoing.

MERRITT LANE
Of Counsel with Clinton Trust
Company.

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Affidavit of Grace F. Grosman.

ESSEX COUNTY CIRCUIT COURT

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,

Plaintiffs,

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vs.

CLINTON TRUST COMPANY, a New
Jersey corporation,
Defendant.

Action at Law.
Affidavit.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss:

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Grace F. Grosman, co-executrice of the Estate
of Abraham Fishman, deceased, and one of the

Affidavit of Grace F. Grosman.

plaintiffs in the foregoing action, being duly sworn on her oath, according to law, deposes and says:

1. That she is one of the executrices of the Estate of Abraham Fishman, deceased, by appointment of the Surrogate of the County of Essex, having duly qualified as such and is now engaged in the fulfilment of her trust. 10

2. That Abraham Fishman died on June 18, 1932, in the City of Newark, County of Essex, New Jersey.

3. That decedent, Abraham Fishman, was for a long time prior to his death a depositor in the bank of the defendant herein.

4. That on June 22, 1932, deponent opened a checking account in the bank of the defendant and commenced to deposit moneys belonging to the Estate of said decedent therein. 20

5. That various deposits were made in said account thereafter and on July 5, 1932, this deponent deposited in said account to the credit of said Estate the sum of \$25,101.38.

6. That on July 8, 1932, deponent opened a savings account in the defendant bank in the name of the Estate of Abraham Fishman, deceased, and did deposit therein the sum of \$5,000.00 and did make further deposits on September 20, 1932 and December 30, 1932, in the sums of \$1397.50 and \$1382.50, respectively, making in all the sum of \$7780.00. 30

7. That after the defendant bank was closed by Presidential proclamation in the early part of March, 1933, the defendant then opened for business on a restricted basis, forbidding withdrawals of any moneys deposited prior thereto. 40

Affidavit of Grace F. Grosman.

8. That thereafter the defendant corporation did hold numerous meetings of stockholders and depositors in an effort to effect a reorganization plan for the resumption of business by the defendant on an unrestricted basis.

10 9. That various members of the Depositors' Committee appointed for the foregoing purpose, contacted this deponent and attempted to induce her to consent to accept fifty per cent in cash of said deposit with accrued interest, twenty-five per cent in what was referred to as Class B stock of the defendant bank, and twenty-five per cent in stock of a holding company to be organized to hold certain real estate then owned by the defendant.

20 10. That this deponent consistently and at all times refused to consent to any such proposition and at all times insisted that said moneys be paid in full.

11. That this deponent protested that the said plan of reorganization was unfair and inequitable.

30 12. That thereafter this deponent was informed that there was available for her withdrawal the sum of \$4,125.47 and that she would have to take stock as aforesaid for the balance in a like sum.

13. That she refused so to do and withdrew from the defendant bank the sum of \$4,125.47 which the defendant bank placed of its own volition at the disposal of this deponent in a new savings account.

40 14. That on July 20, 1934, this deponent caused plaintiffs' attorney to write a letter to the defendant bank informing them that she considered the moneys for which the within action was brought the subject of trust funds and that she

Affidavit of Grace F. Grosman.

refused to accept stock therefor, a copy of said letter being hereto annexed, marked Exhibit "C" and made a part hereof.

15. This deponent further states that she at all times felt that she was not bound by the action of any of the stockholders or any other depositors of the defendant bank and that under the terms of the agreement, had at the time that said deposits were made, and the rules and regulations then in existence governing withdrawals of deposits, she was and is entitled to the full payment of the moneys claim in the foregoing action, and that the reorganization plan referred to in the amended answer filed herein was never consented to by the plaintiffs in the foregoing action and they are not bound thereby.

16. Deponent further states that there is due to the plaintiffs herein from the defendant the sum of \$4125.47, with interest from July 19, 1934; that she believes that the defendant has no defense to said action, and that the amended answer filed herein by said defendant has been filed simply for the purpose of delay and is sham and frivolous.

GRACE F. GROSMAN

Sworn and subscribed to before me this }
6th day of March, 1935. }

CATHERINE I. RESNICK

A Notary Public of New Jersey.

Exhibit "C"

July 20, 1934.

CLINTON TRUST COMPANY,
505 CLINTON AVENUE
NEWARK NEW JERSEY

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Re: Savings account—
Estate of Abraham Fishman,
deceased,

Gentlemen:

I am counsel for the above estate from which
you are withholding the sum of \$4,125.47, balance
in savings account.

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My clients request me to inform you that they
consider these funds trust funds in your posses-
sion and refuse to accept stock therefor, and that
unless payment is made immediately, appropriate
legal proceedings will be instituted.

Very truly yours,

(Signed) ROBERT D. GROSMAN

RDG:Q

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Service of a copy of the within notice of motion
is hereby acknowledged this 6th day of March,
1935.

MERRITT LANE

Of Counsel with Defendant

PITNEY, HARDIN & SKINNER

Of Counsel with Interested Parties

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Answering Affidavit of Harry F. Peal.

(Filed March 22, 1935.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

HARRY F. PEAL, of full age, being duly sworn according to law, upon his oath deposes and says:

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1. I reside in the City of Newark. I was a solicitor on the Depositors' Committee of the Clinton Trust Co. of Newark, during the re-organization of said trust company.

2. In the early part of January 1934, I called upon Mrs. Grossman, Executrix of the Estate of Abraham Fishman, at #80 Keer Avenue, Newark, and requested her to sign a consent to the plan of re-organization. She informed me that I would have to contact her husband, Charles F. Grossman, at #1060 Broad Street, Newark. I there-upon called on Mr. Grossman and he informed me that he could not sign the consent as the Estate was in litigation. Neither Mrs. Grossman nor Mr. Grossman made demand upon me for payment in full of the account of the Estate of Abraham Fishman.

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HARRY F. PEAL

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Subscribed and sworn to before me }
this 19 day of March, 1935. }

L. E. ANSCHULTZ

Notary Public of New Jersey

My commission expires Jan. 21, 1940.

(SEAL)

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Answering Affidavit of Leslie Hughes.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

LESLIE HUGHES, of full age, being duly sworn according to law, upon his oath deposes and says:

10 1. I reside in the City of Newark. I was a solicitor for the Depositors' Committee during the re-organization of the Clinton Trust Company of Newark.

20 2. In the early part of January 1934, I called upon Mrs. Grace F. Grossman of 80 Keer Avenue, Newark, the executrix of the Estate of Abraham Fishman, and requested her to sign a consent to the plan of reorganization. She did not refuse to sign the consent nor did she make any statements as to the plan or re-organization whatsoever, nor did she make any demand upon me or signify her intentions of making any such demand for the entire amount on deposit in name of this Estate. She informed me that whatever business was to be transacted was to be transacted with her husband, Charles F. Grossman.

LESLIE HUGHES

30 Subscribed and sworn to before me }
this 19th day of March, 1935. }

HENRY F. FREY,
Notary Public of N. J.

(SEAL)

Answering Affidavit of Evelyn M. Oliger.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

EVELYN M. OLIGER, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I reside in the City of Newark. I have been employed by the Clinton Trust Company of Newark since April, 1927 and during the campaign by the Depositors' Committee to obtain consents to the plan of re-organization of said trust company, I was in charge of receiving from said Committee the signed or unsigned consents, and it was my duty to keep a record of the reason given by these solicitors for their inability to have consents signed.

2. In the matter of the Estate of Abraham Fishman, the unsigned consent was returned to me with the explanation that the executrix could not sign as the Estate was in litigation, which fact I so noted on my records.

EVELYN M. OLIGER

Subscribed and sworn to before me }
this 19 day of March, 1935. }

L. E. ANSCHULTZ

Notary Public of New Jersey

My Commission expires Jan. 21, 1940.

Answering Affidavit of Charles G. Bauer.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

CHARLES G. BAUER, of full age, being duly sworn according to law upon his oath deposes and says:

10 1. I reside at Maplewood, N. J. I am Vice
President of the Clinton Trust Company, of
Newark, N. J., and have been Vice President since
1927; I have intimate knowledge of all of the
affairs of the bank and have had such intimate
knowledge since 1927; I am familiar with all the
books and records of the bank and was familiar
with the various plans of reorganization and with
the efforts to get plans of reorganization approved.
20 I have read the affidavit of Mr. Goodemoot and
the statements contained in said affidavit are true.

2. I had special charge of the matter of the re-
organization and was in attendance every day to
give information to those who were interested
stockholders and creditors and all complaints with
respect to the plan of reorganization came to my
desk; reports were made to me by those who were
attempting to get consents signed and the like;
at no time up to the date of the reopening of the
bank for normal business after the plan of re-
30 organization had been approved and put in effect
did any representative or principal of plaintiffs
make any demand upon me for the payment in
full of the amount of deposit standing in the name
of plaintiffs, nor was any complaint relative to the
plan upon the ground that it was unfair or in-
equitable or otherwise, received by me, nor did
any such complaint come to my attention; I was
informed that the reason why the plaintiffs would
not sign the consent was that they doubted their
40

Answering Affidavit of Charles G. Bauer.

authority as executors to do so; no demand was made for payment in full at the time of the withdrawal by plaintiffs of the moneys which were withdrawn when the bank was reopened; on July 20, 1934, plaintiffs' attorneys wrote the letter which is mentioned in paragraph 14 of the affidavit of Grace F. Grosman and which is Exhibit C annexed to the affidavit. This is the first intimation that I had or that the bank had, to my knowledge, of any complaint on the part of plaintiffs; I direct the attention of the court to the fact that, while Grace F. Grosman in her affidavit states that in paragraphs 9, 10, 11 and 13 of her affidavit she refers to conversations which she says she had with various members of the Depositors Committee and with others with respect to the subject matter of those paragraphs of the affidavit, she does not at any point identify any particular person.

3. I have, in the light of what I have just previously said, had affidavits prepared by all those whom I can conceive could possibly have talked with Grace F. Grosman, which affidavits are presented herewith. We had a list of all persons who were authorized to talk with stockholders and depositors; I know of no instance in which any person other than those specially assigned talked with any depositor or stockholder. The affidavits which are herewith presented of Evelyn M. Olinger, Harry F. Peel and Leslie Hughes, cover every person who, under our system, could possibly have talked with plaintiffs or their representatives and each one of them came in with the same story, to wit, that plaintiffs did not sign because they did not think they had the authority so to do,

Answering Affidavit of Werden C. Goodemoot.

making no complaint whatever with respect to the
plan, its fairness or equitableness.

CHARLES G. BAUER

10 Subscribed and sworn to before me }
 this 19th day of March, 1935. }

L. E. ANSCHULTZ

Notary Public of New Jersey.

My commission expires Jan. 21, 1940.

**Answering Affidavit of Werden C.
Goodemoot.**

20

ESSEX COUNTY CIRCUIT COURT.

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of ABRAHAM FISHMAN,
deceased,

Plaintiffs,

vs.

30 CLINTON TRUST COMPANY, a New
 Jersey corporation,
 Defendant.

Action at Law.
Affidavits.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

40 WERDEN C. GOODEMOOT, of full age, being duly
 sworn according to law upon his oath deposes and
 says:

Answering Affidavit of Werden C. Goodemoot.

1. I reside in Pequannock Township. I am Vice President of the Clinton Trust Company, the defendant in the above entitled cause. On January 6, 1934, I was Special Assistant Deputy Commissioner of Banking and Insurance of the State of New Jersey; on that date I took charge of the Clinton Trust Company on behalf of the Commissioner of Banking and Insurance, for the purpose of reorganization under the plan mentioned and set forth in the amended answer; I have been connected with the Department of Banking and Insurance of the State of New Jersey since 1931 and I have been in the Reorganization and Liquidation Division. When I was called upon in January 1934, to take charge of the reorganization I was obliged to make a study of the condition of the bank, the preceding history of the bank, of its books and records, and I therefore acquired an intimate knowledge of the matters and things which are set forth in the amended answer; I also had knowledge, of course, of the general banking situation, of the various statutes passed by Congress and of the proclamation of the President, the various statutes of the State of New Jersey and the proclamations of the Governor and the rules and regulations of the Secretary of the Treasury of the United States, and the rules and regulations of the Commissioner of Banking and Insurance which are referred to in the amended answer.

2. The statements of fact contained in paragraph 2 of the first defense of the amended answer are true.

3. The statements of fact and denials contained in paragraphs 3, 4 and 5 of the first defense of the amended answer are correct and my knowl-

Answering Affidavit of Werden C. Goodemoot.

edge thereof is based upon the books and records of the bank.

4. The statements of fact contained in paragraphs 6 and 8 of the first defense of the amended answer are true.

10 5. The statements of fact contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the second defense of the amended answer are true.

6. The statements of fact contained in paragraphs 8, 9, 10 and 11 of the second defense of the amended answer are true.

7. The statements of fact contained in the second paragraph of the fourth defense of the amended answer are true.

20 8. The statements of fact contained in the third paragraph of the fifth defense of the amended answer are true.

9. The statements of fact contained in the fourth paragraph of the seventh defense of the amended answer are true.

30 10. On March 10, 1933, an executive order was issued by the President, pursuant to the statute authorizing and empowering the Secretary of the Treasury to permit banks to reopen under such regulations as he should prescribe and providing for the issuing of a license to members of the Federal Reserve System upon application by the member bank to the Secretary of the Treasury through a federal reserve bank, copy of which executive order is annexed hereto and marked Exhibit 1; the Clinton Trust Company was a member of the Federal Reserve System and as such was long before March 9, 1933, and ever since has

Answering Affidavit of Werden C. Goodemoot.

been and still is subject to the rules and regulations prescribed by the President of the United States pursuant to the Act of Congress of March 9, 1933; the act was limited to such emergency period as the President of the United States could proclaim; the President of the United States has not proclaimed the emergency at an end; the plan of reorganization set up in the second defense of the amended answer was presented to and approved by the Federal authorities, including the Federal Reserve Bank, and on May 7, 1934, the banking business of the defendant Clinton Trust Company was opened under and in pursuance of said plan; the plan had to be presented and approved by the Federal Reserve Bank to the end that the Clinton Trust Company might qualify to reopen pursuant to the executive order of March 10, 1933, Exhibit 1 annexed hereto; under the statutes of the State of New Jersey, membership by said banks in the Federal Reserve System was permitted subject to the assumption of such liabilities by the bank as might be imposed by reason of such membership; if the Clinton Trust Company were obliged to pay the plaintiffs as indicated by their complaint the plan of reorganization would be violated and the bank would be obliged to violate the regulations of the Secretary of the Treasury promulgated by him in pursuance of the act of Congress.

11. In the light of the fact, which is a fact, that at the time the bank was closed when the banking holiday was proclaimed by the President of the United States and the Governor of the State of New Jersey, Clinton Trust Company was insolvent and continued to be insolvent until new money was contributed by the Reconstruction Fi-

Answering Affidavit of Werden C. Goodemoot.

10 nance Corporation and the stockholders in the manner indicated in the amended answer and until the depositors waived their claims to a portion of their deposits as creditors and substituted for those claims the securities which were given to them under the terms of the reorganization plan, the effect of paying the plaintiffs in full would be to appropriate the moneys of the Reconstruction Finance Corporation and other depositors for the benefit of the single depositor, which would result in his unjust enrichment at the expense of others.

20 12. I also point out that the Federal Deposit Insurance Corporation relied upon the reconstruction of the bank under the terms of the reorganization plan for the insurance and never would have insured were it not for the reorganization; without the insurance the bank could never have reopened for it was obliged to comply with the rules of the Federal Deposit Insurance Corporation in order to reopen, in the light of the fact that it was a member of the Federal Reserve System; the net result would be that moneys of the Federal Deposit Insurance Corporation may likewise be taken for the unjust enrichment of the plaintiffs if they are entitled to recover the full amount of the deposit.

30 13. I have made a through investigation of the condition of the bank prior to reorganization and, had the bank been liquidated, in my judgment, based upon my investigation and knowledge of values, the depositors would not have received in excess of 40% of the amount of their deposits; 50% of the amount of plaintiffs' deposit has already been paid and received by them, and in order to get that 40% they probably would have

40

Exhibit 1.

been obliged to wait for a period of approximately four years.

WERDEN C. GOODEMOOT

Subscribed and sworn to before me }
this 19th day of March, 1935. }

10

GEORGE E. MANSFIELD

Notary Public of New Jersey.

My commission expires June 30, 1937

(SEAL)

Exhibit 1.

EXECUTIVE ORDER (No. 6073)

20

(Regulations Concerning the Operation of Banks)

By virtue of the authority vested in me by Section 5 (b) of an Act of October 6, 1917 (40 Stat. L., 411) as amended by the Act of March 9, 1933 and by Section 4 of the said Act of March 9, 1933, and by virtue of all other authority vested in me, I hereby issue the following executive order.

The Secretary of the Treasury is authorized and empowered under such regulations as he may prescribe to permit any member bank of the Federal Reserve System and any other banking institution organized under the laws of the United States, to perform any or all of their usual banking functions, except as otherwise prohibited.

30

The appropriate authority having immediate supervision of banking institutions in each State or any place subject to the jurisdiction of the United States is authorized and empowered under

40

Exhibit 1.

such regulations as such authority may prescribe to permit any banking institution in such State or place other than banking institutions covered by the foregoing paragraph, to perform any or all of their usual banking functions, except as otherwise prohibited.

10 All banks which are members of the Federal Reserve System, desiring to reopen for the performance of all usual and normal banking functions, except as otherwise prohibited, shall apply for a license therefor to the Secretary of the Treasury. Such application shall be filed immediately through the Federal Reserve Banks. The Federal Reserve Bank shall then transmit such applications to the Secretary of the Treasury. Li-
20 censes will be issued by the Federal Reserve Bank upon approval of the Secretary of the Treasury. The Federal Reserve Banks are hereby designated as agents of the Secretary of the Treasury for the receiving of application and the issuance of licenses in his behalf and upon his instructions.

Until further order, no individual, partnership, association, or corporation, including any banking institution, shall export or otherwise remove or permit to be withdrawn from the United States or any place subject to the jurisdiction thereof
30 any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury.

No permission to any banking institution to perform any banking functions shall authorize such institution to pay out any gold coin, gold bullion or gold certificates except as authorized by the Secretary of the Treasury, nor to allow withdrawal of any currency for hoarding, nor to en-
40 gage in any transaction in foreign exchange

Opinion.

except such as may be undertaken for legitimate and normal business requirements, for reasonable traveling and other personal requirements, and for the fulfillment of contracts entered into prior to March 6, 1933.

Every Federal Reserve Bank is authorized and instructed to keep itself currently informed as to transactions in foreign exchange entered into or consummated within its district and shall report to the Secretary of the Treasury all transactions in foreign exchange which are prohibited. (Promulgated Mar. 10, 1933.) 10

Opinion.

ESSEX COUNTY CIRCUIT COURT. 20

(Filed Jan. 31, 1935.)

On plaintiffs' motion to strike out defendant's answer and for summary judgment.

GROSMAN & GROSMAN, attorneys for plaintiffs.

BURKE, SHERIDAN & HOURIGAN, attorneys for defendant.

LOUIS J. COHEN, Assistant Attorney General, *amicus curiae* on behalf of the Commissioner of Banking and Insurance of the State of New Jersey, in opposition to the motion. 30

FREDERICK P. SMITH, *amicus curiae* on behalf of the Reconstruction Finance Corporation, in opposition to the motion.

Opinion.

WILLIAM A. SMITH, CIRCUIT COURT JUDGE.

10 This is a suit by the plaintiffs to recover the balance of a deposit of moneys deposited with the defendant trust company in its savings department. The account was opened by the plaintiffs on July 28, 1932, with a deposit of \$5000. At the end of 1932 the account had been increased by deposits so that the plaintiffs had to their credit \$7780. The defendant trust company, together with others, was closed by the March, 1933, proclamations. Thereafter the defendant was permitted to open on a restricted basis which forbade the withdrawal of deposits made previous to the closing. Subsequently the defendant put into effect a reorganization as to its capital structure, which will be referred to later, and resumed business with the consent of the Commissioner of Banking and Insurance, and new stock was issued, part of which was subscribed for by the Reconstruction Finance Corporation. The defendant received cash for the stock taken by the Reconstruction Finance Corporation, and the reorganization plan contemplated the depositors' taking stock for one-fourth of their deposits, and approximately one-fourth of the deposits was to be exchanged for participating certificates in a holding company formed to take over the frozen assets of the defendant. When a sufficient number of consents had been received from the creditors and stockholders of the defendant, the Commissioner of Banking and Insurance permitted the defendant to open for business on an unrestricted basis.

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30

40 Upon the opening there was placed to the credit of the plaintiffs, and the bank so notified them, the sum of \$4125.47. This amount was thereafter withdrawn by the plaintiffs and this suit is now brought to collect the balance of the deposit

Opinion.

which was in the hands of the defendant company at the time it was closed in March, 1933.

The reorganization is set up as a defense to the action, and this is set forth under the first defense to the answer. The second defense to the answer is to the effect that the plaintiffs are barred from recovering on the ground of estoppel and that they have approved the reorganization agreement by their withdrawal of the deposit which was credited to them. 10

At the time of the closing of the trust company, the Trust Company Act, which governed the charter of the defendant, provided by its tenth section, 4 Comp. Stat. p. 5659, in effect, that no change in the certificate of incorporation of a trust company incorporated under the act should be made whereby rights, remedies, or securities of existing creditors should be in any way impaired; and other sections, particularly Section 22 ^{and} ~~of~~ Section 25, provide for proceedings where the company becomes unsafe and where the same was to be wound up by a receiver. 20

The reorganization was carried out by the defendant pursuant to an amendment of the Trust Company Act passed in 1933 after the closing of the Trust Company and subsequent to the making of the deposits here sought to be recovered. 30

The statutes under which the reorganization was effected are Chapter 116, P. L. 1933, p. 241, and Chapter 287, P. L. 1933, p. 770. The latter statute was an amendment ^{of} ~~to~~ the former in so far as the seventh section is concerned. It will not be necessary to quote these statutes at length; suffice to say that they provide for an amendment of the charter so as to issue the stock contemplated in the reorganization, and the seventh section particularly applies to the creditors. The 40

Opinion.

10 requirement of the statute is that 75 percent. of the creditors and depositors, and two-thirds of the stockholders consent to the plan, and that any of the remaining 25 percent. of the creditors who do not consent are bound by the reorganization and must accept the stock and securities provided for by the reorganization.

The reorganization was carried out without the consent of the plaintiffs, and immediately one-half of the deposit was made available in cash being credited to the plaintiffs' open account, and was withdrawn. This suit is for the remaining half, which the defendant offers to pay half in stock and half in participating certificates in the holding company which took over the unliquidated assets of the defendant corporation.

20 The plaintiffs challenge the constitutionality of the 1933 amendments, particularly the second amendment covering Section 7, in so far as it applies to them as creditors of the defendant at the time of the passage of the acts. It will be noted that the reorganization merely amended the existing charter and did not create a new company.

30 It is my conclusion that the act in question, in so far as it affects the plaintiffs, is unconstitutional in that it is a violation of the New Jersey constitution, paragraph 3, section 7, article 4, which provides that the legislature shall not pass any * * * *ex post facto* law, or law impairing the obligation of contracts, or a law depriving any part of any remedy for enforcing a contract which existed when the contract was made.

40 It is also unconstitutional as being in violation of the United States constitution, Article I, Section 10, which provides: "No state shall * * * pass any law * * * impairing the obligation of contracts."

Opinion.

It seems to me sufficient in holding that these acts impair the obligation of existing contracts to refer to the following cases: *Moore v. Splitdorf Electric Co.*, 114 N. J. Eq. 358; *Baldwin v. Flagg*, 43 N. J. L. 495; *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596.

In the case of *Moore v. Splitdorf Electric Co.*, 10
supra, Justice Perskie, speaking for the Court of Errors and Appeals, affirms the principle that a statute providing a method of reorganization for a failing corporation cannot require a creditor against his consent to accept securities in place of a share of the corporation's assets.

It might be well to refer to the fact that in another state a statute similar to the one the constitutionality of which is here challenged, has been declared unconstitutional by the United 20
States courts, *Shams v. Nebraska* (1931), 48 Fed. Rep. (2d Ed.), 894.

It seems to me also that the statute is unconstitutional as being in violation of the Fourteenth Amendment of the United States constitution, Section 1, which provides in part: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 30

The reason for this is that the statute requires only the determination of the corporation itself as to the propriety of the change in obligation to the creditor, and the consent of the Commissioner of Banking and Insurance. This clearly deprives the plaintiffs of their property without due process of law. No judicial forum is permitted for the purpose of reviewing the fairness of the plan or the fairness of the way it is being carried out. They have no opportunity, before the plan 40

Opinion.

is put into effect, of contesting or disputing claims of other creditors, but must take the stock and participating certificates in common with others who may not be entitled to them, or in an amount which may not be proper.

10 It has been claimed that this statute should be sustained under the police power and that it was a statute passed during an emergency. The statute in question is simply an amendment to the Trust Company Act, and by its terms does not indicate that it is passed under any emergency. I do not therefore think that I may consider it in the guise of an emergency statute. Without any emergency provision, clearly no appeal could be made to sustain its validity as an exercise of the police power on the part of the legislature. The
20 police power might to some extent be applied to the business of banking, but it has its limitations, and the means must have a reasonable relationship to the end. The trend of the decisions in both Federal and state courts seems to be against any statute requiring a creditor to take a lesser amount for his debt as against his retable share in the assets of his debtor.

That this statute cannot be sustained under the guise of an emergency statute, it seems only necessary to refer to the case of *Vanderbilt v. Brunt*
30 *ton Piano Co.*, *supra*, and to the same effect in so far as the court's reasoning is concerned, to the Minnesota mortgage moratorium case, *Home B. & L. Assn. v. Blaisdell*, 54 Sup. Ct. 231, 78 L. Ed. 255.

The defendant in its answer sets up as a second defense what seems to be an allegation that the plaintiffs are barred by estoppel from maintaining this action, it being contended that they stood
40 by without objection and allowed the Reconstruc-

Opinion.

tion Finance Corporation to advance the funds which were to be used in the rehabilitation of the defendant company and applied to the deposits of the creditors, including these plaintiffs.

There is no evidence that the plaintiffs ever notified the Reconstruction Finance Corporation of their objection to the plan. There is likewise no evidence to the effect that they took any stand or made any representation which might be classed as an ^{inducement} ~~amendment~~ on the part of the plaintiffs towards the Reconstruction Finance Corporation's advancing the money and purchasing the preferred stock. There can be found no evidence from the affidavits, nor is there any claim made, that the plaintiffs did anything to induce the Reconstruction Finance Corporation to make the advancement and purchase the stock.

It is my understanding with reference to the law of estoppel as applied to actions at law, that it must first appear that the plaintiffs, to be estopped, did some act which induced the person who is asserting the estoppel, to act, or that the plaintiffs stood by silently with knowledge, when they should have spoken.

It seems to me that there is no proof in the affidavits which would sustain either of these contentions. And the defense of estoppel must further fail because the defendant here is not the one to assert it. If there were any defense of estoppel, it would be a right of the Reconstruction Finance Corporation, and it is not a party to this suit.

The principle of equitable estoppel as recognized and enforced by courts of law is clearly stated in the case of *Central Railroad Co. v. MacCartney*, 68 N. J. L. 165, at pp. 175 and 176.

It is further contended on behalf of the defend-

Opinion.

10 ant that the form of the remedy adopted by the plaintiffs is not available to them because this bank was insolvent before the reorganization was effected, and the money which has become available to pay to the depositors was obtained through this reorganization, and that at most, the plaintiffs should have only their ratable portion of the assets which the defendant had at the time the bank was closed.

20 This suit is against the original debtor. The reorganization is not one where title to assets was transferred to a new corporate entity and that corporate entity is sought to be held. The reorganization, as I have called it, in so far as these plaintiffs are concerned, is effected through the consent of a portion of the other creditors, stockholders, the Commissioner of Banking and Insurance, and the issuing of additional preferred stock to raise the money with which to continue business, and participating certificates in certain assets of the defendant which were withdrawn from the other assets of the defendant. A reorganization along those lines does not change the corporate entity of the defendant or affect its liability at law to answer to the plaintiffs.

30 The plaintiffs have also asserted a claim that trust funds are specifically exempt from the restriction of payment of only one-half in cash following the reorganization; in other words, that it is contemplated in the reorganization that such funds are to be paid in full by the defendant. The provision referred to does not apply to a trust such as the plaintiffs'. ~~If~~ the trust in question were one in which the defendant was the trustee, the case might be different. But the relationship in this case between the defendant and the plaintiffs is that of debtor and creditor.

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Statement.

The application to strike out the answer as being frivolous will be granted and the plaintiffs may enter summary judgment for the balance of their deposit with interest.

WILLIAM A. SMITH
Circuit Court Judge

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January 30, 1935.

Statement.

After the filing of the foregoing opinion, the Court made an order dated March 1, 1935 permitting the filing of an amended answer (p. 4), a motion to strike that answer was made (Notice, p. 37); argument was had and the Court adhered to its opinion and the order was made striking the amended answer (p. 88) and judgment was entered (p. 89).

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Order for Summary Judgment.

ESSEX COUNTY CIRCUIT COURT,
(Filed April 3, 1935).

10	SARA F. BASEN and GRACE F. GROS- SMAN, Executrices of the Es- tate of Abraham Fishman, De- ceased, Plaintiffs, <i>vs.</i> CLINTON TRUST COMPANY, a cor- poration, Defendant.	Action at Law. Order for Summary Judgment.
20	It appearing by affidavit filed in the cause that the defense made by the defendant's amended answer is frivolous and the defendant, after due notice, having failed to show such facts as entitle it to defend: It is ORDERED that the amended answer be struck out and that final judgment be entered for the plaintiff for the sum of Forty-one Hundred and Twenty-nine Dollars and twenty-six cents (\$4129.26) with interest from July 19, 1934 amounting to the further sum of One Hundred Seventy-six Dollars and Eighty-seven Cents (\$176.87), making in all the sum of Forty-three Hundred and Six Dollars and thirteen cents (\$4306.13). Dated April 2, 1935.	

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WM. A. SMITH,
Judge of the Essex County Cir-
cuit Court.

Judgment.

ESSEX COUNTY CIRCUIT COURT,

67219

SARA F. BASEN and GRACE F. GROSMAN, Executrices of the Estate of ABRAHAM FISHMAN, deceased, Plaintiffs, <i>vs.</i>	Action at Law. Summary Judgment on Order Striking Out Amended Answer by Order of the Court. Judgment Entered April 3, 1935. Damage .. \$4,129.26 Interest 176.87 Costs 65.88 Total..... \$4,372.01 Judge William A. Smith. Grosman & Grosman, Attys. of Plaintiffs.
CLINTON TRUST COMPANY, a corporation of New Jersey, Defendant.	

Summary Judgment On Order Striking Out Amended Answer By Order Of The Court in the above entitled Action was rendered on the Second day of April A. D. Nineteen Hundred and Thirty-five in favor of the plaintiffs Sara F. Basen and Grace F. Grosman Executrices of the Estate of Abraham Fishman, deceased and against the defendant Clinton Trust Company, a corporation of New Jersey for the sum of Four Thousand One Hundred Twenty-nine dollars and twenty-six cents (\$4,129.26) with interest from July 19, 1934 amounting to the further sum of One Hundred Seventy-six dollars and eight-seven cents (\$176.87) making in all the sum of Four Thousand Three Hundred Six dollars and thirteen cents (\$4,306.13) damage and Sixty-five dollars and eighty-eight cents Cost of Suit.

Judgment Signed April 2, 1935

Judgment Entered April 3, 1935.

Notice of Appeal and Grounds Therefor.

(Filed April 25, 1935).

ESSEX COUNTY CIRCUIT COURT,

10	SARA F. BASEN and GRACE F. GROSMAN, Executrices of the Estate of Abraham Fishman, deceased, Plaintiffs, <i>vs.</i> CLINTON TRUST COMPANY, a New Jersey corporation, Defendant.	Action at Law. Notice of Appeal and Grounds therefor. Service acknowledged April 24, 1935. Filed April 25, 1935.
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To:

GROSMAN & GROSMAN, Esqs.,
Attorneys of Plaintiffs.

30

TAKE NOTICE that the defendant Clinton Trust Company, a New Jersey corporation, hereby appeals from the order of the Essex County Circuit Court, dated April 2, 1935, striking out the amended answer of defendant and directing the entry of final judgment for the plaintiffs against the defendant, and from the final judgment entered in pursuance of such order to the New Jersey Court of Errors and Appeals in the last resort in all causes upon the following grounds:

40

1. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the said amended answer was not frivolous but on the contrary set up a good defense to the action.

Notice of Appeal and Grounds Therefor.

2. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the defendant showed by its amended answer and by its affidavits such facts as entitled it to defend.

3. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the first defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the first defense.

4. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the second defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the second defense.

5. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the third defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the third defense.

6. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the fourth defense pleaded in said amended answer is good in law and the proofs be-

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Notice of Appeal and Grounds Therefor.

fore the court indicated that defendant was entitled to defend upon the allegations contained in the fourth defense.

10 7. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the fifth defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the fifth defense.

20 8. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the sixth defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the sixth defense.

30 9. The court erred in making the order striking out defendant's amended answer and directing the entry of final judgment as aforesaid, for the reason that the seventh defense pleaded in said amended answer is good in law and the proofs before the court indicated that defendant was entitled to defend upon the allegations contained in the seventh defense.

Dated: April 24, 1935.

BURKE, SHERIDAN & HOURIGAN,
Attorneys for Defendant.

MERRITT LANE,
Of Counsel.

Certificate.

ESSEX COUNTY CLERK'S OFFICE

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX, } ss.

I, JOHN H. SCOTT, Clerk of the Circuit Court,
 in and for the County of Essex in the State of
 New Jersey. 10

Do HEREBY CERTIFY that the foregoing is a true
 and correct copy of the following:

Summons and Complaint.
 Answer.
 Notice of Motion to Strike Out Answer and
 for Summary Judgment.
 Opinion. 20
 Answering Affidavits.
 Amended Answer.
 Notice of Motion to Strike Out Amended
 Answer and for Summary Judgment.
 Affidavits.
 Order for Summary Judgment.
 Judgment record, entered April 3, 1935 in
 Book 123, Page 412 of C C Judgments.
 Notice of Appeal and Grounds.

and the same is taken from and compared with 30
 the original records filed and entered in the
 County Clerk's Office and as the same now re-
 mains on the files of said Court.

IN TESTIMONY WHEREOF, I have here-
 unto set my hand and affixed the official
 seal of said Court & County at Newark,
 N. J., this Twenty-sixth day of April
 A. D., 1935.

(SEAL)

JOHN H. SCOTT, 40
 Clerk.

Concise

THE HISTORY OF THE UNITED STATES

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Clock

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THE HISTORY OF THE

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New Jersey Court of Errors and Appeals

No. 95. MAY TERM, 1935.

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,

Plaintiffs-Appellees,

vs.

CLINTON TRUST COMPANY, a New
Jersey corporation,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court
from Order Strik-
ing Amended
Answer and
directing entry of
judgment in
favor of the
Plaintiffs.

Sat below:
William A. Smith,
C. C. J.

(Italics and the like ours, except where otherwise noted.)

BRIEF OF APPELLANT.

Preliminary.

This case was treated below, in effect, as if it involved *only* the constitutionality of Chapter 116, P. L. 1933, page 241, entitled "An Act Concerning Banks, Trust Companies and Savings Banks having shares of capital stock," as amended by Chapter 287 of the Laws of 1933, P. L. 1933, page 770, which provides for the reorganization of banks, trust companies and savings banks under a plan approved in a certain manner, and which makes such reorganization effective against all depositors, other creditors and stockholders of the institution reorganized, irrespective of whether they had consented to such plan. The case *does* involve the constitutionality of such statute, *but* it involves other matters specifically set forth in the 4th, 5th, 6th and 7th defenses of the amended answer (p. 4), which defenses are of importance,

and, as we submit, effective, irrespective of the constitutionality of the statute.

Some 25 institutions have been reorganized under the permission of the statute. If it be now declared unconstitutional, and, if it be determined that depositors and other creditors who have not affirmatively consented to the plans of reorganization are not bound thereby, the way is open to these depositors and other creditors to sue the reorganized institutions and to recover the full amount of their debts notwithstanding the fact that, upon the faith of the reorganizations, the Reconstruction Finance Corporation has advanced large sums of money for preferred stock and others interested have changed their positions, and that, had there been no plans of reorganization, the depositors and other creditors would have received but a small percentage of their claims. The effect of recoveries in such cases cannot be exaggerated. So far as the federal constitution is concerned, we submit that the decision of the Supreme Court of the United States in *Doty v. Love*, April 1, 1935, Adv. Opinions No. 11, 79 L. Ed. 632, has settled the law contrary to the decision of the court below, except with respect to one point, and with respect to *that* point, it does not expressly speak. The statute of this State makes no provision for the approval of the plan by a court. The Mississippi Statute, considered by the Supreme Court of the United States in *Doty v. Love*, *did* make such provision, but there is nothing in the opinion of the Supreme Court of the United States which indicates that that Court would have held the Mississippi Statute unconstitutional had it omitted the provision for a court review. On the contrary, the fact that the Supreme Court cites cases from State courts sustaining statutes which made no *express* provision for a court review,

without disapproval would seem to indicate that, had the Mississippi Statute been like that here involved, the result would have been the same. The plan of reorganization sustained by the Supreme Court of the United States in *Doty v. Love* went much further than the plan here involved, for it contemplated the release of a statutory stockholder's liability *imposed for the benefit of depositors* and it was *therefor* claimed that the plan deprived dissenting depositors of an existing right and remedy.

Counsel arguing this case argued *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, for the appellant, and he does not depart from anything that he said in the argument of that case. The distinguishing features of the situation in that case and that in this are—the statute in the *Vanderbilt v. Brunton Piano Co.* case was one which had the effect of taking the property of one for the benefit of another—the statute in the instant case provides for the application of the property of the institution involved for the benefit of those interested therein, in a manner approved by the majority required by the statute and by the public authorities and the fact that the stockholders of the institution existing before reorganization are permitted to retain common stock subject to all other interests and of nominal value does not affect this statement—the statute involved in *Vanderbilt v. Brunton Piano Co.* had reference to strictly private rights—the statute involved in the instant case applies to a business which has always been considered of a public nature. This last consideration also distinguishes the instant case from that considered by this Court in *Moore v. Splitdorf Electric Co.*, 114 N. J. E. 358. Counsel writing this brief is also on the brief in the case of the *State of New Jersey ex rel. State Board of Health* against *Newark Milk Company*, No. 48 of

the February Term of this court, and he does not depart from anything that is said in that brief. It is not necessary in this case to resort to the reasoning of the Supreme Court of the United States in the rent cases, *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 68 L. Ed. 841; *Bloch v. Hirsh*, 256 U. S. 135, 65 L. Ed. 865; *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242, 66 L. Ed. 595, or in the milk case, *Nebbia v. State of New York*, 291 U. S. 502, 78 L. Ed. 940, or in the mortgage moratorium case, *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, to sustain the legislation here under attack.

If the majority of the Justices of the Supreme Court of the United States were right in their reasoning and the statutes under review in those cases were constitutional then all the more is the statute here involved constitutional.

The statute here involved is properly a part of a complete scheme for the reorganization of an insolvent banking institution at any time as a method of realizing as much for depositors as possible; as a means of orderly liquidation in the interests of all and of the public.

While a judicial review is not specifically provided by the statute, the depositor or creditor, not consenting to the plan of reorganization, had the right: (1) to apply to the Supreme Court for a certiorari to review the action of the Commissioner of Banking and Insurance in approving the plan as he is required to approve it under Section 7 of the Act; (2) to file a bill in equity to enjoin the enforcement of the plan as unfair and inequitable; (3) to sue at law for damages, alleging that the plan was unfair and inequitable. The suit at bar is not brought under the third subdivision above mentioned, and the defenses, which include the allegation that the plan was fair and

equitable (paragraph 8, first defense, amended answer, page 6; paragraph 8, second defense, page 14, and the same allegation is repeated by reference in the 3rd, 4th, 5th, 6th and 7th defenses) have been stricken. Whether more consideration has been given to stockholders than proper is a matter which goes, not to the legality, but to the *fairness* of the plan.

Statement of the Record.

The appeal (notice of appeal and grounds therefor, p. 90) is from a judgment (p. 89) and an order (p. 88) striking defendant's amended answer as frivolous. The judgment was signed April 2, 1935, and is for \$4,129.26 and costs. The complaint is found on page 1, the amended answer, page 4, the notice of motion to strike the amended answer and for summary judgment, page 27.

Plaintiffs had made a motion to strike defendant's original answer which had resulted in an opinion of the Court (p. 79) directing that it be stricken. Defendant was permitted to file an amended answer, which it did (p. 4). Argument was then had upon the motion to strike the amended answer (p. 27). The Court adhered to its opinion delivered upon the motion to strike the original answer (p. 87), whereupon the order for summary judgment was made (p. 88).

The Facts.

The amended answer having been stricken as frivolous, there can be no controversy here with respect to the facts. We have, generally speaking, taken the facts from the complaint and the amended answer.

On or about March 6, 1933 defendant Trust Company closed, as a result of the proclamation of the President of the United States declaring a National Banking holiday followed by a proclamation of the Governor of New Jersey authorized by the laws of 1933, P. L. 1933, page 1448, approved March 6, 1933; (par. 2, amended answer, second defence, p. 8, Ex. 1, p. 19, Ex. 2, p. 22); plaintiffs, executrices, were ordinary depositors in defendant bank to the extent of \$7,780 (par. 7 of complaint); on March 9, 1933 the President of the United States issued a proclamation continuing the terms of the proclamation of March 6, 1933, Congress in the meantime having passed legislation upon the subject, (act of March 9, 1933, amending section 5B of the act of October 6, 1917 an act relating to Banks, title "An Act to provide relief in the existing national emergency in banking and for other purposes" 12 U. S. C. A. Banks and Banking, pocket part, 1934, section 95a, p. 50, Ex. 3, p. 23); on March 10, 1933 the President of the United States issued an executive order prescribing the terms and conditions under which any member bank of the Federal Reserve System would be permitted to reopen (Ex. 1, annexed to the affidavit of Werden C. Goodemott, offered by defendant bank on motion to strike, p. 77; par. 2, second defence, amended answer); defendant bank was a member of the Federal Reserve System; it applied for permission to reopen under the terms of the executive order of March 10, 1933; its application was denied and the Commissioner of Banking and Insurance of New Jersey refused to permit it to reopen because of its financial condition; it could not qualify for Federal deposit insurance, which was required of member banks of the Federal Reserve System (pars. 3 and 4, amended answer, second defence, p. 9; on March 19, 1933 the Commissioner of Banking and Insur-

ance permitted it to reopen for *restricted* business only as authorized by an act approved February 21, 1933 (chapter 27 laws of 1933, P. L. 1933, p. 43, as amended, Ch. 66, P. L. 1933, p. 125); under the terms of that act and the orders of the Commissioner of Banking and Insurance issued in pursuance of its authority, defendant bank was not permitted to pay any amounts to its depositors, including plaintiffs; while it was permitted to receive deposits those deposits were ear-marked and given priority (par. 4, amended answer, second defence, p. 10); defendant bank was insolvent and continued insolvent until after the reorganization, as a result of which it reopened for business on May 7, 1934 and, had its assets been liquidated in the ordinary way, its depositors would not have received in excess of forty per cent. of the amounts of their deposits and then only after a four year liquidation, (par. 6, amended answer, second defence, p. 10; par. 2 fourth defence, p. 16; par. 13, affidavit of Goode-mott, p. 76); the condition of defendant bank was not an exception; banking institutions over the entire United States were in the same condition and the existence of a National emergency, as well as a State emergency, was recognized; had the assets of financial institutions in the same condition as defendant bank been liquidated, chaos would have resulted with great loss to the depositors of those institutions; the National Government authorized the Reconstruction Finance Corporation to advance funds, under certain conditions, to financial institutions throughout the country for purposes of reorganization; no other source was available; in the light of this condition, the Legislature of New Jersey passed the act, approved April 12, 1933, chapter 116, laws of 1933, P. L. 1933, p. 241, which authorized banks and trust companies, with the approval of the

Commissioner of Banking and Insurance, to amend their charters or certificates of incorporation to provide for the issuance of one or more classes of preferred stock and which also provided that any such institution as had not been authorized by the Commissioner of Banking and Insurance or the Secretary of the Treasury, if the banking institution was a member of the Federal Reserve System, to perform all of its usual banking functions, might be reorganized by issuance of preferred stock and under a plan of reorganization (as the act was amended by chapter 287 of the laws of 1933, approved June 23, 1933, P. L. 1933, p. 770) which would become effective when approved by the Commissioner of Banking and Insurance as fair and equitable to all depositors, other creditors and stockholders and in the public interest and when, after such notice of reorganization as the Commissioner of Banking and Insurance might require, the holders of 75% of the total deposits and other liabilities and the holders of $66\frac{2}{3}\%$ of the stock should have consented in writing to the plan (par. 6, amended answer, second defence, p. 10); the Federal authorities refused to permit any bank, a member of the Federal Reserve System, to reopen until it should become a party to the Federal Deposit Insurance System, which required the intervention of the Federal Deposit Insurance Corporation as a guarantor of the deposits to a limited amount (par. 7 amended answer, second defence, p. 12; act of Congress approved June 16, 1934, title 12 U. S. C. A. Pocket Part, 1934, section 264e, p. 72); after March 19, 1933 a Committee was formed for the purpose of developing a plan of reorganizing defendant bank; such a plan was developed and it provided, in substance, for: the issuance of preferred stock to the Reconstruction Finance Corporation to secure \$250,000; the payment in cash

to the depositors of fifty per cent. of their deposits, ten per cent. more than they would have received had the Bank been liquidated; the issuance to the depositors of class B preferred stock to the extent of twenty-five per cent. of their deposits; the issuance to the depositors of a participation certificate in the assets of a company to be organized to hold certain assets of defendant bank which the Federal and State authorities declined to permit to be carried as assets of the reorganized institution to the extent of the remaining twenty-five per cent. of their deposits (for a full discussion of the effect of the issuance to depositors and other creditors of Class B preferred stock see pp. 19, 41 and 61 of this brief. It did *not*, in practical effect, convert them from creditors into stockholders); the issuance of Class B preferred stock to common stockholders or others, for \$150,000 cash to be paid by them: the retention by common stockholders of their common stock reduced to a nominal value and with very limited voting rights (pp. 24, 54) which served as an inducement to such stockholders to consent to the plan and to purchase Class B preferred stock at fifty, with a par of twenty-five, to furnish necessary capital for the *benefit of the depositors*; under the plan, no common stockholder could receive any benefit until the claims of depositors and other creditors, as recognized by the plan, had been liquidated in full (par. 8, amended answer, second defence, p. 13; Ex. 4, annexed to amended answer, p. 24; Ex. B annexed to motion to strike amended answer, par. 5, p. 44); the plan was circulated among all interested, including plaintiffs; claims of depositors and other creditors were duly passed upon; the Commissioner of Banking and Insurance, after due consideration, declared the plan fair and equitable as to all depositors, other creditors and stockholders and in the public inter-

est; no steps were taken by plaintiffs, although they had full knowledge, or by any other creditor or stockholder, either to review the action of the Commissioner or to enjoin the putting into effect of the plan (par. 9, amended answer, second defence, p. 14); the plan was duly approved by the requisite percentage of depositors, creditors and stockholders; it was declared effective and the Reconstruction Finance Corporation advanced \$250,000 for which it received preferred stock; depositors and other creditors and stockholders surrendered their respective rights, whatever they were, and took in exchange the rights and securities to which they were entitled under the terms of the plan; the capital structure of defendant was completely changed as required by the plan and new securities were issued, the certificate of incorporation of defendant bank having been amended in pursuance of the permission of the statute by an amendment approved on April 23, 1934 by the Commissioner of Banking and Insurance (Ex. B annexed to notice of motion to strike, p. 41; par. 10 amended answer, second defence, p. 15); on May 7, 1934 defendant bank opened for the conduct of its business in the usual manner and it has since been operating, reorganized as above set forth, receiving deposits, paying out monies and the like (par. 11, amended answer, second defence, p. 15); on or about May 7, 1934 defendant bank paid and, with full knowledge of all of the facts, plaintiffs received, \$4,125.47, fifty per cent. of their deposit with interest; defendant bank, in pursuance of the plan, charged the deposit of plaintiffs fifty per cent. and issued for that fifty per cent. the securities required to be issued by the plan; the securities were tendered but plaintiffs refused to take them (par. 11, amended answer, second defence, p. 15); the last certificate showing full compliance with the

plan by defendant bank was filed July 5, 1934 (p. 61); the stockholders by a vote of 20,175 out of a total number of shares of capital stock of 28,000, adopted the amendments to the certificate of incorporation proposed by the directors by their resolution of February 17th, 1934 (Ex. B attached to notice of motion to strike the amended answer, p. 41), at a meeting of stockholders held February 27, 1934 which amendments provided for the issuance of the preferred stock, the rights of the stockholders and the rights of the Reconstruction Finance Corporation as a preferred stockholder and made the necessary changes in the certificate of incorporation required by the plan of reorganization; no stockholder voted against the approval of the amendments (p. 61); plaintiffs had full knowledge of the proposed plan and only refused to sign a consent because, as they said, their estate was in liquidation (affidavit of Peale, par. 2, p. 67; of Hughes, par. 2, p. 68; of Olliger, par. 2, p. 69; of Bowers, par. 2, p. 70; offered by defendant bank); the first intimation that defendant bank had that plaintiffs insisted upon payment of the full amount deposited was the receipt of the letter of July 20, 1934 from their counsel (Ex. C attached to the notice of motion to strike the amended answer, p. 66); [and it is significant that in *that* letter plaintiffs did not rely upon any rights based upon the unconstitutionality of the legislation under which the plan of reorganization was effected, but rather upon the alleged fact that defendant bank was in a position of a trustee for plaintiffs' particular deposit because of the circumstances under which monies had been deposited and that they were, by reason of that fact, under the plan of reorganization (p. 24), entitled to rights other than those of ordinary depositors, (par. 5 complaint, p. 2) which contention was overruled by the court below in its opinion which

led to the striking of the original answer (p. 86) and was not pressed on the application to strike the amended answer (notice of motion to strike, p. 27; affidavit of plaintiff, Grace F. Grossman, attached to notice of motion to strike, p. 62)]; plaintiffs did nothing until they issued their summons and complaint on or about September 2, 1934; the complaint relies upon the trust theory (par. 5, p. 2) rather than upon the theory of the unconstitutionality of the legislation; the first intimation that defendant bank had that the constitutionality of the legislation was to be questioned was when the notice of motion to strike the original answer was served on or about October 22, 1934.

The facts above stated must be considered as correct for they are either admitted or there is dispute which requires the matter to be submitted to a jury.

While the motion was to strike the amended answer both as frivolous and sham (p. 27) the Court struck only as frivolous (p. 88).

It will be at once observed that the effect of the judgment is to permit plaintiffs to take the benefit of the reorganization plan and then to repudiate it; to recover the full amount of their deposit when, if it had not been for the reorganization plan, plaintiffs could not have gotten more than forty per cent. of their deposit and then only after a period of approximately four years of liquidation (par. 13, affidavit of Goodemott offered by defendant bank, p. 76). The result is an appropriation to the use of plaintiffs of monies advanced by the Reconstruction Finance Corporation and by other depositors and stockholders and others without consideration given by plaintiffs; instead of plaintiffs *being deprived of their property rights*, monies and property of *others* is appropriated for *their* benefit. The result would

seem to indicate that the process of reasoning by which it was reached must be wrong.

The Opinion Below.

The opinion below is printed at page 79. It rests upon the theory that Chapter 116 P. L. 1933, page 241, as amended by Chapter 287 P. L. 1933, page 770, insofar as it provides in paragraph 7 for a reorganization which will be binding upon all the depositors and other creditors, if approved in accordance with the statute, is unconstitutional in that it violates paragraph 3, section 7, Article 4 of the New Jersey Constitution, which provides that the Legislature shall not pass any " * * * law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made" and also in that it violates Article 1, section 10 of the Constitution of the United States which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts", and also in that it violates the Fourteenth Amendment to the Constitution of the United States, section 1, which provides that no state shall pass any law depriving a person of property without due process nor deny to any person within its jurisdiction the equal protection of the laws. And, upon the reasoning of the court below, the act would also be unconstitutional in the respect aforesaid as in violation of the due process provision implied in Article 1, section 1 of the Constitution of New Jersey as amended.

The court held that the reason that the act is unconstitutional as in violation of the various constitutional provisions securing due process is that the statute requires "only the determination of the corporation itself as to the propriety of the change in obligation to the creditor and the con-

sent of the Commissioner of Banking and Insurance". The statute requires more than this. It requires the consent of 75% of the creditors and depositors and 66⅔% of the stockholders and we submit that the plan does not contemplate any "change in obligation" for the right of the creditor, the institution being insolvent, was to be treated *fairly and equitably* and his rights were cognizable in *equity*, not law. That is so under the general law and is so by statute for, under the statute as it existed at the time plaintiffs entered into business relations with the bank they could assert no rights against defendant bank or its assets except in equity, and the bank might be permitted to reopen with the consent of the Commissioner of Banking and Insurance and upon *such conditions* as may be imposed by him (pp. 23, 24 of this brief).

While it is true, as stated by the Court, that there is no *express* provision in the statute for judicial review, any person interested may appeal to the Supreme Court for certiorari to review the action of the Commissioner or to a court of equity to enjoin the putting into effect of the plan or may perhaps sue at law for damages, alleging the unfairness of the plan.

Upon the general matter of unconstitutionality the Court refers to *Moore v. Splitdorf Electric Co.*, 114 N. J. Eq. 358, which involved a purely private corporation; *Baldwin v. Flagg*, 43 N. J. L. 495; *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, both of which involved the purely private relationship of mortgagee and mortgagor, the effect of the statutes considered being to appropriate the property of the mortgagee for the benefit of the mortgagor; and *Shams v. Nebraska State Bank*, 48 Fed. (2d) 894 (1931), which must now be read in the light of *Doty v. Love*, decided April 1, 1935, Adv. Op. No. 11, 79 L. Ed. 632,

and the reorganization plan considered in the *Shams* case involved a release of the statutory stockholders' double liability *imposed for the benefit of depositors*.

It is significant, as will be hereafter argued, that the decision of the Court in *Shams v. Nebraska State Bank*, and the effect of the judgment which the Court intimated would be entered would seem to indicate that the judgment entered in the instant case, which permits execution against the *reorganized* bank for the full amount of the balance of the deposit, is erroneous and that the judgment should be so framed as that, if execution be issued upon it, the plaintiffs could not recover more than they would have recovered upon a liquidation of the assets of defendant bank as those assets existed prior to the reorganization. The Court said, 48 Fed. (2d) 897:

“But, though the plaintiff is so entitled to judgment, *the form and measure of his relief is controlled by the facts and the situation. He is not entitled to any judgment operative upon the reorganized bank nor to any execution or relief against the same.* It incurred no liability of any kind to the plaintiff beyond the obligation to account to him for a proportionate amount of the assets of the old bank taken by it. This court should and does take notice of the tender made by the reorganization.”

While it is true that the technical steps taken in the reorganization involved in the *Shams* case were somewhat different from those taken in the instant case, the practical result was the same. The reorganized institution in the *Shams* case had the same charter as the old bank, amended in pursuance of the plan, but the Court, in effect, held that it was “to all practical intent a new corporation” as the bank contended and directed the molding of its judgment accordingly. The Court

molded its judgment at law as if the plaintiff were in equity for the same reasons as set forth in the third and fourth separate defenses of the amended answer (p. 16), the fourth separate defense suggesting that, if plaintiffs have *any* remedy, it is in equity. We have no knowledge of a method in this State of moulding a judgment at law in the manner indicated in the *Shams* case. Nebraska has no separate court of equity and hence the direction of the United States District Judge to mould the judgment as if the suit were in equity assuming undoubtedly the application of the Conformity Act of Congress which requires the Federal Courts to follow state practice on the law side. *Equitable* not legal relief was granted in the *Shams* case. To obtain *this* relief which is all to which plaintiffs can possibly be entitled, if they are entitled to *any* relief, in this state plaintiffs must sue in *equity*.

The Court below suggested (p. 84) that the act could not be sustained as emergency legislation because there is no provision in the statute indicating that it was passed *as such*. Counsel writing this brief does not contend, and hopes he never will contend, that emergency *creates* a power. The Court may, however, in answering the question whether legislation has a reasonable relationship to a legitimate end to be accomplished, where a public business and rights connected therewith are involved, look at the conditions existing at the time of the passage of the legislation, which conditions the legislation was designed to meet. Only by so considering the conditions existing, can the Court determine whether the legislation is reasonable and within the police power. If we are to look, as we submit we must, at the conditions existing at the time of the passage of the legislation which the legislation is designed to meet, not as a justification for the *creation* of a power

but as a justification for the *exercise* of a power always existing, then it is wholly immaterial whether the legislation *upon its face* assumes to have been passed to meet an emergency or whether it is silent upon that subject, and the cases so hold. And we must, we submit, keep in mind that we are not *necessarily* concerned with any "emergency" of a *general* nature.

Insolvency is always an "emergency" so far as those interested in the insolvent are concerned. A general emergency may make the "emergency" of those directly concerned the greater as it did in the instant case, and because of the "greater emergency" created by general conditions, acts may have to be performed, *in the interests of these directly concerned*, which, under different conditions, would not be necessary and therefore would not be justified. The fairness and equity of a plan is to be determined as of the time it is to be put into effect and *all conditions* are to be considered in reaching a determination. The primary concern is the effect on the interests of those directly connected with the insolvent, in this case the depositors.

The legislation sustained in the following cases did not recite the existence of an emergency, although it was passed to meet conditions which may be called "emergent" and, had not the "emergent" conditions existed, the legislation might have been held unreasonable. *Doty v. Love*, (Supreme Court of the United States, decided April 1, 1935), Adv. Op. No. 11, 79 L. Ed. 632; *Milner v. Gibson*, 249 Ky. 594, 61 S. W. (2d) 273; *McConville v. Fort Pierce Bank & Trust Co.*, 101 Fla. 727, 135 So. 392.

It is not essential that so-called "emergency" legislation contain *any* time limit. Again, if we consider the conditions which we call "emergent," not as creating a power but as presenting a situa-

tion which makes the legislation *reasonable*, it is obvious that, whenever the legislation is sought to be applied, the reasonableness of the then sought application of the legislation is to be decided as of *that* time, and the courts have so held. *Chastleton Corporation v. Sinclair*, 264 U. S. 543, 68 L. Ed. 841; *Des Moines Joint Stock Bank v. Nordholm*, 253 N. W. 701 (Iowa); *In re Opinion of the Justices*, 278 Mass. 607, 181 N. E. 833; *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. Ed. 690.

The inclusion of a time limit in so called "emergency" legislation is more likely to render that legislation unconstitutional than to be an aid in holding it constitutional, if the limitation of time is construed to limit the power of the courts to judge the reasonableness of the application of the legislation as of the time it is sought to be applied.

The great difficulty which is occasioned in these cases is due to the persistent confusion between the thought of "emergency" as creating a power which it does not do, and "emergent" conditions as making reasonable a particular exercise of a power which, under other conditions, would be arbitrary and unreasonable.

The court below fell into error when it said (p. 84) "The trend of the decisions in both federal and state courts seems to be against any statute requiring a creditor to take a lesser amount for his debt *as against his ratable share in the assets of his debtor*" if the court means to imply by this statement that the plan of reorganization in the case at bar contemplates that the creditor is required "to take a lesser amount for his debt as against his ratable share in the assets of his debtor." On the contrary the plan of reorganization here involved contemplates that the depositors and other creditors should get every dollar of their ratable share in the assets of defendant bank

as those assets existed just prior to reorganization. The plan took nothing from the depositors and other creditors *except the supposed right to insist upon a forced liquidation of the assets of defendant bank* which would have, in four years, netted them not in excess of forty cents on the dollar, in exchange for which it gave them fifty cents on the dollar in cash plus securities which would bring to them the proceeds of the liquidation of the assets in an orderly manner. We repeat that the plan took nothing from depositors and other creditors except this supposed right which, we submit, did not exist, as will be hereafter argued. We are here dealing with a business of a public nature.

The common stock retained by stockholders as they existed before reorganization was of but a nominal value and could become valuable only as a result of future operation with assets contributed by Reconstruction Finance Corporation, stockholders and others in which depositors had only the interests voluntarily given them and after the preferred stock issued to depositors and other creditors should have been retired for common stockholders are entitled neither to dividends nor other payment until all preferred stock shall have been retired (Ex. B annexed to motion to strike, par. 5, p. 44). All *assets* of the *insolvent* bank were first appropriated for the benefit of depositors. The consideration for the retention of this stock was the inducement held out to stockholders to: consent to the plan; purchase class B stock; contribute to the good will of the reorganized bank. All of this was needed for the benefit of *depositors and other creditors*.

In dealing with the matter of estoppel as set up in the original answer (now set up in the fifth and seventh separate defenses of the amended answer (pp. 17, 18)), the court below held: (1) that there

was nothing in the affidavits to sustain the contention that plaintiffs either "did some act which induced the person who is asserting estoppel, to act, or that the plaintiffs stood by silently with knowledge, when they should have spoken"; (2) that defendant bank is without right to assert the estoppel and that "If there were any defense of estoppel, it would be a right of the Reconstruction Finance Corporation, and it is not a party to this suit."

The court may have treated the defense of estoppel as presented upon the application to strike the original answer as sham. It did not do so upon the application to strike the amended answer. It could not do so for the affidavits supported the defense. It struck the amended answer, with *all* of its defenses, as *frivolous*, not sham.

We will argue the matter of estoppel more *in extenso* later. We here submit that there was a clear estoppel by a standing by without objection while the plan of reorganization was made effective, which permitted the payment to plaintiffs of 50% of their deposit by the use of moneys of the Reconstruction Finance Corporation and stockholders and others which would not have been contributed if the plan had not become effective, and a taking advantage of the plan to the extent that it benefited plaintiffs, and a repudiation of it to the extent that plaintiffs considered it hurt them. That this is equitable estoppel and that it is available at law, we submit, is indicated by *Sun Dredging Co. v. Ottens*, 84 N. J. L. 740; *Wysokowski v. Polish American, etc. Ass'n*, 95 N. J. L. 352; *Carlisle v. Cooper*, 21 N. J. Eq. 576 at page 591; *Todd v. Exeter Land Co.*, 104 N. J. Eq. 431-435.

The defendant bank may properly present the estoppel for it represents all classes of the holders of its securities and the estoppel runs in favor, not only of the Reconstruction Finance Corpora-

tion, but of every stockholder and of every depositor and creditor who acquiesced in the plan, and of every depositor who has placed his deposits in the institution since it reopened on May 7, 1934, upon the faith of the fact that the bank was operating under the reorganization plan freed from any liabilities to its old depositors and creditors other than those recognized by the plan of reorganization, of the Federal Deposit Insurance Corporation, which insured the deposits to a certain extent upon the same assurance or, in other words, in favor of everyone connected with the bank and therefore in favor of the bank itself, the duty of the bank being to protect its assets for the benefit of those legally and equitably interested in them. And the facts which support the estoppel, support *waiver* and, plaintiffs having *waived* their supposed rights which are supposed to support their present action, cannot maintain that action against defendant bank. *The rights are gone.*

The court below, we submit, took entirely too narrow a view of the practical effect of the reorganization when it held (p. 86) that the suit was against "the original debtor" and that therefore the third defense set up in the amended answer (p. 16) was not good. And in this connection we again refer to the observations of the District Judge in *Shams v. Nebraska State Bank*, 48 Fed. (2d) 894 at page 897.

The Statute.

The first six sections of chapter 116 of the Laws of 1933, P. L. 1933, page 241, provide for the issuance by banks, trust companies and savings banks of preferred stock and for the determination of the rights of preferred stockholders. Section 7 of the act, as it was amended by chapter 287 of the Laws of 1933, page 770, provides:

"7. Any such bank, trust company or savings bank which has not been permitted or licensed by the Commissioner of Banking and Insurance, or by the Secretary of the Treasury, if said bank or trust company is a member bank of the Federal Reserve System, to perform all of its usual banking functions, may be reorganized for the resumption of its normal and usual banking business by the issuance of preferred stock as hereinabove provided, or otherwise. Any reorganization plan may provide for the issuance of preferred stock to all of the depositors and other creditors of such bank or trust company or savings bank, and may provide that each creditor and depositor must subscribe at least a certain percentage of his claim for said stock. Any reorganization plan shall become effective (1) when the Commissioner of Banking and Insurance shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe, and (2) when, after such notice of such reorganization as the Commissioner of Banking and Insurance may require, (a) depositors and other creditors of such bank, trust company or savings bank representing at least seventy-five per centum (75%) of its total deposits and other liabilities as shown by the books thereof, and (b) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books thereof, shall have consented in writing to the plan of reorganization; provided, however, that claims of depositors or other creditors which under existing law are entitled to full and immediate payment, even though said bank, trust company or savings bank is operating on a restricted basis, shall not be included among the total deposits and other liabilities of said bank, trust company or savings bank in determining the seventy-five per centum (75%) thereof as above provided."

Section 8 of chapter 116 of the Laws of 1933, P. L. 1933, page 244, provides:

“8. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, trust company or savings bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.”

This statute must be considered in connection with chapter 22 of the Trust Company Act as it was amended by chapter 255 of the Laws of 1931, page 641, in effect prior to plaintiffs making their deposit, which in part provided for the taking over by the Commissioner of Banking and Insurance of the assets of any trust company which was insolvent, or which was conducting its business in an unsafe or unauthorized manner, and the liquidation by him of its assets, and (p. 642):

“Upon taking possession of the property and business of any such trust company by the commissioner, all judgments, decrees, levies and executions against the property of the trust company shall be thereafter stayed until otherwise ordered by the Court of Chancery. Such trust company may, *with the consent of the commissioner, resume business upon such conditions as may be approved by him.*”

And (p. 644):

“Claims presented after the expiration of the time fixed in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the commissioner equitably applicable thereto.”

The statute must also be read in connection with chapter 27 of the Laws of 1933, P. L. 1933,

page 43, as amended by Chapter 66 of the Laws of 1933, approved March 14, 1933, P. L. 1933, page 125, the so-called Altman Act, which gave the Commissioner of Banking and Insurance power and authority

“(a) To direct the postponement for any length of time of the payment of all or any proportion of the deposits in either demand or time accounts of any individual, firm or corporation as he may deem necessary and expedient, to be determined by him according to the ability of any bank, trust company or savings bank to pay such withdrawals.

(b) To direct all such banks, trust companies and savings banks to thereafter receive new deposits under a trust agreement to be approved as to form by the Commissioner of Banking and Insurance, which moneys so received shall be, subject to the terms of said agreement, always available to the depositors.

(c) Whenever the Commissioner of Banking and Insurance shall direct any bank, trust company or savings bank to act under the provisions of this act, he is hereby empowered to make and adopt such rules and regulations as he may deem proper for the protection of the institution and may require daily reports in detail touching their financial condition.

(d) All moneys received by any such bank, trust company or savings bank as new deposits pursuant to the provisions of this act shall be given preference over all debts and liabilities of any such bank, trust company or savings bank, except the preferences, now accorded by statute.”

Chapter 116 of the Laws of 1933, P. L. 1933, page 241, was then passed as an integral part of legislation looking toward the protection of the rights of depositors in embarrassed institutions.

This court in *Maurello v. Broadway Bank & Trust Co. of Paterson*, January 10, 1935, 176 Atl. 391, 114 N. J. L. 167, applied the Altman Act and did not question its constitutionality. It held that the act prohibited a suit against a bank to recover deposits where the Banking Commissioner had acted under the terms of the act. It said:

"The precise point made is that 'the court misconstrued the Altman Act, P. L. 1933, c. 27, as amended by P. L. 1933, c. 66 (N. J. St. Annual 1933, sec. 17-73), as prohibiting the bringing of any law action against a bank operating under the act to recover moneys deposited in the bank,' and the argument thereon is, in essence, that, although the act gives to the commissioner of banking and insurance the power to postpone the payment of demand or time accounts, it does not stay lawsuits to recover such accounts and that there is no intimation in the statute that the Legislature intended to prohibit the bringing of a lawsuit against the bank. We think that the prohibition against the payment of demand and time deposits carries as a necessary corollary the intention to prohibit suits for the recovery of such deposits."

ARGUMENT.

Preliminary.

I think that plaintiffs will be obliged to concede that, had the challenged legislation affected only the rights of stockholders, no claim could be made that it would be unconstitutional, but plaintiffs insist that, because the relationship between a depositor and a bank is that of debtor and creditor the usual incidents (there is dispute as to what those *usual* incidents are, plaintiffs apparently insisting that one of them is the right to

insist upon forced liquidation in the event of insolvency, which insistence is resisted by defendant bank) of such a contractual relationship cannot be disturbed as the result of legislation.

The theory upon which the courts have held, where a purely private business is involved, that there are limitations upon the right of the legislature, by legislation adopted subsequent to incorporation or the issuance of the stock, to change the relationship of stockholders under the reserved power to alter or amend charters is that there is a *contract* between the stockholders *inter sese*. *Kean v. Johnson*, 9 N. J. E. 401; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. E. 178; *Allen v. Francisco Sugar Co.*, 92 N. J. E. 431.

Yet the courts have held that, even where a purely private business is involved, the rights arising out of the supposed contract of the stockholders *inter sese* may be changed to some extent. *Berger v. United States Steel Corp.*, 63 N. J. E. 809 at page 825. In that case this court conceived that, even in the case of a purely private business, public interest and public policy might be considered as justifying a change in rights accomplished as the result of legislation passed after incorporation and the issuance of stock.

If the contract between the depositor and the bank is purely that of creditor and debtor, and we submit it is more, the contract has no more sanctity under the constitution than the supposed contract between stockholders *inter sese*.

In many of the cases in which the courts have held that the Legislature might, to some extent, affect contract rights, the rights of creditors have been involved. Thus in *Polk v. Mutual Reserve Fund Asso. of N. Y.*, 207 U. S. 310, 52 L. Ed. at p. 229, a change which affected the nature of the business against the will of minority stockholders was sustained by the Supreme Court of the United

States notwithstanding *contract rights* of stockholders based upon policies of insurance. And so in *Noble Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590, affirmed by the Supreme Court of the United States, 219 U. S. 575, 55 L. Ed. 341, which sustained the propriety of legislation making one bank responsible for the debt of another, the rights of depositors were affected. And so *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, which sustained legislation providing for the regulation and control of rates and premiums, involved purely private contract rights.

It is a mistake, however, we submit, to say that the relationship between a bank and its depositor is, under *all* circumstances, *purely* that of debtor and creditor. The statement is true enough for ordinary purposes. The use of the expression arose because of an early insistence that there was a relationship of trust. It was a convenient expression adopted by the courts to indicate that a bank was not supposed to hold the money of its depositors in its vaults or to account for the money as a trustee, *but*, for *certain* purposes, the relationship between a bank and its depositor is more than that of mere debtor and creditor. In *Brex v. Smith*, 104 N. J. E. 386, the Court of Chancery held that a bank would be enjoined from giving information with respect to the accounts of its depositors to the Prosecutor of the Pleas. Such an injunction would not have gone had the relationship between the bank and the depositor been that *merely* of debtor and creditor.

When a depositor makes a deposit in a bank he realizes that he is entering into business relationship with an institution charged with the conduct of a public business and that *the credit extended by him to the bank is the basis of credit extended*

by the bank, the instant withdrawal of which may cause a public calamity. The credit which he extends to the bank is a credit which he knows will be used in the conduct of a business charged with a public interest. *The credit which he extends is no less embarked in the conduct of a business charged with a public interest than are the monies of the stockholders.*

If the business be one charged with a public interest and subject to regulation under the police power, the rights of *all* persons having direct contact with that business may be altered and changed in a reasonable manner, and may indeed be destroyed. *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. Ed. 77; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 275; *Bloch v. Hirsh*, 256 U. S. 135, 65 L. Ed. 865; *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242, 66 L. Ed. 595.

And see *Hoff v. First State Bank of Watson*, 174 Minn. 36, 218 N. W. 238 (1928); *McConville v. Fort Pierce*, 101 Fla. 727, 135 So. 392 (1931); *Doty v. Love* (April, 1935), Adv. Op. No. 11, 79 L. Ed. 632; *Gibbes v. Zimmerman*, 290 U. S. 326, 332, 78 L. Ed. 342, involving statutes changing the rights of depositors in banks.

Many of the cases in which changes in the rights of stockholders have been sustained involved action by the Legislature under the reserved power, but the decisions might have well rested upon the police power.

I.

Plaintiffs are not deprived of any constitutional rights secured to them either under the State or Federal constitution as the result of the operation of the plan of reorganization.

While there are four distinct constitutional provisions involved—

1. The provision of the State constitution forbidding the legislature passing an act which will impair the obligation of a contract or take away a remedy.

2. The provision of the Federal constitution forbidding a State adopting an act which will impair the obligation of a contract.

3. The provision of the State constitution securing due process of law.

4. The provision of the Federal constitution securing due process of law,—

most of the cases mentioned consider more than one of the constitutional provisions and so, in the course of the argument, the four will not be kept separate and distinct.

A.

Plaintiffs must show that, as a result of the operation of the plan of reorganization authorized by the statute, they have been deprived of some constitutional right.

It is elemental that a person cannot complain of the unconstitutionality of a statute unless, as a result of some action taken under it, *his* constitutional rights have been infringed.

It is not enough that action *may* be taken under a statute which will infringe the constitutional rights of a party. In the instant case, unless the plan of reorganization which has been adopted takes away property of plaintiffs either without due process¹⁶ of law or in a manner which impairs the obligation of their contract or takes away a remedy, plaintiffs cannot complain. *Lang vs. Bayonne*, 74 N. J. L., at pp. 459, 460 (Court of Errors & Appeals); *State vs. De Lorenzo* (Su-

preme Court), 80 N. J. L., at pp. 502, 503; *State vs. James* (Court of Errors & Appeals), 96 N. J. L., at pp. 143, 144; *Commercial Trust Co. vs. Hudson Tax Board* (Court of Errors & Appeals), 87 N. J. L., at p. 184; *Rindge Co. vs. Los Angeles County*, 67 L. Ed. 1186, 262 U. S. 700.

It is hard to see how *any* plan of reorganization adopted in pursuance of the permission of the statute could infringe the constitutional rights of any person interested in the institution because the plan must be "fair and equitable."

B .

The business of banking is of a public nature and the rights of all connected therewith are subject to regulation by the legislature and the legislature may by that regulation reasonably affect the obligations of contracts and the remedies for their enforcement.

The matter came before the United States Supreme Court in *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590 affirmed by the Supreme Court of the United States in 219 U. S. 104 (1911), 55 L. Ed. 112, explained on rehearing in 219 U. S. 575, 55 L. Ed. 341 (1911). The Court held that the Legislature had the power to make one bank responsible for the debts of another. And, Mr. Justice HOLMES, delivering the opinion of the Court, said (55 L. Ed. at p. 116):

"Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state

thinks that the *public welfare* requires the measure under consideration, analogy and principle are in favor of the power to enact it.”

And further—

“We cannot say that the public interest to which we have adverted and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe.
* * *

The legislation attacked in the above case not only affected stockholders of the banking institutions involved but likewise their depositors.

And see *Citizens State Bank v. Strayer* (Sup. Ct. Neb., 1926), 114 Neb. 567, 208 N. W. 662; *Schaake v. Dolley* (Sup. Ct. of Kans., 1911), 85 Kan. 598, 118 P. 80; *Challenberger v. First State Bank of Holstein*, 219 U. S. 114, 55 L. Ed. 117; *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. Ed. 123; *Lankford v. Platte Iron Works* (1914), 235 U. S. 461, 59 L. Ed. 316; *National Liberty Ins. Co. v. Bank of America*, 214 N. Y. Sup. 643 (1926).

In *Craughwell v. Mousam River Trust Co.*, 113 Me. 531, 95 Atl. 221 (1915), the Court said at page 222:

“Banking is necessarily a delicate business. To be successful it must retain public confidence. * * * If a bank were a private institution, and the consequences which we have referred to were to visit only those who have chosen to associate together as stockholders, those consequences would be lamentable, but endurable. *But a bank is not merely a private institution.* It is in a very important sense a *public institution*, in that the public are deeply concerned in its well being. Its welfare affects not only its stockholders, but also its depositors. *And besides stockholders*

and depositors, the business public itself is concerned. The general well being of the public is affected by the success or downfall of the banks, which feed the arteries of business."

In *Cartmell v. Commercial Bank & Trust Company* (Ct. of App., Ky., 1913), 153 Ky. 798, 156 S. W. 1048, 1049, the Court said:

"Banks are to the Commercial world what arteries are to the human system."

In *In re Opinion of Justices*, 278 Mass. 607, 181 N. E. 833 (1932), the legislature had submitted to the Justices of the Supreme Court the question as to whether a proposed statute which, in effect, provided for the formation of a corporation to be known as the "Mutual Savings Guaranty Fund, Inc." which was to assist member banks temporarily in need of cash by advancing funds against "slow securities" in their portfolio, and that the moneys should be obtained by assessment made proportionately upon the member banks requiring each to deposit in cash a total of not more than three per cent. of its deposits, would be constitutional. The Justices unanimously advised that the statute would be constitutional and, in so advising, stated (p. 835):

"The bill is manifestly designed to be an exercise of the police power. That power may rightly be exerted within rational limits to regulate and protect the safety of banking. In the exercise of that power the nature of securities in which investments may be made by banks may be restricted to classes deemed to be comparatively safe and devoid of speculative features. The freedom of contract on the part of savings banks may be limited in reasonable ways to accomplish the same result. Measures may be enacted to secure some

degree or co-operation between banks to the end that general solvency and financial strength may be promoted, particularly in times of panic and general depression. State supervision of the business of banking has become familiar and rests upon the same footing.

The relations between savings banks and their depositors, so far as contractual in nature, have been entered into subject to future proper exercise of the police power by the enactment of wholesome and reasonable laws for the common good. Laws of that character do not impair the obligations of such contracts. Depositors of savings banks cannot be *despoiled* under the guise of police regulations. If a very large percentage of the deposits of the member banks was required to be paid over in way of assessment for the benefit of the corporation, different questions would be presented which need not now be considered. And if the bill should be passed and in its practical operation should become hereafter arbitrary or confiscatory in operation, its validity, even though once established, would be open to future inquiry and investigation in the light of the changed economic or banking conditions. *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass. 335, 342, 343, 157 N. E. 651, 58 A. L. R. 867."

In *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. Ed. 690 (1931), the Supreme Court of the United States, in sustaining an amendment to a bank Guaranty Law which imposed special assessments upon local banks *in favor of closed banks*, said (75 L. Ed. 707):

"We see no reason to doubt the power of the legislature to extricate the banks and the administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan and to exercise a reasonable discretion in seeking this result."

In *Barrett v. Bloomfield Savings Institution* (1903), 64 N. J. E. 425 (affirmed on opinion below in 1904; 66 N. J. E. 431), Vice-Chancellor PITNEY said (p. 428):

“I have said that the question is of great importance, not so much to the parties to this cause as to the public at large, and especially to those citizens who believe that the savings bank system of this State and, indeed, of most of the other states of the Union, is of great value to the public at large. * * *”.

And see *Campbell, Rec. v. Watson*, 62 N. J. E. 396 (Pitney, V.-C.), in which banks are referred to as quasi public institutions.

In *Bingham v. Savings Invest. &c. E. Orange*, 101 N. J. E. 413, while Vice-Chancellor BACKES did not decide the case upon the ground that the institutions there involved were public institutions, he said (p. 418):

“The decision would be the same if the savings investment company were one of the companies whose franchise was to be merged and extinguished, but for a different reason. Trust companies and banks, while not public utilities, in the technical sense, for they may select their depositors, and deny borrowers, are, nevertheless, *public agencies, in the sense that through them the industry, trade and commerce of the country are carried on, and are universally recognized as affected with an important public interest, and subject to police regulation.*”

This Court affirmed but with a separate opinion (102 N. J. Eq. 302).

And see *Gierth v. Fidelity Trust Co.* (1921, in this Court) 93 N. J. Eq. 163, 165.

C.

If the business is one so charged with a public interest as that the legislature has the right to make reasonable regulations under the police power, the obligation of contracts and the remedies for their enforcement may be affected.

In *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 275 (1905), the Supreme Court of the United States said, at page 278:

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is *paramount to any rights under contracts between individuals*. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary.”

In addition it is only necessary to cite *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. Ed. 828, 70 N. J. Eq. 695, in this Court;

Pearsall v. Great Northern R. R. Co., 161 U. S. 645, 40 L. Ed. 839; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *Lord v. Equitable Life Assurance Society*, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

The last case upon the subject which we have been able to find in this court is *Hourigan v. North Bergen Township* (April 12, 1934), 113 N. J. L. 143. In that case the constitutionality of the statute creating the municipal finance commission was questioned upon the ground that the remedy for the enforcement of the debts of creditors of a municipality were affected.

This Court noticed that it was well settled that the obligation of a contract with a municipality and the remedies to enforce it could *not* be taken away. 113 N. J. L. 147. It then noticed that the legislation was of an emergent nature. Six of the Justices of this Court then, speaking by Mr. Justice HEHER, said, page 149:

"The act confers upon the finance commission, in respect of the municipality's financial affairs, powers somewhat akin to those exercised by receivers of insolvent corporations. It was designed to give support to the tottering municipalities, and to prevent complete collapse and total paralysis of function. It embodies wise and useful provisions tending to restrain and check the reckless levy of taxes, and to promote economy and the orderly conduct of the municipality's affairs. Its primary purpose is to keep intact the corporate structure, and to continue municipal function until rehabilitation can be effected.

"This is, of necessity, a proper legislative function, and the rights of creditors, in such a situation, are secondary. It is a proper exercise of the police power. *It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the pro-*

motion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. *Manigault v. Springs*, 199 U. S. 473; 26 Sup. Ct. 127; 50 L. Ed. 274; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372. The proper exercise of the police power is the highest duty of government. The state may, in some cases, forego the right of taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. *Boston, &c., R. Co. v. York County*, 79 Me. 386. As was said by Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 629; L. Ed. 629: ‘The framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and the instrument they have given is not to be so construed.’ And in *McCulloch v. Maryland*, 4 Wheat. 316, 415; 4 L. Ed. 579, 603, this eminent expounder of the federal constitution observed that it was ‘intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.’

“It has been held without dissent that the clause of the federal constitution forbidding the states to pass any laws impairing the ob-

ligation of contracts, does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the state, and the protection of the rights of individuals as may be deemed important. All contracts and all rights are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. 2 Cooley Const. Lim. (8th ed.) 1237. 'Powers which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.' *People v. Jackson and Michigan Plank Road Co.*, 9 Mich. 285, 307; 2 Cooley Const. Lim. (8th ed.) 1241."

Mr. Justice Donges wrote a separate opinion concurring, page 152.

The statute involved in the *Hourigan* case was more vulnerable than the statute in the case at bar, for the effect of the operation of the statute in *that* case was to take the property or rights of the creditors of municipalities *for public purposes without compensation*, whereas the statute in the case at bar has no such effect, its only effect being to appropriate the property of the debtor insol-

vent bank for the benefit of the depositors, *but in a manner designed to promote their own interest as well as the interest of the public*. Neither the public nor any interests involved in the insolvent institution are given any property belonging to the depositors and other creditors.

D.

Cases in other jurisdictions in which analogous statutes have been considered.

An annotation will be found to *Dunn v. Love* (Mississippi Supreme Court), 155 So. 331, as reported in 92 A. L. R. 1323 at page 1337, and reference is made in that annotation to prior annotations in the same work. The cases are also mentioned in the decision of the Supreme Court of the United States in *Doty v. Love* on appeal from the decision of the Mississippi Supreme Court (April, 1935), Adv. Op. No. 11, 79 L. Ed. 632, at page 636.

In *Milner v. Gibson* (1933), 249 Ky. 594, 61 S. W. (2d) 273, the statute was essentially like that involved here except that it provided for a court approval of the plan. The general language of the court which, by reference, was approved by the Supreme Court of the United States in *Doty v. Love*, 79 L. Ed. at page 636, is apposite. The court said, 61 S. W. (2d), at page 278:

“Banks and banking are proper subjects of legislative control and strictly within the internal police power of the state. Thompson on Corporations (1st Ed.), sec. 640; *Blaker v. Hood*, 53 Kan. 499, 36 P. 1115, 24 L. R. A. 854; *American Southern National Bank v. Smith*, 170 Ky. 512, 186 S. W. 482, Ann. Cas. 1918B, 959. They are subject to such regulations as the state may lawfully impose in the exercise of its police power to protect the welfare of the public (*Holden v. Hardy*, 169

U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780), where there are feasible reasons of public policy for them (*Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 S. Ct. 159, 50 L. Ed. 322). The state is not required to pay tribute to them or their or other private contracts at the expense of the public welfare. It is only arbitrary restraint and impairment of contracts (article 1, sec. 10), not immunity from reasonable regulations to safeguard the public interests, that the Federal Constitution prohibits. *Miller v. Wilson*, 236 U. S. 373, 35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829. Contracts being subject to legislation enacted in the exercise of the police power, it is not invalid merely because of its incidental effect upon them. *St. Louis Poster Adv. Co. v. St. Louis*, 249 U. S. 269, 39 S. Ct. 274, 63 L. Ed. 599. They must yield to the public welfare when the latter is appropriately declared and defined, and the two conflict. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420. Where made by parties, either of whom is subject to statutory regulations, they must of necessity be subject to the exercise of the sovereign power of the government to enact legislation for the protection of the general welfare. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421 Ann. Cas. 1917B, 455. When the public welfare demands the exercise of the sovereign right of the government for its protection, and private contracts intervene, they must yield to the right of the sovereign to exercise the police power. *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079."

In *Nagel v. Ghingher*, 166 Md. 231, 171 Atl. 65, 92 A. L. R. 1315 (1934), the statute provided that, upon application to the Circuit Court a dissenting depositor might "apply for the ascertainment of the fair liquidating value of his claim, stock or

other interest, which liquidating value shall be made or paid either in money or in kind'', thus differentiating the statute from that involved here. The following language of the Court, however, has application. The Court said, 92 A. L. R., at page 1321:

“It would have been impracticable for the statute to have erected explicit standards to govern the board of directors in the formulation of a plan of reorganization. The financial affairs of the numerous banking institutions present independent problems with respect to every one, since they differ in capital, assets, and liabilities, in the scope and nature of their financial operations, in their organization, management, and field of activity. *It violates no principle of law to delegate to the governing body of a financial institution the preparation and proposal of a plan of reorganization, and then to require its presentation to the bank commissioner to study and investigate the plan and to make his approval necessary before the plan may be submitted to everybody in interest for their acceptance or disapproval * * ** The provisions of the section contemplate a reasonable exercise of the power conferred, and afford no sound basis for objection on constitutional grounds.”

Now, while it is true that the statute in that case expressly provided that the dissenting depositors might have their claims liquidated by payment in money or in kind out of the assets of the closed institution, is not that precisely what the plan of reorganization in the instant case accomplishes for *all* depositors because the depositors get 50% of their deposits in cash and an interest in the assets, *which represents a distribution to them in kind*, of the assets of the closed institution.

While 25% of their deposits are represented by Class B preferred stock, that preferred stock is

evidence only of their right to a payment which must be deferred until orderly liquidation because provisions are made in the plan for the retirement of this preferred stock and the common stock has no dividend or other rights until the preferred stock shall have been retired or, in other words, until that portion of the indebtedness due to depositors which cannot be paid in cash but which may be considered as representing the remaining value of the assets which go with the reorganized institution applicable to the payment of debts if a going value is considered and opportunity be given for an orderly liquidation. The only indebtedness which is placed ahead of this 25% is that which had to be incurred to obtain new money from the Reconstruction Finance Corporation. *The new money* contributed by the *stockholders and others* is represented by the *same Class B preferred stock* which represented the 25% of the claims of depositors and other creditors. Thus the depositors are in reality favored by being placed on a parity with new money.

The courts have said, among others the Supreme Court of the United States in *Gibbes v. Zimmerman*, 290 U. S. 326, 332, 78 L. Ed. 342, and it repeated the assertion in *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632, the depositors have no vested interest in a *method of liquidation*.

In *McConville v. Ft. Pierce Bank & Trust Co.*, Florida Supreme Court, 101 Fla. 727, 135 So. 392 (1931), the court sustained a statute of Florida which permitted the freezing of all deposits of a closed institution and an order of the State Comptroller directing that the bank should pay 5% of the deposits in cash on reopening and 45% in *certificates of deposit on or before three years after date of reopening*, and that the remaining 50% of deposits of any nature whatsoever be paid on or before three years from open-

ing from the proceeds obtained from slow and doubtful paper, assets to be classified and set aside for the benefit of such depositors. A depositor sued for his deposit; a plea set up the act of the Comptroller; a demurrer was filed to the plea; it was overruled and the action of the Trial Court was sustained by the Supreme Court. The Court said, 135 So., at page 395:

“It is also insisted that the act of 1927 has the effect of impairing the obligation of contracts. Since 1913, the section in question has retained the provision that pending the possession by the comptroller, and until the affairs are placed in a sound and safe condition or a receiver is placed in control, ‘all the remedies at law or in equity of any creditor or stockholder against any such bank, banking company or banker shall be suspended,’ etc.; and it has been held that the relation of creditor and debtor always exists as between a depositor and the bank in the absence of special contract or rules to the contrary. *Bryan v. Coconut Grove Bank & Trust Co.* (Fla.), 132 So. 481; *City of Miami v. Shutts*, 59 Fla. 462, 51 So. 929.

“It is well established that all contracts are inherently subject to the paramount powers of the sovereign and the exercise of such power is never understood to involve their violation. The statute here involved is not within the provision of the Constitution forbidding a state to pass laws impairing the obligation of contracts. See *Osborn v. Nicholson*, 13 Wall. 654, 20 L. Ed. 689, and cases cited.”

And so in the case at bar, plaintiffs could not have asserted their rights against defendant bank at law. See page 21 *et sequi* of this brief and *Maurello v. Broadway Bank & Trust Co. of Paterson*, 114 N. J. L. 167.

In *Doty v. Love* (April—1935) Adv. Op. No. 11, 79 L. Ed. 632, the Supreme Court of the United

States had before it for review the *Mississippi* case reported *sub nom. Dunn v. Love* in 155 So. 331, 92 A. L. R. 1323. The statute in that case expressly provided for an approval of the plan of reorganization by the Chancellor. The Supreme Court of the United States affirmed the action of the Mississippi Supreme Court in sustaining the statute and said, 79 L. Ed. at page 635:

“If we look to the surface of the statute and no farther, there is not even colorable basis for the argument that the Constitution is infringed. All that the statute does upon its face is to *change the method of liquidation. The assets of the business are to be devoted without impairment or diversion to the payment of the debts.* As to this the statute is explicit. Act of 1932, chap. 251, sec. 3. In the discretion of the Court of Chancery a reopened bank is to take the place of the state Superintendent for the purpose of gathering in the assets and discharging liabilities. The substitution may not be made unless the court is satisfied that the reopened bank is solvent and able to satisfy the debts to be assumed. *Payment of the creditors is still the end to be attained, and resumption of business a means and nothing more.* If debts are thereby swollen or assets made to shrink, the outcome is an unlooked for incident of a method of administration conceived to be more efficient than present sale and distribution. The Constitution of the United States does not confer upon the depositors a vested right to liquidation at the hands of a state official. *Gibbes v. Zimmerman*, 290 U. S. 326, 332, 78 L. ed. 342, 347, 54 S. Ct. 140.

“The argument will not hold that the necessary operation of the statute is to subject dissenting creditors, who may be as many as one-fourth, to the will or the whim of the assenting three-fourths. The creditors favoring reorganization, though they be ninety-nine per cent, have no power under the statute to impose their will on a minority. They

may advise and recommend but they are powerless to coerce. *Their recommendation will be ineffective unless approved by the Superintendent.* Even if approved by him, it will be ineffective unless the court after a hearing shall find it to be wise and just. Upon such a hearing every objection to the plan in point of law or policy may be submitted and considered. The decree when made by the Chancellor will represent his own unfettered judgment. The judicial power has not been delegated to non-judicial agencies or to persons or factions interested in the event. Like statutes have been upheld by the courts of other states. * * *

"The Act of 1932 being valid on the surface, the question remains whether it has been so applied or interpreted in the adoption of this plan as to bring out defects that were lurking underneath * * *."

The plan involved in the *Mississippi* case contemplated the surrender of statutory liability on stock imposed for the benefit of depositors which is not the fact in the plan involved in the case at bar. Nevertheless the Supreme Court of the United States sustained the plan.

Upon this subject the Court said:

"The argument is made that a cause of action upon contract has been destroyed or given away to the prejudice of depositors in that shareholders have been released from their personal liability in return for a contribution of capital to the regenerated business. This is said to constitute a denial of due process or an impairment of contract within the doctrine of *Ettor v. Tacoma* * * *. The answer is much the same as to the argument last considered. The effect of the release has been to make it possible for the bank to be reopened with the result to the creditors of economies and other benefits that would otherwise be lost. During about two years and a half of liquidation there had been collected from the whole body of the share-

holders, representing 2,000 shares, a small percentage only of the total liability. The Superintendent expressed the belief that it might be possible in the course of many years and with great expense and labor to bring collections from these sources to a total of \$75,000. Through the method called for by the plan, capital in the sum of \$55,000 became available at once as additional security for the obligations assumed by the reorganized business. This capital was supplied by the holders of 1,100 shares, whose maximum liability was \$110,000. The liability of the other shareholders (\$90,000 at the maximum) continued unimpaired for whatever it was worth. The Chancellor found from the evidence that in all probability the moneys thus obtained as contributions to capital could not have been collected by judgment and execution, and that the depositors would be the gainers by the substituted form of payment. He reached that conclusion after a trial in the county of the vicinage with his finger on the pulse of neighborhood conditions. On appeal to the Supreme Court his findings were confirmed. Cf. *Smith v. Texley*, *supra* (55 S. D. 195, 225 N. W. 307).

In such circumstances it is idle to speak of the release of liability as a gift or a sacrifice of valuable assets. The release was none of that, but a compromise of a liability of uncertain value upon terms beneficial to the creditors."

The retention of common stock by the stockholders of defendant bank as they existed before reorganization cannot be put in the same category as the taking away of the right of depositors to insist upon a statutory liability of stockholders *imposed for their benefit* for, as pointed out on pages 9, 19, 41, of this brief the common stock so retained had but a nominal value and depositors received full consideration. And the matter goes, not to *legality*, but to *fairness*.

The claim was also made in the *Doty* case that the plan was unfair in that it deprived dissenting depositors of their rights because it contemplated the payment of small accounts in full. The Court said, page 637:

“The appellants also say that their constitutional rights were infringed by those provisions of the plan whereby a preference was granted to the holders of small claims. None of these claims (\$3,649.87 in the aggregate) was for more than \$5, and many, we were informed upon the argument, were for only a few cents. The Chancellor found by his decree that it would be more economical to pay these accounts in full than to incur the book-keeping expenses incidental to a calculation of percentages whenever dividends were paid to others. Cf. *Nagel v. Ghingher*, *supra* (166 Md. 231, 171 A. 69, 92 A. L. R. 1315). The objecting creditors have not been damaged by that feature of the plan.”

Under the next heading we will consider cases in other jurisdictions in which the statute assailed did not require a Court approval of the plan of reorganization.

E.

The fact that the statute does not require the approval by a Court of the plan of reorganization or prescribe the method of notice is not fatal.

The statute involved in the Kentucky case of *Dorman v. Dell*, 245 Ky. 34 (1932), 52 S. W. (2d) 892, did not provide for a special court review. The statute read, page 893:

“That whenever any bank or Trust Company or combined bank and trust company organized under the laws of this Commonwealth shall for any reason be suspended or

closed, or is now suspended or closed, if not less than twenty-five of the depositors therein, with deposits in excess of twenty-five dollars each, shall notify the 'Banking Commissioner' of the Commonwealth of Kentucky, in writing, that they desire to attempt to reorganize, or otherwise reopen or consolidate such bank or trust company, or combined bank and trust company with some other banking institution, a reasonable time shall be given by the 'Banking Commissioner' of the Commonwealth of Kentucky, during which liquidation of such institution shall not proceed except in such matters as may in the opinion of the Banking Commissioner be necessary for the preservation of the assets of said institution; and thereupon the depositors shall proceed without delay with the perfection of a plan and articles of agreement, outlining in general the proposed plan of consolidation or reopening, which proposed plan must be signed by deposit creditors representing seventy-five per cent of the amount of all deposits in such bank or trust company or combined Bank and Trust Company; exclusive of deposits of less than twenty-five dollars each." Chapter 19, Acts 1932, section 165a-64, Ky. Stats. 1932 Supp."

The statute *did* provide for a review by the Circuit Court of *any* act of the Banking Commissioner "in the same manner and by the same rights and powers as would have attached had such Commissioner been a receiver appointed by the Court," which right exists in this state without the aid of statute.

The Banking Commissioner had made an order suspending further liquidation upon the promulgation of a plan of reorganization by a group of depositors and then had revoked the order of suspension. The Circuit Court had set aside the order of revocation and it was from that order that the appeal was taken which was the subject matter of the review by the Court of Appeals of Kentucky. The Court said, page 894:

“The act does not authorize three-fourths of the depositors to reorganize the bank without regard to the rights of the minority, nor does it allow one-fourth of the depositors to defeat the purpose of the remaining three-fourths. If any of the depositors are hurt, it is not by virtue of the statute, *but it would be the fault of the particular plan of reorganization*. Any plan approved by the banking commissioner and the Circuit Court may be reviewed *here* at the instance of any party aggrieved. *Jennings v. Fidelity & Columbia Trust Co.*, 240 Ky. 24, 41 S. W. (2d) 537.”

The Court used other language which is applicable here. We quote 52 S. W. (2d) at page 894:

“1. It is argued that the act violates several sections of the state Constitution and the Fourteenth Amendment to the Federal Constitution, in that the obligation of a contract is impaired and due process of law is denied. The appellant does not complain that any constitutional right of his has been invaded, but that the minority of the depositors who might not concur in the plan of reorganization are in some way deprived of their vested rights, and that the obligation of the contract between the trust company and its depositors might be impaired.

“It is said that, when a bank closes its doors, each depositor thereof has a claim against the bank for the amount of his deposit which constitutes property subject to his control; that the provision of House Bill No. 84 deprives the minority depositors of the right of control over such property, and makes it absolutely subject to the arbitrary power of the three-fourths majority of the depositors. The argument is fallacious. The 75 per cent. of the depositors that concur in the reorganization agreement do not have absolute or arbitrary power over the rights of the other depositors. The bank is insolvent and unable to perform its contract with the depositors. Each of the depositors

has a claim against the bank to be paid out of the assets. It is certain that the depositors are confronted with a condition that may result in a loss. *The contract with the depositors is not impaired by the statute, which seeks merely to provide means for the mitigation of the loss already incurred.* If it is possible for a reorganization to be perfected, the loss of each depositor may be lessened. The act does not authorize the confiscation of any property. Any plan of reorganization must be submitted to the banking commissioner, and his approval or disapproval must be obtained, and his action is subject to review by the circuit court, *and by this court.* The officer has authority, and it is his duty to protect all of the depositors. *The majority, no less than the minority, must be considered.* If all of the depositors should agree upon a reasonable plan of reorganization, certainly no one could say that contract rights were unconstitutionally impaired. If any of the depositors do not join the plan, other provision may be made for the protection of their just rights. *Jennings v. Fidelity & Columbia Trust Co., 240 Ky. 24, 41 S. W. (2d) 537; Cralle v. Louisville Title Co., Ky. , 52 S. W. (2d) 891.* The sufficiency of the protection afforded would be a proper subject for consideration by the commissioner, and, if his acts were unsatisfactory to any one concerned, the circuit court is empowered to review them. Ky. St. sec. 165a-17. *The depositors have no absolute right to continue liquidation, when that course is no longer necessary to secure their rights."*

When we turn to *Jennings v. Fidelity & Columbia Trust Co.*, 240 Ky. 24, 41 S. W. (2d) 537, we find that the Court is speaking of the *general power of a Court of Equity.*

So here, while the statute does not *in terms* provide for a court review of the fairness of the plan, the remedies by certiorari and in equity are always available.

In *Lehigh Valley R. R. Co. v. Board of Public Utility Commissioners*, 278 U. S. 24, 73 L. Ed. 161, the railroads questioned the constitutionality of the statute which permitted the Board of Public Utility Commissioners to require railroads to eliminate grade crossings, and one of their grounds was that the remedy prescribed by the statute of a review by certiorari was not sufficient because the allowance of a writ of certiorari by the Supreme Court of this State is discretionary.

The Supreme Court of the United States, after considering the matter of discretion of the Supreme Court of this State in the award of its writ of certiorari, said, 73 L. Ed., at page 169:

"But if for any reason that remedy, as defined in those decisions, should not be available or be inadequate, it would seem to be clear that resort then might be had to the court of chancery. In Allen v. Distilling Co. of America, 87 N. J. Eq. 531, 100 Atl. 620, the court of chancery in New Jersey used this language:

'So long as courts of equity are to serve the purpose of the creation of the court of chancery of England,—and in this state the court of chancery is the successor, in all that such term implies, of that court,—jurisdiction must depend only upon the existence of, or a threatened wrong, and the absence of an adequate remedy at law. . . . Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the court of chancery.' "

The bank reorganization statute involved in the Minnesota case of *Hoff v. First State Bank* (1928), 174 Minn. 36, 218 N. W. 238, did not provide for notice or for a court review. The statute was not applicable to depositors who had become such prior to its enactment. It was claimed, however, that the statute deprived depositors, who became such *after* the enactment of the statute, of their property without due process of law for it made no provision as to notice prior to the action of the Commissioner of Banks or for a court review. Answering this contention the Minnesota Supreme Court said, 218 N. W. at p. 241:

“The action of the commissioner in approving the composition agreement is not a final judgment in a judicial proceeding. It is in the nature of an administrative order, and is not conclusive as against non-assenting creditors. Opportunity to be heard and to contest his action is required. But such hearing need not necessarily be given before action is taken by him. In judicial proceedings such hearing must be given before a final or conclusive judgment or decision is rendered.

* * * In other proceedings by boards, commissions and public officers it would seem to be sufficient if opportunity to be heard is given before the party affected has been concluded or deprived of property or rights. *The opportunity to be heard and to contest the order or proceedings need not be given in express terms or in the same law that provides for the order or proceeding.* State v. C., M. & St. P. Ry. Co., 38 Minn. 281, 37 N. W. 782; Pelkey v. Nat. Surety Co., 143 Minn. 176, 173 N. W. 435; Pittsburgh, C. C. & St. L. R. Co. v. Hartford, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461; C. B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *Id.*, 170 U. S. 57, 18 S. Ct. 513, 42 L. Ed. 948; Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct.

789, 48 L. Ed. 1092; *Noble State Bank v. Haskell*, *supra*; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 S. Ct. 189, 55 L. Ed. 123; *Lankford v. Platte Iron Works*, 235 U. S. 461, 35 S. Ct. 173, 59 L. Ed. 316; *Wadley S. R. Co. v. Georgia*, 235 U. S. 651, 35 S. Ct. 214, 59 L. Ed. 405.

"The action of the commissioner of banks does not expressly determine the rights of non-assenting depositors or certificate holders. It cannot be held to be conclusive as to them. They may, as in this case, bring suit directly to recover their deposits, or may by any appropriate action, contest the validity of the act of the commissioner. In such suit or action they are entitled to be heard and to present all matters that they could have presented upon a hearing before the commissioner. As said by the Nebraska court in the case cited:

'Due process of law * * * is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be obtained.'

"As to administrative proceedings, 'the party affected by them may always test their validity by a suit instituted for that purpose, and this is supposed to give him ample protection.' * * *"

The Minnesota Supreme Court, in *Paul v. Farmers and Merchants State Bank* (1932), 187 Minn. 411, 245 N. W. 832, 84 A. L. R. 1466, approved *Hoff v. First State Bank*, 174 Minn. 36, 218 N. W. 238.

The Minnesota statute contained the same provision as the statute here involved, to wit, that all depositors and unsecured creditors should be bound by the agreement to the same effect as if they had joined in the execution thereof.

It is true that the statute here involved, section 8, chapter 116 of the Laws of 1933, P. L. 1933, at

p. 244, provides that, if the reorganization shall have been approved *and shall become effective*, all depositors and other creditors and stockholders shall be bound as if they had consented, *but* this provision is subject to the *general law* (and a provision for review or notice need not appear in the statute assailed, if either under another statute or the general law a right of review exists) that any depositor or other person, conceiving himself to be injured, may review the action of the Commissioner in approving the plan either by certiorari in the Supreme Court or by bill in a court of equity. The legislation does not assume to take away those rights.

Nor does it assume that the Commissioner will not give notice and hear any persons interested. It is not necessary that notice be specifically provided for by the statute. *Hoff v. First State Bank*, 174 Minn. 36, 218 N. W. 238, at p. 242.

Nor can one complain if he has in fact received notice or has had an opportunity to review. Cases heretofore cited.

The cases of *Dorman v. Dell*, 245 Ky. 34, 52 S. W. (2d) 892; *Hoff v. First State Bank*, 174 Minn. 36, 218 N. W. 238; *Paul v. Farmers & Merchants State Bank*, 187 Minn. 411, 245 N. W. 832, 84 A. L. R. 1466, were cited without disapproval by the Supreme Court of the United States in *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632.

We repeat that, while it is true that the Minnesota statute, considered in the two opinions from Minnesota above mentioned, did not apply to depositors who had become such before the enactment of the statute, *the matter of due process, notice and the like and the binding effect of the plan upon depositors and other creditors who do not consent is precisely the same as involved in the instant case.*

The case is not, of course, persuasive upon the matter of impairing the obligation of the contracts but *that matter is disposed of*, we submit, by the decision of the Supreme Court of the United States in *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632.

We have, therefore, the opinion of the Supreme Court of the United States in *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632, disposing of the matter of the impairment of the obligations of the contract and citing a case, without disapproval, which disposes of the matter of due process of law.

The Commissioner of Banking and Insurance, when he acts in approving a plan is *not* acting in a judicial capacity, and the requisites of notice in judicial proceedings are therefore not present. His act in approving a plan is not conclusive upon any person interested who does not consent save only as a result of acquiescence. The statute does not purport to make *his approval* conclusive.

Section 8, chapter 116, Laws of 1933, p. 241, at p. 244 makes "reorganization," which "shall have been approved" and which "*shall have become effective*," conclusive. The effect of the statute is to leave to all persons interested their legal and equitable remedies and they are at liberty, notwithstanding the consent of the requisite majority of depositors and other creditors and stockholders *and* the approval of the Commissioner of Banking and Insurance, to appeal to a court to review the matter and, on such appeal, *the court has the power, and is under the duty, to determine both the law and the facts*. The requisites of due process are thus present. If this were not so then every statute which permits a merger, consolidation or other change, which will affect the rights of stockholders of a corporation, by amendment of the charter and action by the corporation and the stockholders, would have to provide for the

same sort of notice as is requisite in judicial proceedings and expressly for a judicial review, for the rights of stockholders depend upon contract.

It has never been so held and, if that were the law, then obviously all of the cases including *Bingham v. Savings Investment and Trust Company*, 101 N. J. E. 413, 416, affirmed 102 N. J. E. 302, were improperly decided.

F.

The contract of plaintiffs is not impaired and plaintiffs are not deprived of any remedy.

Much has been said already bearing upon this subject and considerable will be hereafter said. We desire to emphasize certain matters here.

We are fully aware that, unless the provision of the Federal Constitution which forbids a state passing a law that impairs the obligation of a contract is to be interpreted in the manner in which it was interpreted by the Supreme Court of the United States in *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132, our constitutional provision which forbids the Legislature passing an act which will impair the obligation of a contract or deprive a party of any remedy for enforcing a contract which existed when the contract was made is broader than the provision in the Federal Constitution. *Rader v. Southeasterly Road District of the Township of Union*, 36 N. J. L. 273; *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, at p. 598.

But in the case at bar no legal remedy which the depositors had at the time of the making of their contract is taken away as a result of the plan of reorganization. When they made their contract, by depositing their moneys, they had the right to sue the bank, obtain a judgment and issue execution, *but the moment that the bank became*

insolvent that right ceased. See the discussion upon this subject on pp. 21, 23, 60, of this brief.

Whereas, before insolvency, a depositor had the right to sue the bank and to attempt to recover his debt without regard to the rights of other depositors, the moment insolvency intervened he had *no* rights which he might prosecute without regard to the rights of other depositors for the rights of *all* then became equitable in their nature. A common trust fund was then created in which all depositors, other creditors and stockholders had equitable interests. And the trust fund, under such circumstances, was to be dealt with having due regard to the rights of *all*. The matter then became one of the administration of a trust fund in an equitable manner.

And, irrespective of the matter of insolvency, in the case at bar plaintiffs could not assert their alleged claims at law because the Commissioner of Banking and Insurance had acted under the terms of the Altman Act, ch. 27 of the laws of 1933, P. L. 1933, p. 43, as amended by chapter 66 P. L. 1933, p. 125, which statute this court applied in *Maurello v. Broadway Bank & Trust Co. of Paterson*, 114 N. J. L. 167, 176 Atl. 391.

In *Gibbes v. Zimmerman*, 290 U. S. 326, 332, 78 L. Ed. 342, 347, one of the points made against the constitutionality of the statute was that it arbitrarily deprived the depositor of a remedy for the enforcement of *stockholders liability*, which remedy was his property. And it was with respect to *that* contention that the Supreme Court of the United States said that "the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

And in *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632, the plan of reorganization involved a release of any statutory liability on the part of stockholders on the shares of stock which they held if they purchased new shares in accordance with the plan.

And in *Shams v. Nebraska State Bank*, 48 Fed. (2d) 894, the reorganization plan interfered with the right of the depositors to resort to the statutory double liability of the stockholders and *it was this right* of the stockholders of which the Court held he had been deprived and that the result was an impairment of his contract.

In *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632, the Supreme Court of the United States held otherwise.

Neither the Court below, in its opinion (p. 79), nor plaintiffs in their brief below, pointed specifically to any remedy of which plaintiffs have been deprived or to the specific manner in which their contract has been impaired.

In this State we have no double liability of stockholders and we are not confronted here with the question as to whether, under our constitutional provision, a plan of reorganization which would result in a surrender of the stock liability imposed for the specific benefit of depositors would deprive a depositor of a remedy which he had at the time he made his contract although we submit, *were* the question here, it would have to be answered in the negative. It is over *this* matter that all the controversy has raged.

G.

Cases distinguished.

We have already distinguished *Moore v. Splitdorf*, 114 N. J. E. 358; *Baldwin v. Flagg*, 43 N. J. L. 495, and *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, at page 14 of this brief.

A further word may be appropriate with respect to *Moore v. Splitdorf*. The case was decided here by a vote of five to nine. It involved a purely private corporation. The plan of reorganization, which was the subject of review, proposed that each holder of \$100 par value of debentures would receive 2 shares of the common stock of a new company, and each holder of twenty shares of common stock would receive one share of the common stock of a new company and, in addition, a right to purchase three shares of the new common stock for cash at \$5 a share. *It is obvious that the plan contemplated the appropriation of property of the debenture holders for the benefit of stockholders.* The common stockholders were thus put on a par (but in different ratio) with debenture holders from the beginning. The plan might be claimed to be neither fair nor equitable and, while this Court spoke of the right of a person interested in the assets of an insolvent company to a *conventional* sale of assets, we submit that the impelling force behind the decision of this Court was the assumed unfairness of the plan. In the case at bar that which stockholders were permitted to retain had but a nominal value and depositors received full consideration and the depositors and other creditors were *not*, in practical effect, converted, to the extent of 25% of their claims into stockholders. See discussion, pages 19, 41, 61 of this brief.

The case of *Coriell v. Morris White*, 54 Fed. (2nd) 255 (C. C. A. 2nd), cited by this court in support of the theory that a creditor is entitled to a conventional sale, if by "conventional sale" is meant, as the word indicates, an *actual* sale, does *not* so hold. The Court used the language quoted in the opinion of this Court but it did not base its decree upon the theory indicated by the language quoted. On the contrary, it said (p. 260):

"They (dissenting creditors) are *ordinarily* entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to their proportionate share of the price which would have been realized at such sale after deduction of administration expenses. *If a court of equity* can protect these rights and at the same time carry out the wish of the other creditors, who favor the plan of reorganization, it should be done. The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected.

The appellants will be fully protected *by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale.* If the appellants establish that preferences have been granted by pledging as collateral the accounts to the banks, these preferences should be regarded as invalid for the purpose of the calculations and the amount of the accounts so pledged considered as part of the assets. In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. *Geddes v. Anaconda Co.*, 254 U. S. 590, 41 S. Ct. 209, 65 L. Ed. 425, *Jones v. Missouri-Edison El. Co.* (C. C. A.) 203 F. 945. *Thus the appellants will be placed in a position of having awarded to them what would be the result if a distribution of the proceeds of a sale of the assets of the corporation had been made.* If payment is not thus made in cash, the several amounts which appellants are

found entitled to may be collected by a sale of the property transferred to the new corporation. This enables the minority creditors, in a practical manner, to obtain cash in payment, or part payment of their indebtedness. It will afford co-operation with the majority in carrying out the plan of reorganization. *Kansas City Ry. v. Central Co.*, 271 U. S. 445, 46 S. Ct. 549, 70 L. Ed. 1028. There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

The effect of this latter language was not disturbed by the reversal in the Supreme Court of the United States sub. nom. *National Surety Co. v. Coriell*, 289 U. S. 426, 77 L. Ed. 1300.

The great distinguishing feature between *Moore v. Splitdorf Electrical Co.*, 114 N. J. E. 358, and the case at bar is that the *Splitdorf* case involved a purely private business—the case at bar involves a public business.

That there is a distinction in matters of this kind between purely private corporations and rights therein, and in their assets, and corporations which are engaged in a public business and rights therein, and in their assets, is unquestioned as witness the greater power of courts to authorize receiver's certificates displacing liens where the business is one of a public nature than where the business is one of a private nature, 8, Thompson on Corporations, sec. 3656, pp. 514, 517.

It is significant that the opinion of the majority of this Court in the *Splitdorf* case, 114 N. J. Eq. 358, does not rely upon our constitutional provision against the impairment of contracts. The action of a court was there involved and not the action of the legislature. If, however, we keep in mind that the rights of parties to the enforce-

ment of their contract by legal means ceases with insolvency and that, thereafter, the matter becomes one of equity and that the rights of *all* parties must be observed and the rights of one are qualified by the rights of others, all difficulty disappears.

In distinguishing *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, we not only direct attention to the fact that in that case the purely private relationship of mortgagor and mortgagee was involved but also to the fact that *the property of the mortgagee was appropriated for the benefit of the mortgagor without consideration* and to the fact that the plan in the case at bar contemplated giving to the depositors *more* than the equivalent of anything that they could possibly obtain as a result of a forced liquidation.

H.

Conclusion on Point I.

We feel that perhaps more time and space have been taken in an analysis of the cases than necessary for the matter can be reduced, we believe, to a very simple form.

The statute is only designed to provide a means whereby the assets of a closed banking institution may be *best* appropriated for the benefit of its depositors and likewise in the interest of the public, the business being of a public nature.

Under the plan of reorganization under which defendant bank was re-opened, no property of depositors or other creditors was appropriated either for the benefit of stockholders or of the public. We are not concerned with the release of stockholders' liability or with the sharing of stockholders in assets in which depositors and other creditors have priority rights. Those assets

were first appropriated for the benefit of depositors. No attack is made on the record upon the fairness of the plan. Plaintiffs cannot here assert its unfairness for the judgment brought up went upon the theory that the matter was *immaterial* and the Court below struck the amended answer which affirmatively alleged that the plan was fair. Plaintiffs always had their remedy, either by certiorari or in equity, to review the fairness of the plan.

As we have attempted to indicate on page 41, it is erroneous to consider that the depositors have been changed from a position of creditor to one of stockholder. In the first place the depositors and other creditors were paid in cash fifty cents on the dollar, which is ten cents more than they could have received on a forced liquidation. But it was conceived that better could be done for the depositors if the bank should be reorganized and become a going institution. To accomplish this it was necessary to obtain new money from the Reconstruction Finance Corporation the only source available. This new money could not be obtained unless it was given a position ahead of the balance which might be due depositors which was lost unless the bank reopened.

Hence for the new money obtained from the Reconstruction Finance Corporation, Class A preferred stock was issued. But then at a valuation of the assets, *considered from the standpoint of a going concern*, it appeared that there was still an equity equal to 25% of the amount due depositors and other creditors. For that 25% Class B preferred stock was issued *as evidence of a deferred claim on the part of depositors and other creditors*. While called preferred stock, its rights were superior, as against common stockholders, to the rights usually accorded to preferred stock for there were provisions for retirement (par. 5, Ex.

B annexed to the motion to strike the amended answer, p. 44) and no dividends or other distribution in cash, property, stock or otherwise could be declared, ordered, set apart, paid or made in respect of the common stock so long as any shares of preferred stock were outstanding, and the voting rights of the common stock were suspended to the full extent permitted by law so long as any preferred stock was outstanding and unretired (par. 12, Ex. B annexed to the bill of complaint, p. 54).

In effect, therefore, the case was precisely like those in which, after payment is made in cash to creditors of all that can be paid, the creditors are given evidence that the payment of the balance due them has been suspended until an orderly liquidation can be accomplished.

Further new money was needed and *that* new money was represented by Class B preferred stock, the depositors and other creditors thereby being given a position with respect to this new money which they did not deserve.

Upon a valuation of the assets which went into the reorganized institution, there was no equity whatever left for the common stockholders. Common stock was given but a nominal value and, as heretofore set forth, the common stock could never hope to attain any benefit unless in the future, by the use of funds and assets in which the then present depositors and other creditors had no interest, a successful result could be accomplished.

Unless this Court should hold that, as matter of law, depositors and other creditors in a closed banking institution have an absolute right, against the will of a great majority of their fellows, to force a sale of the assets of the closed banking institution under the hammer, it would seem that no constitutional objection can be raised to the statute and that there is no substantial theory

upon which it can be claimed that, as a result of the operation of the plan, plaintiffs have been deprived of any constitutional right.

POINT II.

Plaintiffs are equitably estopped from suing defendant bank for the balance of their deposit and have waived their right so to do.

We have set forth the facts at page 5, *et seq.*, and we have considered to some extent the matter of estoppel at page 18. Plaintiffs deliberately, with full knowledge, stood aside and permitted the plan of reorganization to become effective. They permitted: their fellow depositors and the other creditors to consent to the application of 50% of their claims for the purposes of reorganization; the Reconstruction Finance Corporation to advance \$250,000, and stockholders and others to advance \$150,000 upon the faith of the reorganization; the Federal Deposit Insurance Corporation to insure deposits; the public generally to deal with the bank and make deposits therewith; all upon the faith of the financial condition of the bank created as a result of the plan of reorganization.

Having so stood by, they took 50% of the amount of their deposit which they could not have gotten had the plan not become effective. They did more than merely stand aside; they gave as a reason for not consenting to the plan the fact that their estate was in litigation, whereas, as it now develops, their *real* reason was that they proposed to insist upon the payment of their deposit in full. They did not act until after they had received all the benefits of the plan of reorganization, and then they attempted to repudiate its obligations.

We cannot follow the court below in its conclusion that the elements of equitable estoppel available at law are not here present. The court below refers to *Central R. R. Co. v. MacCartney*, 68 N. J. L. 165, at page 175, as indicating the elements which must be present in order to create an equitable estoppel by conduct. Justice Pitney who delivered the opinion for the Supreme Court (Fort, Hendrickson and Pitney, J. J.) did not assume to set forth the elements of equitable estoppel applicable to *all* cases. He unquestionably had in mind the facts in the case which was before the court, and he used the phrase "may be stated with *approximate accuracy*."

This Court in *Todd v. Exeter Land Co.* (1929), 104 N. J. Eq. 431-435, said, page 435:

"The principle of equitable estoppel proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. A person is not permitted to deny a state of things which by his culpable silence he has led another to believe existed and who has acted accordingly upon that belief."

In *Carlisle v. Cooper*, 21 N. J. E. 576, at page 591, this Court said:

"So a party who knowingly, though passively, encourages another to expend money under an erroneous opinion of his rights, will not be permitted to assert his title, and thereby defeat the just expectation upon which such expenditure was made."

In *Sun Dredging &c. Co. v. Ottens*, 84 N. J. L. 740, this Court said, at page 745:

"The principle is familiar law that *the court will refuse its aid to one who remains silent when duty, candor and fair dealing require him to speak out, and such estoppel in pais may be set up in actions at law as well as in equity.*

The doctrine of estoppel (says Herman) 'is both equitable and legal, and will be applied by courts, both in law and equity, in all proper cases upon well ascertained facts and between the proper parties.' Herm. Estop. 11, paragraph 9; 2 Pom. Eq. Jur., paragraph 802; 16 Cyc. 725, 727, and cases cited.

Central Railroad Co. *v.* MacCartney, 39 Vroom 167, and cases cited on page 175. In the opinion of Mr. Justice Pitney in this case, it is said (at p. 175) that the doctrine of equitable estoppel, although the creature of equity and depending upon equitable principles, is recognized and enforced alike by the courts both of law and of equity. *Ross v. Elizabeth Town*, 1 Gr. Ch. 422."

And this Court then referred to *Carlisle v. Cooper*, 21 N. J. E. 576.

It cannot be urged that the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the other depositors and creditors, and the stockholders would have proceeded with this plan so that public moneys, as well as private moneys, would be placed at the hazard of the business if plaintiffs had indicated that they intended to assert their right to the payment in full of their deposit and to assert that the plan could not constitutionally be made effective. It was the duty of plaintiffs to do more than *merely* speak. They had their remedy either by certiorari or in equity, and, had they invoked that remedy in due course, the plan could not have been made effective until the Court had passed upon the questions raised by plaintiffs.

The result of the conduct of plaintiffs has been a *waiver* of their supposed rights to sue defendant bank for the balance of their deposit.

It is not our purpose here to enter into an extended discussion of the doctrine of waiver. It is considered in 67 *Corpus Juris*, page 289, *et seq.* While it has been defined in some cases to be the

intentional relinquishment of a known right, it may be implied from the conduct of a party, "irrespective of what his actual intention may be," certainly, if the elements of estoppel are present, 67 *Corpus Juris*, page 295, and 67 *Corpus Juris*, sec. 6, page 303: the intention to waive "may be indicated by language or conduct, may be either express or implied, express or constructive, explicit or presumed, actual or conclusively presumed from conduct without any element of estoppel, express or imputed by law. Accordingly, waiver may not be intended in fact, but may arise from the acts of the party; the intent to waive may appear as a legal result of conduct; any conduct relied upon which warrants the belief that the intentional relinquishment of a known right has been made constitutes in law a waiver." And, page 306:

"Although the essence of waiver is voluntary choice, and not mere negligence, and it has been stated that negligence, oversight, or thoughtlessness will not create a waiver, that on principle and the overwhelming weight of authority a party does not lose a substantial right merely by failure to mention it, *waiver has been defined to be an implied consent by a failure to object, a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it may operate as a trap to the other party to insist upon it afterwards.* Thus it has been stated that *an implied waiver arises from an omission to object when the occasion gives proper opportunity; that a waiver may be implied from negligence or the omission of the party who has the power of waiving; that a waiver will be implied from such negligence and failure to act as to induce a belief that it was the intention and purpose to waive; that a waiver may even take place in consequence of laches merely.* It has been said, relative to practice, that every failure to assert a legal right at the proper time is a waiver of that right."

There may be a waiver without estoppel, but, with estoppel, it can be fairly said there is *always* waiver.

The result of a waiver is to *obliterate the right*, or, as 67 *Corpus Juris* puts it, sec. 14, page 313: "once waived, the right is gone forever". If the conduct and the silence of plaintiffs in the case at bar, plus the acceptance by plaintiffs of the 50% of their deposit which they would not have received had the plan not been made effective, can be considered as a waiver, then, the right having gone forever, plaintiffs cannot assert the right against defendant bank, and there is no point in the suggestion of the Court below that "the defendant here is not the one to assert it" (waiver) (p. 85).

We have already stated (p. 18) that the estoppel in this case runs in favor of all interests in defendant bank, and the rights of those interested in defendant bank cannot be protected except by the assertion of the estoppel by defendant bank.

Defendant bank changed its position, for it changed its corporate structure, issued its securities and incurred obligations to the Reconstruction Finance Corporation, its stockholders, its old depositors and new depositors, upon the faith of the plan of reorganization.

Considered as a pure estoppel, we, therefore, urge that defendant bank is in a position to assert it. Considered as a waiver, as it is, the right of plaintiffs which they now seek to enforce is gone, and they cannot assert that right against defendant bank, or anyone else.

We submit that the Court erred in striking out the fifth defense of the amended answer which sets up estoppel. It is true that the word "waiver" is not found in this defense, but the *facts* are set forth, and, whether those facts amount to a waiver, is a legal conclusion which need not be set out in terms.

POINT III.

Defendant bank is not the same corporation with which plaintiffs had their contractual relations and does not owe the debt demanded (3rd Defense, Amended Answer, p. 16).

POINT IV.

Plaintiffs' remedy, if any, is in equity and not at law (4th Defense, Amended Answer, p. 16).

These defenses, while separate, are inter-related and will be argued together. The Court below (p. 86) took the narrow view that, because defendant bank had the same charter as the closed institution, notwithstanding the drastic amendments of that charter and the complete change in its financial and corporate structure, defendant bank was the same corporate entity, and therefore was responsible to the full extent for all corporate debts. It applied the fiction of corporate entity to the full extent.

Corporate entity is a fiction developed by the law in the first instance to permit the operation of a partnership, under a control selected by the partners, without individual liability on the part of the partners for the acts of the partnership, and originally in determining the rights of stockholders *inter sese* and the like, the law of partnership was applied. *Kean v. Johnson*, 9 N. J. E. 401; *Black v. Delaware & Raritan Canal Co.*, 24 N. J. E. 455, at page 463. As time went on, *Kean v. Johnson* having been decided in 1853, it became evident that, if a business corporation was to serve the purpose for which it was conceived,

more regard should be given to the corporate fiction, as it became apparent that it was impracticable to apply the law of partnership to its full extent to the relationship of stockholders *inter sese*, and so we have the case of *Jackson v. Hooper*, 76 N. J. Eq. 592, in this Court, in which the doctrine of the fictional corporate entity was applied to the limit.

But corporate entity began as a fiction and has continued as such, and can be nothing else, for it is wholly artificial. Being artificial and fictional, the artifice and the fiction will either be disregarded, or its consequences limited, to accomplish a just and a practical result.

As the Supreme Court of the United States said in *Bank of Kentucky v. Wister*, 2 Peters 318, 7 L. Ed. 437, "a corporation is a metaphysical person," and as it said in *Dartmouth College v. Woodward*, 4 Wheaton 518, 4 L. Ed. 629, a corporation is an artificial being, invisible, intangible, existing only in contemplation of law and possessing the quality of immortality and individuality, by which a perpetual succession of many persons are considered as the same and may act as an individual.

Under certain circumstances, the courts will disregard the corporate form and look through it to the essence. After all, that of which a corporation really consists is, (1) its assets; (2) the rights of its creditors and stockholders in those assets. The Supreme Court of the United States has said that if it is necessary to accomplish a just result, the corporate form may be looked through.

In *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 78 L. Ed. 1348, the Supreme Court of the United States said, 78 L. Ed., at page 1353:

"As a general rule a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of

course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights."

And many cases are cited in the note.

In *Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Asso.*, 247 U. S. 490, 62 L. Ed. 1229 at page 1237 the Supreme Court of the United States said:

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law*, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

In *Garford Trucking, Inc. v. Hoffman*, 114 N. J. L. 522, the Supreme Court (Heher and Perskie, J. J.) in an opinion by Mr. Justice Perskie, after referring to *White v. Evans*, 115 N. J. Eq. 177; *Jennings v. Studebaker Sales Corp.*, 112 N. J. L. 399; *Jackson v. Hooper*, 76 N. J. Eq. 592, and to the fact that those cases had held that a corporation is not an individual even if one individual owned all the stock of the corporation, said, "Nevertheless, it is also a fact that the doctrine of corporate entity is not permitted by the courts, to stand in the way of defeating fraud."

The Supreme Court also referred to *J. J. McCaskill Co. v. United States*, 216 U. S. 504, 516, 54 L. Ed. 590, and italicized the following language of the Supreme Court of the United States: "*A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose.*"

The Supreme Court then referred to *O'Donnell v. Herring, Hall-Marvin Safe Co.*, 208 U. S. 267, 52 L. Ed. 481, and italicized the language of Mr. Justice Holmes: "** * * under such circumstances, a court ought to look through the corporation to the men behind it.*"

The Court then referred to *Stockton v. Central Railroad Co.*, 50 N. J. Eq. 52, and Morawetz on Corporations, chapter 227, in which the following language is used (114 N. J. L., p. 530):

"The statement that a corporation is an artificial entity apart from its members is merely a description in figurative language of a corporation viewed as a collective body. *A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact.*"

And the Supreme Court then referred to the statement of Lord Mansfield in *Johnson v. Smith*, 2 Burr. 962, 97 Eng. Reprint 647, to the effect that "a fiction of law shall never be contradicted so as to defeat the end for which it was invented, *but for every other purpose it may be contradicted.*"

If the courts will disregard corporate fiction and look through forms to accomplish justice under one set of circumstances, courts will do likewise, wherever the circumstances require that the fiction and the form should be ignored to accomplish substantial justice.

We have stated that the essence of a corporation is its assets and the rights of the parties in

those assets. The assets and the rights of the parties in the assets of defendant bank after reorganization were as different from the assets and the rights of the parties therein before reorganization as if there had been two distinct associations of persons. And the enforcement of the judgment in the case at bar against the reorganized corporation, with its assets and the rights of parties therein quite different from the situation prior to reorganization, would be an injustice. And there is no reason why, to prevent that injustice, the court should not disregard the fictional continuance of the same corporate entity merely because the charter is the same charter although changed to such an extent as that it is wholly unlike the original charter.

The Supreme Court of the United States in *Northern Pacific R. R. Co. v. Boyd*, 228 U. S. 482, 57 L. Ed. 931, indicated to what extent that Court would go, not only in disregarding corporate form, but also in disregarding the apparent effect of decrees of Courts which have the effect of creating injustice, and the case is also authority upon the matters argued under Point I. Boyd had a judgment against a railway and navigation company rendered in 1896. Prior to the rendition of the judgment, but after the incurring of the obligation, property of the railway and navigation company had been sold under foreclosure to Northern Pacific. The property was purchased on foreclosure as a result of a plan of reorganization, which made no provision for unsecured creditors, but did make provision for stockholders of the railway and navigation company by giving them an equal number of shares in the new railway company. Boyd brought a suit *in equity* to subject the "property bought" to the payment of "the debt" due to him. The Court said, 57 L. Ed. 942:

“But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept fair terms offered. The enormous value of corporate property often makes it impossible for one, or a score, or a hundred bondholders to purchase, and equally so for stockholders to protect their interests. A combination is necessary to secure a bidder and to prevent a sacrifice. Co-operation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property.”

It then held in effect, that, as against creditors, the proceeding was a mere form, and that the new company was accountable *in equity* to him for what would have been his pro rata share of the value of the property as of the time it was taken over by the new company.

The Court further said, 57 L. Ed. p. 943:

“This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. *His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock.* If he declines a fair offer, he is left to protect himself as any other creditor of a judgment debtor; and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good, he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. *If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities.*”

In *Shams v. Nebraska State Bank of Bloomfield*, 48 Fed. (2d) 894, which was relied upon by the Court below (p. 83) and which we have already considered (pp. 14, 15, 56) the bank had been taken over by the Department of Trade and Commerce of Nebraska. Under permission of the statute of Nebraska a reorganization plan had been proposed and the Department had approved it. The purpose of the plan was the reorganization of the bank and the statute provided that, if the requisite majority of the creditors and the Department approved, then all creditors should be treated in all respects as if they had joined in the plan "in the event of *restoration* of such bank to solvency and the reopening of the same for business."

New and amended articles of incorporation were adopted for the bank, the name being slightly changed, and the good assets of a value of 75% of the amount of the unsecured debts, including deposits, were transferred by the Department "to the new or reorganized corporation" in consideration of which it assumed to pay seventy-five cents on the dollar to depositors in payments of 10% a month. The rest of the assets were turned over to a corporation called "Bloomfield Liquidating Association" which was to administer them in the interest of creditors.

The suit was by a holder of a certificate of deposit of the bank. For technical purposes the reorganized institution was the same institution. It claimed that it was "to all practical intent a new corporation".

The Court held that, notwithstanding the statute the creditor was not bound by the plan of reorganization, the point apparently being that the plan deprived him of his right "to cause the stockholders to respond to their double liability fixed by the *Constitution of the State* and the

officers and directors to account for excess and improvident loans or such misconduct." The Court said, page 897:

"I am of opinion that these were substantial rights of the plaintiff incident to his contract as a depositor, and, under the reorganization plan, neither the department of the state nor the state court has reserved any powers to enforce the rights. All initiative is left with the liquidating association."

Notwithstanding all this, the Court held, in effect, that what the creditor was entitled to was a proportionate amount of the assets of the "old bank" taken over by the reorganized institution. In other words, it accorded the creditor the same right as was accorded to the creditor by the Supreme Court of the United States in *Northern Pacific R. R. Co. v. Boyd*, 228 U. S. 482, 57 L. Ed. 931, *i. e.*, an accounting.

To reach this result the Court was obliged to ignore the fiction of the continuous corporate identity.

Now, in the case at bar, what was accomplished under the plan or reorganization is, for substantial purposes, the same as was accomplished in the *Shams* case.

The assets of the bank had been, in effect, taken over by the Department of Banking and Insurance; the charter of the bank was radically changed by amendment; certain of the assets which were considered good assets were transferred by the Department, or released by the Department, to the bank; the proceeds of the sale of the preferred stock to the Reconstruction Finance Corporation, \$250,000 and the proceeds of the sale of Class B preferred stock to stockholders, \$150,000, were paid in to the bank; the bank issued its new Class B and preferred stock and its common stock was reduced to a nominal par value and

deprived of dividend and voting rights; it assumed to pay to the depositors 50% of their deposits and to give them Class B preferred stock amounting to approximately one-half of the other 50% which was waived; the bank transferred to a holding company assets which the Department refused to permit it to carry as banking assets, and participation certificates in those assets were issued to depositors to represent the balance due them. The result was that the reorganized institution, with respect to its financial and corporate set-up, was entirely different from that of the bank before the banking holiday.

For all practical purposes the reorganized bank was a "new corporation".

Nor must we overlook, we submit, the fact that the bank was acting under restrictions imposed by the Commissioner of Banking and Insurance under the authority of the Altman Act, chapter 27, of the laws of 1933, P. L. 1933, page 43, as amended by chapter 66 of the laws of 1933, page 125, which this court applied in *Maurello v. Broadway Bank & Trust Co. of Paterson*, 114 N. J. L. 167, 176 Atl. page 391, and held that the bringing of suits against a bank so situated was prohibited.

We submit that, under these circumstances, plaintiffs, if they were entitled to any relief, were obliged to seek that relief in equity, in which court only, as the law is in this State, that to which they were justly entitled could be accorded to them, *i. e.*, an accounting of the assets in which they had an interest when the bank was closed and the payment to them of the difference between that which they received, 50% of their deposit, and what they would have received had there been a liquidation in the usual course. The relief which the District Judge in the *Shams* case indicated he would accord by controlling the execution cannot be afforded in this State at law. While

the *Shams* case was at law, it was dealt with by the Judge as if it had been in equity, the Judge overlooking the distinction between equity and law which prevails in the federal practice notwithstanding the conformity act.

If the forum should be equity, then it is important that plaintiffs be relegated to that forum. There are defenses which may be interposed in equity which may not be interposed at law, one of the most important of which is *laches*, which alone may be sufficient to deprive plaintiffs of an equitable remedy, and, if their rights are in reality equitable, then the enforcement of those rights should be governed by equitable principles.

What we shall say under the next point is also to be considered under this point.

POINT V.

Satisfaction of the judgment in the instant case would require defendant bank to violate the laws of the United States and of the State of New Jersey and the regulations of the Commissioner of Banking and Insurance adopted and promulgated by virtue of the laws of the State of New Jersey (Sixth Defense, Amended Answer, p. 17).

By P. L. 1914, p. 293, 1 Cum. Supp. to C. S. of New Jersey, 1911-1924, secs. 17-59, p. 130, it became lawful for a trust company incorporated under the laws of this State, to become a member of the Federal Reserve System under the provisions of the Federal Reserve Act and the statute provided that, upon the purchase of Federal Reserve stock, as provided in said act, the trust company should assume liabilities and become entitled to the benefits recited in said Federal Reserve Act.

Defendant bank was a member of the Federal Reserve System at the time it was closed and has continued so to be. The bank was closed in pursuance of the proclamation of the President of the United States of March 6, 1933 (Exhibit 1, annexed to the amended answer, p. 19), and the proclamation of the Governor of March 4, 1933 (Exhibit 2, annexed to the amended answer, p. 22) and continued closed under the proclamation of the President of the United States of March 9, 1933 (Exhibit 3, annexed to the amended answer, p. 23). The President, by the executive order of March 10, 1933, laid down conditions under which banks, members of the Federal Reserve System, might reopen (Exhibit 1, annexed to the affidavits presented by defendant bank on the motion to strike, p. 77 and see paragraphs 7, 8 of the second defense of the amended answer, p. 12 and the sixth and seventh defense set-up in the amended answer, p. 17). The executive order, in part, read, page 77:

“The Secretary of the Treasury is authorized and empowered under such regulations as he may prescribe to permit any member bank of the Federal Reserve System and any other banking institution organized under the laws of the United States, to perform any or all of their usual banking functions, except as otherwise prohibited.

“The appropriate authority having immediate supervision of banking institutions in each State or any place subject to the jurisdiction of the United States is authorized and empowered under such regulations as such authority may prescribe to permit any banking institution in such State or place other than banking institutions covered by the foregoing paragraph, to perform any or all of their usual banking functions, except as otherwise prohibited.

“All banks which are members of the Federal Reserve System, desiring to reopen for the performance of all usual and normal banking functions, except as otherwise prohibited, shall apply for a license therefor to the Secretary of the Treasury. Such application shall be filed immediately through the Federal Reserve Banks. The Federal Reserve Bank shall then transmit such applications to the Secretary of the Treasury. Licenses will be issued by the Federal Reserve Bank upon approval of the Secretary of the Treasury. The Federal Reserve Banks are hereby designated as agents of the Secretary of the Treasury for the receiving of application and the issuance of licenses in his behalf and upon his instructions.”

As alleged in paragraphs 7 and 8 of the second defense of the amended answer (p. 13) and in the sixth and seventh defenses (pp. 17, 18) the plan was submitted to the Federal authorities, approved by them and, only as a result of such approval, was defendant bank permitted to open.

If defendant bank and its officers should now pay plaintiffs the full amount of their deposit, they would be violating the conditions under which the Federal authorities permitted the bank to reopen for general business and would also be violating the orders promulgated by the Commissioner of Banking and Insurance in this State under the so-called Altman Act, chapter 27, Laws of 1933, p. 43, as amended by chapter 66, Laws of 1933, p. 125 (quoted p. 23 of this brief), which forbade banks in the condition in which defendant bank was at the time of the bank holiday paying out moneys to their depositors.

As heretofore stated, this court applied the Altman Act in *Maurello v. Broadway Bank & Trust Co. of Paterson*, 114 N. J. L. 167, 176 Atl. 391, and held that it prohibited suits against banks to recover deposits, the payment of which would vio-

late the contracts of the Commissioner of Banking and Insurance issued under the authority of the Altman Act.

Defendant bank and its officers are subject to the rules and regulations of the Federal Reserve Act and to the penalties therein prescribed.

In *Hiatt v. United States*, (C. C. A. 7th), 4 Fed. (2d) 374, certiorari denied 268 U. S. 704, 69 L. Ed. 1167, it was urged that one of the conditions imposed by the Federal Reserve Act upon member banks; viz., that its officers should be subject to the provisions and penalties of certain of the Revised Statutes was repugnant to the Federal Constitution and beyond the power of Congress because it withdrew from the State the power to enact criminal laws with respect to the same offenses and suspended the operation of such criminal statutes touching the offenses enumerated in that section. The Court held this was not so and cited the case of *United States v. Lanza*, 260 U. S. 377, 67 L. Ed. 314, from which it quoted as follows:

“We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”

The Court also held that the provisions of the Federal Reserve Act authorizing state banks to apply for membership were not beyond the constitutional power of Congress.

And see *Westfall v. U. S.*, 274 U. S. 256, 71 L. Ed. 1036.

By the act of March 9, 1933 (12 U. S. C. A. title "Banks and Banking," sec. 95, p. 43, pocket part, 1934) Congress provided "that no member of the Federal Reserve System should transact any banking business except to such extent and subject to such regulations, limitations and restrictions as should be prescribed by the Secretary of the Treasury with the approval of the President."

If this defendant bank is obliged to pay plaintiffs their deposit in full, its officers will have violated the conditions under which defendant bank was permitted to reopen and will have misapplied the assets, with the result, as set forth in the seventh separate defense to the amended answer (p. 18) that a fraud will be perpetrated upon the Reconstruction Finance Corporation, the Federal Reserve System, the Federal Deposit Insurance Corporation, the other depositors and creditors and stockholders of defendant, and the public, which has made deposits with defendant bank upon the faith of the plan and the faith of the reports of defendant bank, made in pursuance of the law, which did not disclose any such deposit liability as would be indicated if plaintiffs are entitled to recover the full amount of their deposit. The effect of the enforcement of the judgment in the case at bar would be to compel defendant bank and its officers to perform acts denounced as crimes.

These considerations add emphasis to our insistence made under the last point that the remedy of plaintiffs, if any, is in equity and not at law.

Conclusion.

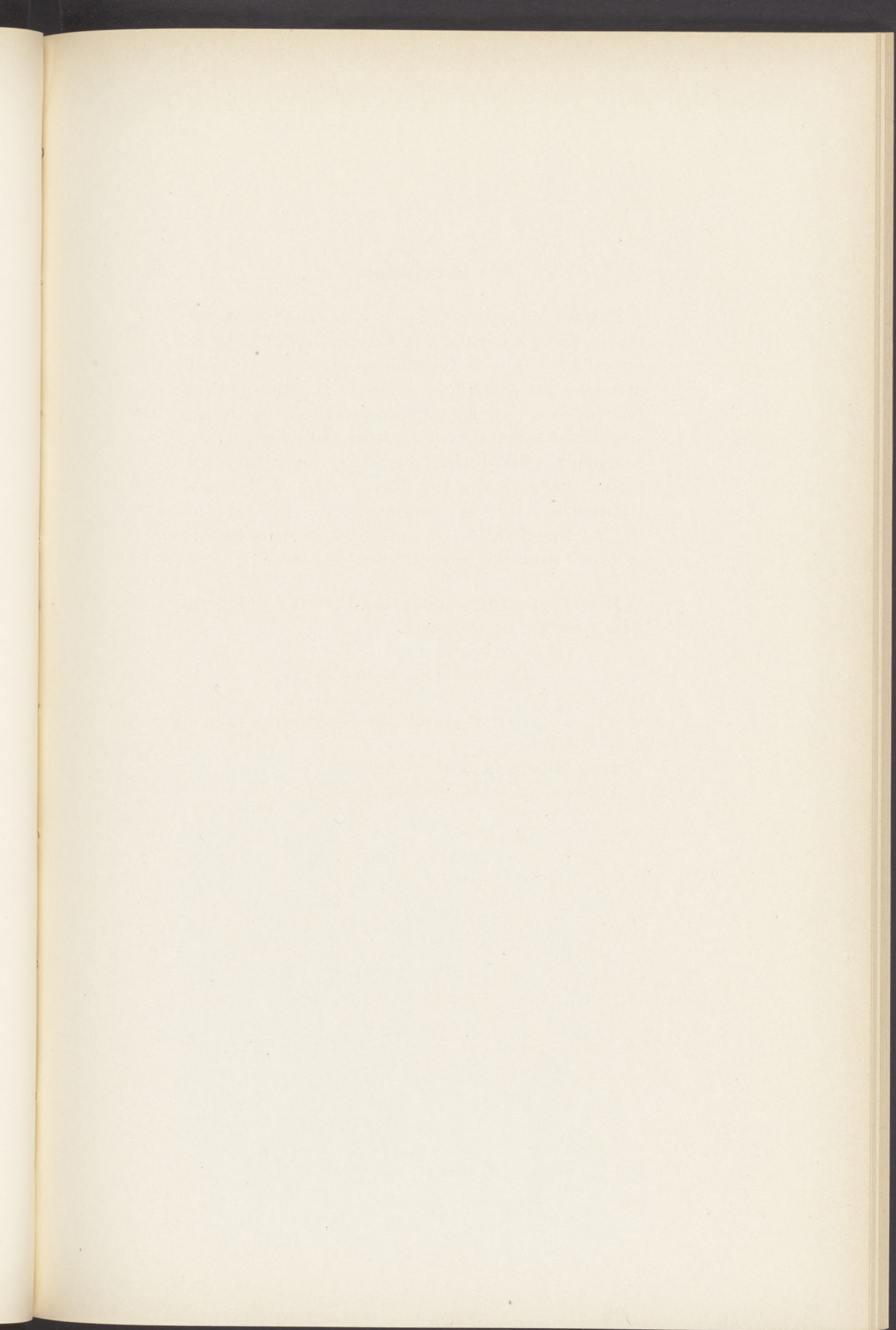
Finally, there is nothing in this case to indicate that plaintiffs were in any wise injured. They received more in cash (excluding any promises indicated by the preferred stock in the reorganized institution or by participating interests in the assets which were set apart from the assets of the reorganized institution) than they could, upon the record, have obtained by the exercise of the legal rights which they say they had.

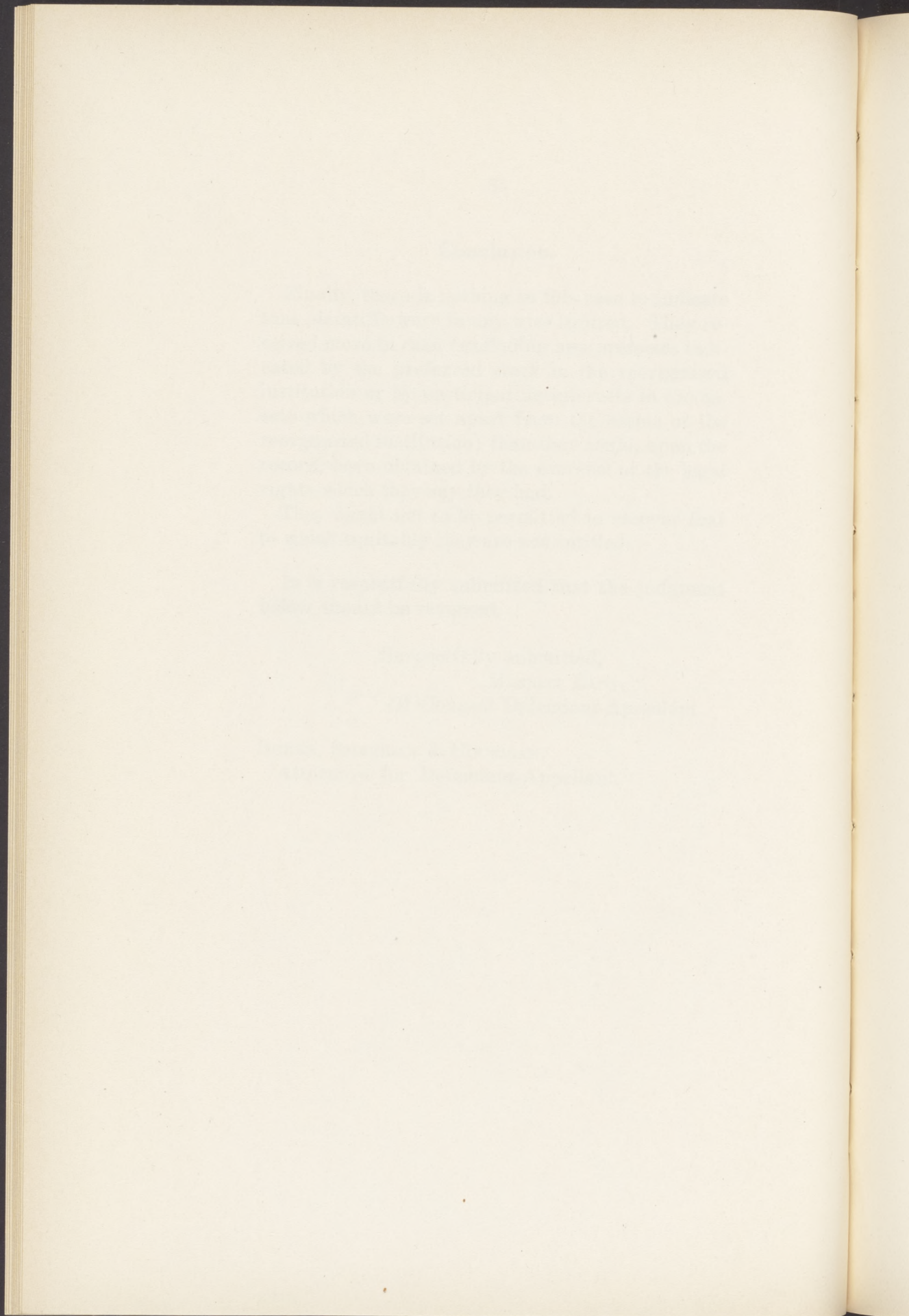
They ought not to be permitted to recover that to which equitably they are not entitled.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,
MERRITT LANE,
Of Counsel Defendant-Appellant.

BURKE, SHERIDAN & HOURIGAN,
Attorneys for Defendant-Appellant.





THE FIRST PART OF THE HISTORY OF THE

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OF ENGLAND

BY

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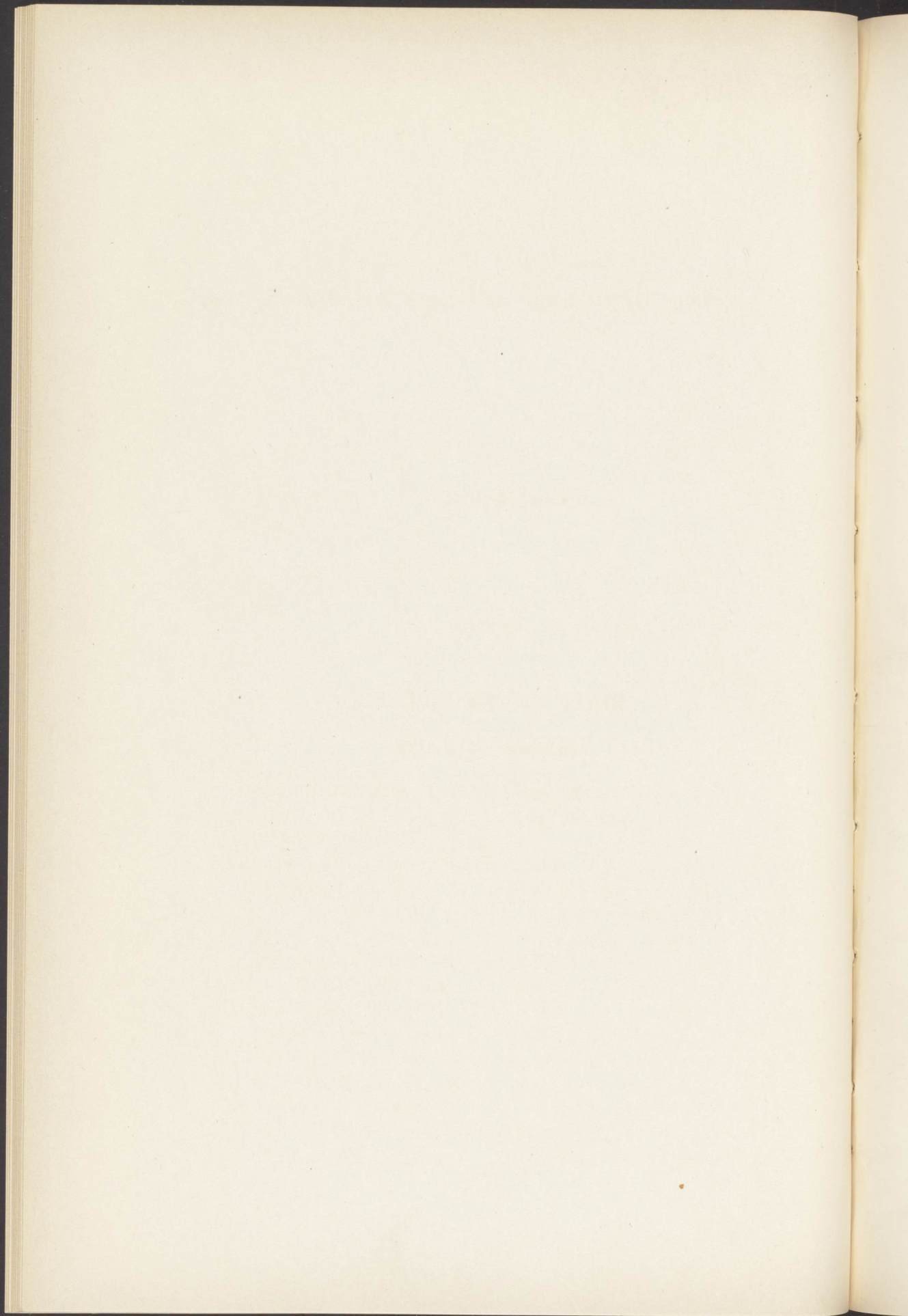
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95 MAY.T 1935

New Jersey Court of Errors and Appeals

(No. 95—MAY TERM, 1935.)

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,

Plaintiffs-Appellees,

vs.

CLINTON TRUST COMPANY, a New
Jersey corporation,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court, from
Order Striking
Amended Answer
and Directing
Entry of
Judgment in Favor
of the Plaintiffs.

—
Sat Below:
William A. Smith,
C. C. J.

BRIEF OF APPELLEES.

Statement of Facts.

Plaintiffs commenced a suit in the Essex County Circuit Court to recover \$3654.30, together with interest and costs of suit, representing moneys deposited by the plaintiffs in the bank of defendant. The defendant is a trust company organized under the laws of the State of New Jersey.

The moneys in question were part of deposits totaling \$7780.00 placed by the plaintiffs with the defendant in a savings account in July, 1932.

Thereafter, on March 18, 1933, the operations of the defendant bank were placed on a restricted basis pursuant to an act of the New Jersey Legislature, passed in the year 1933, entitled, "An Act Concerning Banks, Trust Companies and Savings Banks having shares of capital stock." The bank was subsequently reopened on an unre-

stricted basis after having put through a reorganization plan wherein fifty per cent of all deposits were payable forthwith, twenty-five per cent in class B stock of the bank and the balance of twenty-five per cent in stock of a holding company organized by the bank, to which holding company was transferred real estate and other frozen assets formerly owned by the defendant bank.

The Act under which the reorganization plan was promulgated is set forth in detail in Chapter 116, page 241, and Chapter 287, pages 770-771, of the Laws of New Jersey for the year 1933.

The defendant bank claims that the holders of at least seventy-five per cent of the total deposits and other liabilities of the bank have agreed to accept preferred stock. The plaintiffs never agreed to accept preferred or any other kind of stock for their claim.

Plaintiffs' claim has two bases: (1) The contractual obligation of the defendant bank to repay to these plaintiffs on demand the moneys deposited with it in said savings account. (2) The laws (P. L. 1933, Chapters 116 and 287) under which the defendant bank was reorganized and reopened are unconstitutional and cannot affect the vested rights of these plaintiffs, as said laws were passed long after the moneys in question were deposited with the defendant bank and at the time said moneys were deposited, there was no restriction of the rights of the plaintiffs to the withdrawal thereof.

We will divide this brief into two parts. Section A of Part I will reply to the five points in the brief of the defendant in the order in which they appear in said brief, and Section B thereof will set forth the plaintiffs' points and reasons why the judgment should be affirmed. Section A of Part II of the brief will reply to the brief of the Attorney General of New Jersey, appearing

as *amicus curiae*, and Section B thereof will set forth such facts and cases as we deem pertinent thereto.

PART I.

Section A.

Reply to Defendant's "Preliminary".

Defendant bank, in its preliminary statement, attempts to impress this honorable Court with the magnitude of the financial investment and the chaotic condition which it thinks will result if the judgment of the plaintiffs should be affirmed. We think that this argument is not tenable for the reason that courts of law do not deal with cases from the standpoint of the sum of money involved, but rather with the view that cases should be decided on their merits and justice should be done. The statements relative to the investments of the Reconstruction Finance Corporation in the banks under the permission of the statute in question does not, in our opinion, have any place in these proceedings because said corporation is not a party to this action and if it made investments without proper safeguards, it did so at its own peril just as any other investor. Counsel for the defendant bank cites the decision of the Supreme Court of the United States in *Doty v. Love*, April 1, 1935, Adv. Opinions No. 11, 79 L. Ed. 632, as having settled the law contrary to the decision of the court below in the instant case. We will attempt, further on in this brief, to differentiate between *Doty v. Love* and the case at bar, as we feel certain that there is absolutely no similarity between said cases, and the acts under which both cases were decided are different from every possible angle as will hereinafter be shown. Furthermore, although counsel for de-

fendant states that there is nothing in the opinion of the Supreme Court of the United States which indicates that the court would have held the Mississippi statute, which is construed in *Doty v. Love*, as unconstitutional had it omitted the provision of a court review, there certainly is nothing which can be spelled out as favoring the position which the defendant seeks to take with reference to the statutes of the State of New Jersey hereinabove cited under which the defendant bank reorganized, in the opinion of the court in *Doty v. Love*.

Counsel for defendant bank states that he argued *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, for the appellant and although the opinion in that case of the Court of Errors and Appeals of this State is diametrically opposed to the stand which the defendant in the instant case seeks to have the court take, defendant's counsel attempts to place a construction, favorable to the defendant in this case, by citing said case with explanation that the statute involved therein had reference to strictly private interests while the statute in question herein applies to a business which has always been of a public nature. We submit that even though the banking business be considered of a public nature, no action can be taken by a bank to violate contractual obligations or violate property rights without due process of law and in violation of state and federal constitutional guaranties, which we will prove the defendant bank did under the legislative enactments in question hereinabove referred to. This is also our answer to defendant's reference to the case of *Moore v. Splitdorf Electric Co.*, 114 N. J. E. 358. Counsel for defendant states that he is on the brief in the case of the *State of New Jersey ex rel. State Board of Health* against *Newark Milk Company*, No. 48 of the February Term of this

court, and that he does not depart from anything that is said in that brief. We cannot reply to that brief as it is not a part of the instant case nor have we been served with a copy of said brief. We therefore ask this court to disregard the reference thereto.

Defendant makes reference to the reasoning of the Supreme Court of the United States in the rent cases, milk cases and mortgage moratorium cases cited at page 4 of defendant's brief. These cases have no place in the instant case because of the fact that all of said cases were clearly emergency legislation and were stated to be such by the United States Supreme Court in the several opinions written in connection therewith and furthermore, all the facts in the several cases indicated that emergency existed. The argument that the statute here involved is properly a part of a complete scheme for the reorganization of an insolvent bank at any time as a method of realizing as much for depositors as possible; as a means of orderly liquidation in the interests of all and of the public, cannot be sustained because constitutional guaranties, both state and federal, prescribe certain rights and privileges accorded to contracting parties and this cannot be abrogated in derogation of the rights of the creditor without due process of law. The creditors are entitled to a judicial forum where all parties in interest and objectors may be heard, their objections passed upon, and the fairness and equitableness of the distribution sought to be made, determined and approved by a court of competent jurisdiction. The statements made by the defendant are therefore simply its own conclusions and should not be accorded any weight.

Defendant admits that no judicial review is provided by the statute and contends that a non-consenting depositor or creditor had any one of

three remedies, viz.: certiorari, Chancery proceedings, or a suit at law for damages. We contend that plaintiffs were not obligated to take any of these proceedings but that they had a right to sue because of the debtor and creditor relationship; that they proceeded to exercise such right in the Essex County Circuit Court.

The allegation at page 5 of the defendant's brief to the effect that whether more consideration has been given to stockholders than proper is a matter which goes, not to the legality, but to the fairness of the plan, is without merit, in our opinion, because unless the plan were approved by a court of competent jurisdiction, the legality of the law under which the plan was formulated is successfully subject to attack in the absence of a provision in said law that the plan must first be approved by such court of competent jurisdiction.

**Reply to Defendant's Statement Under
"the Facts".**

Defendant makes several allegations under this section which we feel are not properly part of the record and simply state conclusions which have no merit and should not be considered by the court. At page 7 of defendant's brief the statement is made that the defendant bank was insolvent and continued insolvent until after the reorganization, as result of which it reopened for business on May 7, 1934 and, had its assets been liquidated in the ordinary way, its depositors would not have received in excess of forty per cent of the amounts of their deposits and then only after a four-year liquidation. There is no proof of the truth of these allegations other than the affidavit of defendant's agent which is a self-serving declaration, and unsupported by any judicial finding. The statements of defendant as

to the condition of other banks throughout the United States have no place in these proceedings as each bank must stand on its own footing.

At page 9 of its brief defendant speaks of the fact that the reorganization plan did not convert the creditors into stockholders. There can be no denying the fact that consenting depositors of the defendant bank received only fifty per cent of their deposit in cash, twenty-five per cent in Class B stock of the bank and twenty-five per cent in stock of the mortgage company to which had been transferred all the frozen assets, negligible notes and other slow commercial paper which the bank examiners refused to consider as liquid assets. Furthermore, the plan was inequitable because the stockholders of the defendant bank before its reorganization, still remained stockholders of the reorganized bank and all things being equal, they will realize on their investment very much sooner than the depositors who consented to and have taken twenty-five per cent of their deposit in stock of the frozen holding company. Plaintiffs do not deny that they knew of the plan of reorganization, but they do insist that they objected to every one who came representing the defendant bank to secure their consent; that they stated to the representatives of the defendant bank exactly how the plan was unfair and unjust, as is in detail hereinbefore set forth. The plaintiffs did all that was required of them insofar as refusing to consent to the plan and voicing their objections thereto is concerned. They were under no legal obligation to attempt to have the action of the Commissioner of Banking and Insurance reviewed or enjoin the putting into effect of the plan and that is one of the fatal defects in the law under which the defendant bank reorganized. Plaintiffs had a perfect right to take one-half of the deposit. There is no denial

by defendant that it notified plaintiffs that it had placed to their account in a new savings account one-half of the deposit which was subject to immediate withdrawal. This withdrawal by plaintiffs had no effect whatsoever on their rights as a creditor of the defendant bank for the remaining one-half of the deposit. Plaintiffs deny the defendant's statement that they only refused to sign a consent because they stated their estate was in liquidation but to the contrary they allege in the affidavits on file in this cause that they at all times objected to the plan (Affidavit of Grace E. Grosman, S. C., p. 64, par. 11). The argument that plaintiffs did not rely upon any rights based upon the unconstitutionality of the legislation under which the plan of reorganization was effected but on the fact that the defendant bank was trustee of plaintiffs' deposit as set forth on page 11 of defendant's brief, has no merit because the notice of motion (S. C., pp. 27-30) sets forth the unconstitutionality of the act under which defendant was reorganized.

The allegations at page 12 of defendant's brief that there is a dispute which requires the matter to be submitted to a jury, have no merit because everything that the defendant did in taking away the property rights of its non-consenting depositors were done under color of authority by the statute and if the statute is unconstitutional, it had no right to take such action and the matters in issue are purely questions of law, and there is nothing which requires submission to a jury.

On said page it is further set forth that plaintiffs could not have gotten more than forty per cent of their deposit and then only after a period of approximately four years of liquidation, referring to allegations in the affidavit of Goode-mott. This is nothing but a conclusion and is a self-serving declaration, is not supported by any

judicial findings and therefore these statements should not be considered. Plaintiffs deny that they are depriving Reconstruction Finance Corporation or other depositors and stockholders of any of their moneys in seeking to recover their unpaid deposit, but on the contrary, they simply seek to receive back from the defendant bank moneys which they are entitled to as depositors.

Reply to Statements Under "the Opinion Below".

At page 14 defendant contends that the plaintiffs should have instituted certiorari proceedings, Chancery proceedings or sue at law for damages, alleging the unfairness of the plan of reorganization. We submit that the plaintiffs had a perfect right to sue for the return of their deposit on a debtor and creditor basis and that plaintiffs were not obligated to take any proceedings to have courts pass upon the fairness or equality of the plan but rather that in the absence of an express provision in the enabling acts whereby the plan required the approval of a judicial forum, the acts are unconstitutional as being in violation of the State and Federal constitutions, in that they deprive creditors of their property without due process in violation of the obligations of contract. The statement on page 14 that the decision in the case of *Shams v. Nebraska State Bank*, 48 Fed. (2d) 894 (1931), is now supplanted and overruled by the decision in *Doty v. Love*, is fallacious because in *Doty v. Love*, which construes the Mississippi statute, it is expressly stated that any plan of reorganization of banks must be submitted to the Chancellor on a verified petition and on due notice to all depositors and stockholders, and after a proper judicial hearing, the plan may be either approved or rejected. These are the very things which are wholly and totally absent from

the laws under which the defendant bank reorganized.

At page 15 defendant contends that plaintiffs are only entitled to a distributive share of the assets of the defendant as they existed at the time of the reorganization. We have no quarrel with this proposition but we do object to the defendant telling us what the percentage of our distributive share would be without having a judicial forum pass upon the amount of assets and liabilities as they existed at the time of the reorganization, and we submit that defendant's remedy would be an application to the Chancellor for the appointment of a receiver or trustee to take into his possession and liquidate the assets of the defendant bank as of the time of the reorganization, pass upon the claims which existed against the same as of that time and make a distribution thereof equitably among all the depositors and creditors entitled thereto.

As to the argument advanced in the citation from the *Shams* case at page 15, that plaintiffs must go to equity to obtain relief, we cannot agree to the proposition that we were obligated to do anything but sue at law on a contractual relationship for the recovery of the moneys involved.

At page 16 counsel makes the statement that the legislation was designed to meeting existing conditions at the time of the passage of said legislation. We urge that the court cannot take this into consideration because the enabling acts are simply amendments to the trust company acts and no one can spell out the legislative intent from the acts in question to the extent that such acts were passed for the purpose of meeting emergency conditions and under police power.

The statement at page 17 that insolvency is always an emergency is without merit because we have a definite stated procedure in insolvency

cases under the Corporation Act of this State and we cannot construe amendments to laws as being emergency legislation simply because they may involve an insolvent corporation.

At page 19 counsel states that the plan of reorganization took nothing from the depositors and other creditors but with this we cannot agree. The old stockholders of the bank continued to remain stockholders subject to Class A stock held by Reconstruction Finance Corporation and Class B stock taken by consenting depositors to the extent of twenty-five per cent of their deposits. There can be no question about the fact that the old stockholders who stand in third place as against the bank's assets would realize on their stock much sooner than the depositors who were compelled to take twenty-five per cent of their deposit in the frozen assets transferred by the bank to the corporation. This is one of the reasons why it was most necessary for a court of competent jurisdiction to pass upon the fairness and equitableness of the plan, and the statute, failing to make this provision for the benefit of the depositors, is unconstitutional in that it takes away property rights without due process of law.

The argument at page 20 that plaintiffs are estopped because they stood by without objection while the plan of reorganization was made effective, is without merit because plaintiffs at all times contended that the plan was unfair and unjust.

Plaintiffs did nothing which might be classed as an inducement on their part to anyone to do some act which they otherwise would not have done, nor did they stand by silently without objecting to the reorganization. Furthermore, the defendant cannot assert the defence of estoppel as clearly indicated by *Central Railroad v. MacCartney*, 68 N. J. L. 165, at pages 175-6. We deny that

plaintiffs waived any rights by accepting one-half of the deposit for the reasons surrounding the acceptance of the deposit as hereinbefore set forth.

Reply to Statement Entitled "the Statute".

At page 23 defendant contends that the statutes in question, under which the reorganization was had, must be considered in connection with Chapter 22 of the Trust Company Act as amended by Chapter 255, Laws of 1931, page 641. We have no quarrel with this proposition excepting that it will be noted that the last mentioned act provides for supervision by the Court of Chancery. In other words, a judicial forum is designated which is absolutely absent from the acts under which the reorganization was effected.

At page 25 defendant cites *Maurello v. Broadway Bank & Trust Co. of Paterson*, 114 N. J. L. 167, and states that this court did not question the constitutionality of the Altman Act. A reading of the opinion in that case indicates that the constitutionality of the Act was not under attack and it is well known that courts will not pass upon constitutionality or other points unless the same are directly urged.

Reply to Defendant's "Argument (Preliminary)".

Defendant attempts, at pages 25, 26, 27 and 28 of its brief, to place the plaintiffs in the same category as stockholders and claim that as such they are subject to the same regulation as stockholders of a corporation. This argument we feel has no weight because depositors in a bank are in the relationship of creditor and debtor and as such, there is a definite contract between the defendant bank and the plaintiffs whereby the defendant agreed to repay to the plaintiffs moneys

deposited, on demand, in cash and not in stock of the bank or a holding company.

Reply to Point "I".

Defendant argues that plaintiffs are not deprived of any constitutional rights secured to them either under the State or Federal constitutions as the result of the operation of the plan of reorganization. To this we cannot agree. They have been deprived of their property rights without due process of law. The acts of the defendant bank are confiscatory. They violate the State and Federal constitutions in that they impair the obligations of a contract. There is no judicial forum provided for to determine the fairness and equitableness of the plan and the Commissioner of Banking and Insurance is given judicial as well as executive powers, in violation of our State constitution. Outside of these defects, the acts seem to be all right.

At page 32 of defendant's brief counsel for the defendant recites the Opinion of Justices, 278 Mass. 607, 181 N. E. 833 (1932). This was simply an opinion and did not deal with any specific case. However, the proposed law in which said opinion was given, had in its title that the law was for the purpose of protecting deposits in savings banks. This provision certainly brought notice to everyone that the object of said bill was a protective one and came within the police power of the legislature, and is altogether different from the acts (Chapters 116 and 287 of the Laws of New Jersey, 1933) entitled: "An Act Concerning Banks, Trust Companies and Savings Banks having shares of capital stock." There is no injunction whatsoever in either of said acts that they were passed under the police power of the legislature or as a protective measure of any kind.

At page 33 of defendant's brief counsel refers to *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. Ed. 690 (1931). This case is not in point with the case at bar because it deals with an amendment to a bank Guaranty Law which imposed special assessments on local banks in favor of closed and liquidating banks and refers to liabilities of stockholders of banks. Certainly it is not analogous to the relationship of a depositor of a bank which is that of creditor and debtor.

At pages 36, 37 and 38 defendant refers at great length to the case of *Hourigan v. North Bergen Township*, 113 N. J. L. 143. In that case the act, which was sought to be proven unconstitutional by counsel for the plaintiff, who also happens to be attorney for defendant in the case at bar, recites that the Legislature found that an emergency existed and the court at page 147 of said decision states:

"The finding of the Legislature that an emergency exists has a factual basis of which we take judicial notice."

There is no such recital in either Chapter 116 or Chapter 287 of the Laws of 1933 under which the reorganization plan was promulgated.

At pages 39, 40 and 41 defendant attempts to indicate that its plan of reorganization is fair and equitable; that it accomplishes for all depositors the payment of fifty per cent of their deposit in cash and an interest in the assets, which represents a distribution to them in kind, of the assets of the closed institution. We cannot agree with the fairness of this proposition which gives the law under which the reorganization plan became effective the power to make the Commissioner of Banking and Insurance the sole arbiter as to the fairness and equality of the plan, the percentage of the assets which the depositors

shall receive in cash, as well as the percentage which they shall receive in securities of the mortgage company and stock of the bank, and it also leaves the old stockholders in a better position than the depositors are placed in.

At pages 43, 44, 45, 46 and 47 counsel refers to *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632, Supreme Court of the United States. We cannot see how defendant feels that this case helps its position. The Mississippi act which was construed by this decision, provides for permitting the reopening of closed banks upon terms proposed by three-fourths of the creditors in number or in value, if the plan is approved by the Superintendent of Banks and affirmed by the Court of Chancery. It requires that before any such bank shall be reopened, the entire plan for reopening and all the facts in connection therewith shall be submitted by the Superintendent of Banks to the Court of Chancery in the county in which the bank is situated, by proper petition duly verified, such petition to contain a statement of the assets and liabilities of the bank and sufficient information necessary to convey to the court the true facts with reference to the condition of the bank, and if the court is satisfied that the plan of reorganization is feasible and just, the plan shall be approved. Dissenting depositors or stockholders are given a judicial forum where they may appear and voice their objections and have their objections passed upon by competent authority. It also permits the taking of testimony as to the exact financial condition of the bank and the collectibility of its frozen and slow assets. If the 1933 Laws under which defendant bank reorganized had had these provisos, there would have been proper safeguards for plaintiffs and other dissenting depositors to find out what the situation was relative to the defendant's affairs; to

appear in court and voice their objections and point out how the plan was inequitable; to point out that the old stockholders, in receiving Class C stock in the reorganized bank, were being put in a better position than the depositors as far as realizing on their stock in that the reorganized bank has a much better chance of showing a profit than has the mortgage company to which has been transferred all the frozen and practically worthless assets of the defendant bank.

At page 47 counsel cites the case of *Dorman v. Dell*, 245 Ky. 34. That case is not analogous to the one at bar because in the *Dorman* case the statute provided for the review of the acts of the Commissioner of Banking by a circuit court. This privilege is not given in the New Jersey 1933 Act. We fail to see how the Banking Commissioner can be construed as having the power to approve the reorganization plan without a judicial hearing.

Counsel, at pages 52 and 53 cites *Hoff v. First State Bank*, 174 Minn. 36. An examination of this case discloses that the facts are not like those in the case at bar for reason of the fact that in the *Hoff* case the plaintiff made a deposit on May 26, 1925 and the bank was subsequently reorganized under Chapter 38 of the Laws of 1925 which went into effect in March, 1925. It will therefore be observed that in the *Hoff* case plaintiff's deposit was made after the law permitting reorganization had been passed and naturally was bound by said law as all other depositors would be. In the instant case plaintiffs made their deposit in July, 1932 and defendant's bank closed about ten months after plaintiffs made their deposit, so that the doctrine of the *Hoff* case absolutely does not apply to our situation.

At page 62 defendant, in referring to the case of *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, states that the case at bar is distinguishable

from that case because in the instant case the plan contemplated giving to the depositors more than the equivalent of anything that they could obtain as a result of a forced liquidation. This is absolutely a conclusion on the part of defendant, is not supported by any impartial investigation and therefore has no merit.

At page 63 defendant makes the statement that no attack is made on the record on the fairness of the plan. This is absolutely not so. The affidavit of Grace F. Grosman (S. C. 64, par. 11) sets forth in detail that they protested that the said plan of reorganization was unfair and inequitable.

Plaintiffs are not required to initiate certiorari or Chancery proceedings to test the fairness of the plan, but on the contrary, the enabling acts are fatally defective because they attempt to give the Commissioner of Banking and Insurance, who is in the executive branch of the government, a judicial right and these rights, under our constitution, cannot be delegated.

We are at a loss to understand how defendant can insist so forcefully that the depositors under the reorganization plan, obtained ten cents more on the dollar than they could have at a forced liquidation because there was no judicial finding as to what the assets of the bank, at the time of its reorganization, would bring or what legitimate claims there were against the bank. At page 64 defendant states that upon a valuation of the assets which went into the reorganized institution, there was no equity whatever left for the common stockholders. Common stock was given but a nominal value. The fact remains that the common stockholders whose holdings existed prior to the reorganization, now have a lien on the assets of the reorganized bank and have a much better position for the realization of one hundred cents on the dollar than the depositors who consented and

took part of their deposit in stock of the holding company.

Reply to Point "II".

Defendant argues that plaintiffs are equitably estopped from suing defendant bank for the balance of their deposit and have waived their right so to do. Defendant states that plaintiffs deliberately, with full knowledge, stood aside and permitted the plan of reorganization to become effective. This is absolutely denied and the affidavit of Grace F. Grosman (S. C. 64, pars. 10 and 11) indicates that plaintiffs refused to accede to the plan and protested against the same as being unfair. Furthermore, the defendant cannot urge the doctrine of estoppel under the circumstances. The only one who might would be the Reconstruction Finance Corporation and they are not a party to the proceedings. See *Central Railroad v. MacCartney*, 68 N. J. L. 175-6. That case deals at great length with the estoppel proposition. It is well known that estoppel rests upon the theory that he who has been silent when he should have spoken, shall not be heard when he should be silent. This cannot be said to have been the action of the plaintiffs. They were given no judicial forum where they might properly object. The 1933 Laws gave them no such right. They therefore objected wherever they could which was every time a representative of the defendant called to see them.

We cannot accede to defendant's position as stated at page 67, that it was plaintiffs' duty to do more than merely speak and that they must have gone to equity or certiorari to protect their rights.

At page 69, defendant takes the viewpoint that the defendant bank changed its position and that in effect, it is now a new corporation. We think

this argument is ridiculous on its face. It was urged before the lower court which pointed out that the defendant was still the same corporate structure with which plaintiffs dealt; that no new corporation was organized; no assets were transferred to any new corporation. The defendant is still the same defendant with whom the plaintiffs did business excepting that it now has some new officers and directors and has made a few amendments to its charter.

Reply to Point "III".

Defendant urges that it is not the same corporation with which plaintiffs had their contractual relations and does not owe the debt demanded.

We feel that this argument is so fallacious that it requires practically no answer. The records show that the defendant is the same corporation which received plaintiffs' moneys. In reorganizing, it simply amended its charter. No new corporate entity was formed. No transfer of assets was effected from the defendant as it existed when plaintiffs made their deposit right up to the present time. It is well known that mere amendments to a charter of a corporation do not result in the formation of a new corporation or the dissolution of the old one.

Reply to Point "IV".

Defendant claims that plaintiffs' remedy, if any, is in equity and not at law.

We cannot agree with this proposition. Defendant contends throughout its argument on this point in its brief that the defendant bank, by reorganizing and amending its charter, was for all practical purposes a new corporation. We think that this proposition needs no argument. The defendant may consider itself a new corporation but

from a legal standpoint it is still the same corporate entity with which the plaintiffs did business. No corporation becomes a new corporation simply by amending its charter or changing its officers and we think that this is such a well-settled rule that no citations are necessary but that this honorable Court will take judicial notice of the reasonableness of this argument.

Reply to Point "V".

Defendant claims that the satisfaction of the judgment in the instant case would require defendant bank to violate the laws of the United States and of the State of New Jersey and the regulations of the Commissioner of Banking and Insurance adopted and promulgated by virtue of the laws of the State of New Jersey (Sixth Defense, Amended Answer, p. 17).

These statements are also purely argumentative because the defendant bank, in obtaining permission to reopen its bank, did so under color of the authority given to it by the 1933 Laws hereinabove referred to. If the laws are unconstitutional, as we contend they are for the reasons hereinbefore and hereinafter set forth, then the defendant bank is in a position where it has done something honestly and sincerely which it later found out it had no right to do and under these circumstances, some satisfactory arrangement will have to be worked out with the several State and Federal agencies referred to.

Reply to "Conclusion".

The statements under conclusion at page 84 are simply conclusions arrived at by the defendant without proper judicial sanction and are merely self-serving declarations which cannot and should not be given any weight in this court.

Section B.

Our argument in support of the affirmance of the judgment of the Essex County Circuit Court are as follows:

POINT I.

Chapters 116 and 287, P. L. 1933 of New Jersey, are unconstitutional in that they violate the following Sections of the Constitution of the United States and of the State of New Jersey.

Article I, Section X, Paragraph I, of the Constitution of the United States, which provides that:

“No state shall * * * pass any * * * law impairing the obligation of contracts.”

Article XIV, Section I, of the Amendments to the Constitution of the United States, which provides, among other things, that:

“Nor shall any State deprive any person of * * * property, without due process of law * * *.”

Article III, Section I, of the Constitution of the State of New Jersey, which provides:

“The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.”

Article IV, Section VII, Paragraph 3, of the Constitution of the State of New Jersey which provides, among other things, that:

“The legislature shall not pass any * * * law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made.”

Our position is that it would be an impairment of the plaintiffs' contract and a deprivation of their property without due process of law if they should be compelled to take preferred stock in the defendant bank and holding company stock in payment of their claims.

The statute in question may be valid legislation as applied to all creditors whose claims were created after the passage of the statute. The plaintiffs' claim was, prior to the passage of the act, a vested right to payment in cash or participation in the proceeds of liquidation in accordance with the statute under which the bank was operating at the time when the debt was created.

The banking acts then had no provision for preferred stock and no provision for reorganization under any plan such as is allowed by the 1933 Amendment. Prior to this amendment, the act specifically provided that:

“No corporation organized under this act shall create more than one class of stock” (1930 Supp. to C. S., p. 69, par. 17-1; 1 Cum. Supp. (1925), p. 118, par. 17-1, and 1 C. S., p. 165, par. 1).

The act contained no reservation of the right of the legislature to amend it. But, whatever the effect of the absence of such a provision, it is well settled that the act cannot be so amended as to impair existing contracts between the corporation and its creditors or deprive such creditors of any

remedy which they had when their contracts were made.

Defendant's position is based entirely, however, upon the contention that by reason of the extraordinary conditions of financial stress prevalent throughout the State and Nation, the public welfare has demanded the legislation in question, and that this legislation is a proper and legal exercise of the reserve power of the State to provide for great public exigencies. The contention is that in times of distress the constitutional guarantees are inoperative, and the State has unlimited power to provide for what its government conceives to be for the common good.

Thus the real issue in the case is confined to the question whether in this instance the legislature has properly exercised emergency powers. The question is whether the particular legislation under consideration is an emergency law, reasonably designed to meet the exigency and properly limited in time and scope so as to preserve the permanent constitutional framework upon which depend the safety and security of the people, not for a brief period, but for the duration of the form of government to which the State and Nation are committed, bearing in mind that the power to change the basic constitutional principles is reserved to the people and does not rest in the hands of either the legislature or the courts. The scope of legislation properly falling within this classification has been defined by the highest authority, and we shall confine our discussion to a few recent cases in which this definition has been made, without dwelling upon the well-established and conceded principles. In doing so, we beg leave to quote at some length from these cases.

In *Shams v. Nebraska* (1931), 48 Fed. (2d) 894, facts almost identical with the facts in this case

were presented to a Federal court and that court held that a non-consenting depositor was not bound by the reorganization plan.

The action in that case was on two certificates of deposit issued in 1928. The bank became insolvent in 1929 and the Nebraska department of trade and commerce took possession and was administering its affairs, when the legislature passed a statute reading in part as follows:

“If the Secretary of the Department of Trade and Commerce with a view to restoring the solvency of any bank of which the department has taken charge pursuant to law shall approve a reorganization plan entered into between depositors and unsecured creditors representing eighty-five per cent. or more of the total amount of deposits and unsecured claims of such bank on the one hand and the bank or reorganizers thereof on the other, then and in such case all other depositors and unsecured creditors shall be held to be subject to such agreement to the same extent and with the same effect as if they had joined in the execution thereof, and their claims shall be treated in all respects as if they had joined in the execution of such articles of reorganization, in the event of restoration of such bank to solvency and the reopening of the same for business. Any county, city, village, township or school district, through its governing board, and the State, through the Governor, may enter such agreement.”

The plaintiff maintained that as to him the act was an unconstitutional impairment of his contract rights, and that he was entitled to go against the assets of the bank for the collection of his deposit. The court held, WOODROUGH, D. J.:

“It is clear that the depositors and unsecured creditors who have joined in the reorganization plan could not maintain such

an action as the plaintiff here presents, because they made new contracts and are bound thereby.

“But this plaintiff has made no new contracts, and it was not within the power of the Legislature to impair by statutory enactment the obligation of the contract he had nor to deprive him of any of his substantial security. If, therefore, the reorganization plan of the statute and what has been done under it accomplish such a wrong to the plaintiff, he cannot be without remedy in this court. The mere fact that others who were similarly situated with himself are willing to agree in no wise affects his substantial rights. In this case the proportionate number of those who have entered into the new agreement is very large, including as it does, all creditors but two. The principle, however, cannot be otherwise than if there had been only 50 per cent. named in the statute instead of 85 per cent. Whatever rights the plaintiff has are his own, though he comes from Syria and is only one of two depositors standing out.”

In *Hoff v. First State Bank of Watson* (Minn. Sup. Ct. 1928), 218 N. W. 238, a statute almost exactly like ours was held unconstitutional as to creditors who did not consent. OLSEN, C., rendered the opinion of the court and held:

“These constitutional provisions prohibit the enactment of any law which attempts to change the contract rights of parties to any contract made before the law is enacted so as to impair the obligations of such existing contracts, but as to the contracts made after the enactment of the law, a state statute cannot be said unconstitutionally to impair the obligation of contracts made subsequent to its enactment.”

Three Decisions of the New Jersey Court of Errors and Appeals.

Our Court of Errors and Appeals in *Schwarzwaelder v. German Mutual Fire Insurance Co.* (1899), 59 N. J. Eq. 589, held:

“The German Mutual Fire Insurance Company was organized under our general laws, in 1893, and the complainant became a member of it in 1898. As we have seen, the company had then no power to change itself into a joint stock company. The complainant’s right to membership was one of the benefits accruing to her from her contract of insurance in the company. Of this benefit the company had no power to deprive her, except in the mode provided by the contract itself. The act of March 6th, 1899, if enforced against the complainant, would impair the obligation of her contract by enabling the company to take from her a right derived from her contract with it, in a method not authorized by the contract. Such a law would be unconstitutional and void. Although the act under which the company was organized is subject to amendment, alteration and repeal by the legislature, yet such amendment, alteration or repeal can be effected only by the legislative power of that body, and its legislative power does not extend to the enactment of a law which impairs the obligation of a legal contract previously made. *Rahway v. Munday*, 15 Vr. 395.”

The same court on October 16th, 1933 set out the applicable principles in *Moore v. Splitdorf Electrical Co.*, 114 N. J. Eq. 358. In that case Vice Chancellor BIGELOW had approved a plan of reorganization for the defendant insolvent corporation whereby stock in a reorganized corporation was to be distributed to creditors and stockholders of the defendant in payment of their claims. The appellants, debenture holders, re-

fused to assent. In the opinion of the court, reversing the Vice Chancellor and disapproving the plan, Mr. Justice PERSKIE quoted with approval from the opinion of Vice Chancellor BENTLEY in *Lonsdale Securities Corp. v. International Mercantile Marine Co.*, 101 N. J. Eq. 554 (at p. 559), as follows:

“It has been urged that a proper spirit would cause these complainants to relinquish their strict legal rights in the common interest of the corporation and the other stockholders. Such an argument might well be addressed to the complainants by their fellow stockholders, but cannot be adopted by the court. It is trite to say that one may be generous with his own property, but it is scarcely generosity to deal lavishly with that of another. The fourth section of the existing certificate of incorporation of the defendant creates a contract between the defendant and the complainants by which the latter are clothed with certain property rights having a fixed, determinate value. In place of those rights it is intended to substitute others of a less valuable character, over the objection of the complainants. That they do object is conclusively shown by the filing of these bills. It is true that there would be placed in the hands of the owners of the new shares of stock issued to replace the preferred shares intended to be retired, a greatly increased power of franchise, but the complainants neither seek, nor wish, to surrender their present rights for the one offered in their stead, and it is beyond the power of the corporation, this court or the legislature to compel it.”

The court also approved the statements of law contained in *Coriell v. Morris White, Inc.*, 54 Fed. Rep. (2nd) 255, saying (pp. 364-365):

“A very recent and interesting case on the subject is that of *Coriell v. Morris White*,

Inc., 54 Fed. Rep. (2nd) 255, decided by the Circuit Court of Appeals for the Second Circuit. (This case was reversed by the Supreme Court of the United States in an opinion by Mr. Justice Brandeis, May 22d, 1933, volume 77, No. 14, 1932 term, page 865. The reversal, however, was based on the fact that the District Court had not taken proof before it declared the plan of reorganization fair. The Supreme Court specifically stated that by reason of this error on the part of the District Court, it became unnecessary to pass on the points decided by the Circuit Court.) In that case the Circuit Court of Appeals held:

‘The question presented to us is whether these minority creditors are obliged to accept the plan, taking stock and notes in place of cash, and be contented to wait the outcome of this new venture in the hope that some day the preferred stock will be redeemed and payment of their notes made. Have the appellants been deprived of their rights as creditors by this order?’

‘Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment of its creditors. It has likewise long been recognized that contract obligations may not be impaired by the courts. *Muhlker v. New York and Harlem Railroad*, 197 U. S. 544; 25 Sup. Ct. 522; 49 L. Ed. 872. Private property may not be taken in violation of contract obligations. A creditor may not be compelled to accept, in payment of his claim against a private corporation, paper which is not legal tender of the United States. *Constitution of the United States*, art. 1, par. 10. Any other tender is not a valid tender. *Farmers’ and Merchants’ Bank v. Federal Reserve Bank*, 262 U. S. 649; 43 Sup. Ct. 651, 67 L. Ed. 1157; 30 A. L. R. 635. If the order appealed from does not pay the debts of the corporation to the extent of its financial ability to pay, it wipes out the contract obligations by which credit

was extended to the corporation. The court has not the power to direct a creditor to accept stocks of a private corporation in payment of its commercial obligation. The assets of the corporation may not be used as a fund for the benefit of the debtor rather than a creditor. Commercial obligations, such as an extension of credit, must be imposed by the contracts of the parties with the legal obligations flowing therefrom. It must be left to the decision of the creditor whether he will accept a new form of security in payment of his debt, and thus embark upon a new venture, or insist upon the rights which are his because of the contract which he entered into and by which he extended credit.' "

The foregoing cases establish that the Banking Act of 1933, insofar as it provides that non-consenting creditors are bound to accept preferred stock for their claims if seventy-five per cent of the creditors and two-thirds of the stockholders have assented, is an impairment of contract obligations.

POINT II.

The statute is not emergency legislation. There is no reference to an emergency. Its existence and operation are not limited in time. The rights of creditors are not temporarily suspended but rather permanently abrogated. There is no provision for the restoration of the rights of creditors at any stated time in the future.

An examination of the statute reveals that it is not by its terms emergency legislation; in fact there is no reference to an emergency; *that its existence and operation are not limited in time; that the rights of creditors are not temporarily*

suspended, but are permanently abrogated; and that there is no provision for the restoration of the rights of creditors at any stated time in the future.

In *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, our Court of Errors and Appeals laid down the line of demarcation between permissible emergency legislation and a law impairing the obligation of contracts. The court in that case declared unconstitutional Chapter 82 of the Laws of 1933, providing that in mortgage deficiency suits the defendant be credited with the fair market value of the property instead of the amount realized at the foreclosure sale as theretofore. Mr. Justice CASE delivered the opinion of the court and held (pp. 602-603):

“It is next said that the constitutionality of the statute may be sustained under the police power; and the burden of this argument assumes that the act was passed simply to save mortgagors from oppressive suits in the present financial emergency.

“As has been already stated, the appellants rely wholly and exclusively upon the statute; and *the statute neither purports to be directed towards an emergency nor limits the application of the enactment either in field or in time. Its purview is absolute, final and permanent.* It extends to all classes of property—homes, business properties, speculative ventures, everything. According to its terms, it is in force henceforth and forever. *If effective now, it will be just as effective after, and entirely regardless of, the passage of the emergency.* To hold that the police power enables the legislature to do that against an existing contract would be to contravene the provisions, *supra*, of the constitutions, both federal and state. * * * Mr. Justice HOLMES said in *Block v. Hirsh*: ‘As emergency legislation the title is to end in two years unless sooner repealed. * * * *A limit in time, to tide over a passing trouble,*

well may justify a law that could not be upheld as a permanent change.' The Massachusetts case concerned certain regulations imposed upon savings banks chartered by that commonwealth to do business and need not be reviewed further than to quote therefrom these words: 'Depositors of savings banks cannot be despoiled under the guise of police regulations.'

"We may take judicial notice of the financial emergency that now presses upon so many people in so much of the world, but we may not read into the statute a limited duration that is neither expressed nor implied therein nor do we subscribe to the intimation that an emergency automatically lifts all constitutional restraints. The statute does not grant a stay or a delay and therefore does not deal with the question of a moratorium. The subject-matter of the point under discussion does not save the statute from the fault laid against it.

"We conclude that the 1933 amendment is unconstitutional in so far as it purports to restrict or limit the pre-existing right of recovery on the bond. The judgment will be affirmed." (Our italics.)

A Recent New York Decision.

Similarly, the New York Supreme Court, Appellate Division, First Department, at the October Term, 1933, in *Moses and Berney v. Guaranteed Mortgage Co. of New York* (Case, No. 3124), held invalid a regulation of the New York Banking Department limiting the right of mortgagees to recover interest and principal from mortgage guaranty companies to the amounts collected from the mortgagors during part of each month, less disbursements. The regulation had been promulgated pursuant to a New York statute (Chapter 41, Laws of 1933), which the court held unconstitutional as an impairment of the obligations of contracts (as well as an improper delegation of

legislative authority). The statute referred to an emergency and authorized the banking board to suspend any provision of the banking law and to provide regulations inconsistent with the law as might be necessary to promote the public safety, during the financial emergency. The period of emergency was defined as follows:

“Section 5. The period of the emergency herein provided for shall be from the date of the taking effect of this act until such date as the legislature may, by joint resolution, designate to be the termination thereof, or if the legislature be not in session, the date so designated by a proclamation of the Governor.”

Mr. Justice GLENNON said for the Court:

“Plaintiffs attack the constitutionality of Chapter 41 of the Laws of 1933, upon two grounds: (1) the statute improperly delegates to the banking board legislative functions, and (2) the statute is so indefinite as to time as to impair the rights and obligations of existing contracts. While we realize the stress of circumstances and the conditions which prevailed at the time of the proclamations of the President, of the Governor of this State, of the Treasury Department’s interpretations, as well as of the enactment of Chapter 41, of the Laws of 1933, still it is our duty to determine whether or not the constitutional rights of these plaintiffs have been violated.”

* * * * *

“The second point urged by plaintiffs is that the statute is too indefinite as to time. No one would quarrel with the right of the legislature to suspend the payment of principal on mortgages such as are involved in this case for a definite period of time. Here, however, the law contains the following provision:

(The court quoted Section 5 as above.)

"Under the terms of this provision nobody can tell with any degree of certainty when the joint resolution may be passed or when the Governor, if the Legislature is not in session, may issue a proclamation declaring the emergency at an end. Thus the existing legal rights of plaintiffs may be totally destroyed, and they would appear to have no definite remedy. The rights and obligations of contracts are thus impaired. (Constitution of the United States, Article i, §10.) It will be noted that in the mortgage moratorium laws the suspension of remedies was for a definite period of time. Here it is indefinite."

"In *Sliosberg v. New York Life Insurance Co.* (244 N. Y. 482-497), Judge KELLOG said:

'In our case the statute requires that actions of a certain class be stayed until thirty days after "the recognition *de jure* of a Government of Russia by the Government of the United States." In other words, the actions are to be stayed "until the happening of an event which may never happen." As said in *Burt v. Williams* (*supra*) the great weight of authority is to the effect that a State imposing such a stay impairs the obligations of contracts and violates the constitutional limitation.'

"Defendant attempts to sustain the statute upon the broad ground that, in view of the grave emergency which has been proclaimed to exist in the State and in the nation, it is a proper exercise of police power. We do not doubt that the legislature may enact a law which will control the situation, but we must hold, for the reasons stated, that the statute in its present form is unconstitutional."

Home Building & Loan Association v. Blaisdell.

A recent decision on emergency legislation is, of course, the decision of the United States Supreme Court in *Home Building & Loan Associa-*

tion v. Blaisdell, 78 L. Ed. (Ad.) in which the Minnesota Mortgage Moratorium Law was held valid. The statute in that case declared the existence of an emergency requiring relief and provided that the act should remain in effect "only during the continuance of the emergency and in no event beyond May 1st, 1935." It authorized the District Court of the County to extend the period of redemption from foreclosure sales "For such additional time as the court may deem just and equitable," but in no event beyond May 1st, 1935. The court was authorized to grant the extension after a determination of the reasonable value of the income or rental value of the property and was required to order the mortgagor "To pay all or a reasonable part of such income for rental value in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness," as directed by the court.

The state further suspended the right to a deficiency judgment for the same period.

As applied to the case before the court, the statute was attacked as an impairment of the obligation of contracts, a deprivation of property without due process of law, and on other grounds. The opinion of the court, delivered by Chief Justice HUGHES, is devoted in large part to the question of the impairment of contract obligations. The effect of the decision is carefully limited.

Mr. Justice HUGHES said (p. 265):

"The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them (citation) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights. * * * In *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed

condition of business, following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the *Bronson* case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. * * * In *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447, a state law was found to be invalid which prevented a bank from transferring notes and bills receivable which it had been duly authorized to acquire * * *."

Page 266:

"* * * In *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, the Court held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This ruling was to the same effect as that in *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, *supra*, and *Howard v. Bugbee*, 24 How. 461, 16 L. ed. 753, *supra*. But in the *Barnitz* case, the statute contained a provision for the prevention of waste, and authorized the appointment of a receiver of the premises sold. Otherwise the extension of the period for redemption was unconditional, and in case a receiver was appointed, the income during the period allowed for redemption, except what was necessary for repairs and to prevent waste, was still to go to the mortgagor.

"None of these cases, and we have cited those upon which appellant chiefly relies, is

directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period."

Page 269:

"Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which *temporary restraint of enforcement* may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent *limited and temporary interpositions* with respect to the *enforcement* of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. * * *"

After reviewing the cases in which emergency rent legislation has been sustained, including *Block v. Hirsh* and others, Mr. Justice HUGHES noted that these cases sustained temporary and conditional legislation limited to a definite period of emergency, saying:

Page 271:

"In these cases of leases, it will be observed that the relief afforded was *temporary and*

conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession. The Court also decided that while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law 'depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. * * *

Mr. Justice HUGHES adverted repeatedly to the declaration of an emergency by the legislature in the act under review. The preamble of the act so declaring and stating the facts upon which the declaration was based is printed in a note to the opinion (Note 3). The Court took judicial notice of the facts, as a basis for a determination that the legislature's declaration was reasonable and not contrary to fact, and recognized that to declare an emergency is a legislative function. Neither the Supreme Court of Minnesota nor the United States Supreme Court undertook to declare an emergency.

The Minnesota Court specifically held (249 N. W. 334, 86 A. L. R. 1507, headnote 3):

"Whether the emergency existed and was of such nature that resort might be had to the police power of the state was primarily for the legislature, but, though the courts have authority to determine whether such emergency in fact exists, common knowledge of conditions and the action of the President and the Congress indicate a reasonable basis for legislative action."

In the same opinion (86 A. L. R. 1510) the court quoted with approval from the opinion of Judge POUND in *People v. La Fetra*, 230 N. Y. 429; 130 N. E. 601, 604; 16 A. L. R. 152 at 158, as follows:

“Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. * * * ”

Thus it is established that the court cannot in the first instance exercise the legislative function of determining when extraordinary conditions exist calling for extraordinary temporary measures.

The judicial power extends merely to a review of the legislative declaration. It follows that in the case at bar, where the legislature has not declared an emergency, this court cannot read into the law that it was enacted to meet an exigency. In failing to declare an emergency, the legislature is free from judicial review. Courts have no power to pass upon the reasonableness of *in-action* on the part of the legislature.

This view is demonstrated by the first conclusion of Chief Justice HUGHES (p. 272):

“1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. The declarations of the existence of

this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block v. Hirsh*, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A. L. R. 165, *supra*. The finding of the legislature and state court has support in the facts of which we take judicial notice. * * * ”

Other essential conclusions of the Court were (pp. 272-3) :

“3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

“f. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, *the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law.* * * * ” (Our italics.)

The Chief Justice compared the legislation with the power of courts of equity to grant similar relief in mortgage cases, indicating that the legislation went no further than courts of equity have gone.

Page 274 :

“5. *The legislation is temporary in operation. It is limited to the exigency which called*

it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change of circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.
 * * *” (Our italics.)

It is clear, therefore, that the distinction made in *Brunton v. Vanderbilt* in our Court of Errors and Appeals, between legislation which expressly declares an emergency and limits relief to the period of emergency, and legislation of a permanent character, permanently impairing the obligation of a contract, has been recognized by the United States Supreme Court as one basic difference between valid and invalid emergency legislation. In addition, that court has sustained only the *suspension* of the *enforcement* of contractual rights after an express declaration of emergency, with adequate safeguards and compensation to creditors in the meantime. It has not placed its stamp of approval upon a permanent substitution against the will of a creditor, of a payment in stock of indefinite and unknown value for a payment in cash. It has not given *carte blanche* to legislatures, but has carefully limited to reasonable temporary provisions the power of the State to provide for emergency situations.

An emergency is by definition a temporary situation. The essential quality of such legislation is its limited duration. The keynote is to be found in the statement of Mr. Justice HOLMES in *Block v. Hirsch*, *supra*: “*A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.*”

As already indicated, the act here before the court does not conform in any way to the specifi-

cations of temporary legislation. It does not declare an emergency; it does not limit its operation to a definite period of time; it does not suspend remedies, but against the will of the obligee, permanently substitutes property of unknown value for the right to payment in money.

Bingham v. Savings Investment & Trust Company, 101 N. J. E. 413, has been cited by the defendant as being in favor of its position. That case and the law under which the merger was effected, provides that the dissenting stockholders get compensation for their shares and it is therefore not analogous to the case at bar because under the reorganization plan in the instant case, the depositors are compelled to take stock of the bank for twenty-five per cent of their deposits in stock of the Newark Mortgage Company to which has been transferred, admittedly, all the frozen mortgages and slow notes of the company which are not considered liquid by bank examiners, and which may never be worth anything insofar as converting them to cash is concerned, or which in any event will probably result in a very serious loss to all the bank depositors who were compelled to take said stock by the reorganization plan.

In *Milner v. Gibson* (1933), 249 Ky. 594, 61 S. W. (2d) 273, it is stated:

“Without exercising the police power, the state may alter, enlarge, modify, or limit existing methods of procedure, or substitute or provide others without impairing contracts, *if a sufficient one be left or provided*” (italics ours).

This case dealt with a reorganization plan which stated that it was subject to the approval or veto of the Banking Commissioner and *circuit court of the county in which it is located*.

POINT III.

The law in question gives to the Commissioner of Banking and Insurance of the State of New Jersey judicial powers which cannot, under the State Constitution, be delegated to an executive branch of the government.

The Act makes the Commissioner of Banking and Insurance the sole arbiter as to the fairness and equitableness of the reorganization plan, the approval of claims of creditors against the assets of the defendant and provides no judicial forum wherein the fairness and equitableness of the plan may be passed upon and objections thereto voiced by depositors or other parties in interest.

PART II.

Section A.

Answer of Plaintiffs to Brief of Attorney General as *Amicus Curiae*.

Reply to "Preliminary".

In this section of the brief the Attorney General seeks to impress the court with the serious consequences which will result from an affirmance of the judgment below, in that innumerable suits will be instituted against the banking institutions involved in the various reorganizations in this State and he alleges that this would inevitably result in their suspending business with the consequent chaotic conditions which obtained during the banking holiday of March, 1933. We cannot agree with this proposition because in the first place courts are not concerned with what supposed in-

jury may result from a determination of a particular case but rather that justice be done regardless of who may suffer. Furthermore, the fact is apparently overlooked that at least seventy-five per cent or more of the depositors in the various institutions must have consented in writing to the reorganization plans and therefore the remaining non-consenting depositors could not possibly cause the chaotic conditions to arise which are represented to the court might obtain from an affirmation of the judgment below.

The Attorney General seems to take the position that because substantial interests are concerned in the result, the court could in effect look away from the merits of plaintiffs' position and decide contrary to the inherent protective rights given by the Federal and State constitutions.

Reply to Statement Under "the Facts".

The brief of the Attorney General at this point sets forth that if the assets of the defendant bank had been liquidated in the ordinary way, its depositors would not have received in excess of forty per cent of the amounts of their deposits and that claims of depositors and other creditors were duly passed upon. This is purely a conclusion and not supported by facts which have been passed upon by any judicial forum, and furthermore, no list of claims of depositors and other creditors were available to plaintiffs or could be inquired into, under the law as it now stands, with the same efficacy as if the plan of reorganization had been submitted to a court to be passed upon and approved after due notice to all depositors and creditors as is provided for in the Mississippi statute which counsel for the defendant bank relies on and which is set forth in Part I of this brief.

It is further contended that no steps were taken by plaintiffs, although they had full knowledge, or by any other creditors or stockholders either to review the action of the Commissioner or to enjoin the putting into effect of the plan. We contend that plaintiffs were under no obligation to take any steps other than to object, which they did as set forth in Part I of this brief, and the fact that no judicial forum is given in the act wherein non-consenting creditors could complain or attack the plan, is one of the reasons on which we base our contention that the act is invalid.

Reply to Statement Under "Argument".

Under this section of the brief it is stated, at page 9, that where the construction of a particular clause of the Constitution would inevitably lead to a destruction of the social structure sought to be created by it, such a construction will be denied. We think that this argument has no place in these proceedings because we feel that no such result would prevail from an affirmance of the plaintiffs' judgment. It would simply mean that the defendant would be required to pay to non-consenting depositors such sums as have been withheld without their consent, and certainly the Commissioner of Banking and Insurance in this State should have had in mind that there probably would be some attack on the reorganization plans of the savings banks referred to, by non-consenting depositors and we submit that it was up to the Commissioner of Banking and Insurance to enlist the aid of the Court of Chancery in this State in passing upon the various plans of reorganization and providing a hearing for non-consenting depositors at which their objections to the plans could be passed upon.

The case of *People v. Nebbia* (1934), 291 U. S. 502, is cited with excerpts. This case is not anal-

ogous to the one at bar because the cited case concerned a statute which had a recital that it expired on March 31, 1934 and the court held by reason thereof, there was an indication that the act was passed to cover a temporary emergency.

The case of *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 S. C. 231, 78 L. Ed. 413, is cited. This case is one in which the statute declared the existence of an emergency requiring relief and provided that the act should remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." It authorized the District Court of the County to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," but in no event beyond May 1st, 1935. The court was authorized to grant the extension after a determination of the reasonable value of the income or rental value of the property and was required to order the mortgagor "to pay all or a reasonable part of such income for rental value in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness," as directed by the court. It can readily be seen that this case is not analogous to the case at bar as all of the safeguards which are thrown around the stated case are missing from the case at bar.

The reference at page 11 of the Attorney General's brief of the case of *Hourigan v. Township of North Bergen*, 113 N. J. L. 143, is completely answered in Part I of our brief and reference is made thereto.

We are not attempting to answer every cited case either in this brief or defendant's brief because of the magnitude of the task, but we are rather attempting to set forth for the court's consideration such facts and cases which we feel

are analogous and deal with the position of plaintiffs.

The case of *Doty v. Love*, U. S. 79 L. Ed. 632, is cited at page 15 of the Attorney General's brief as being analogous to the case at bar. We have dealt with this case in Part I of our brief and reference is made thereto. We feel that a reading of that case will clearly indicate that it is not parallel to the case at bar for the reason that the *Doty* case, which deals with the Mississippi statute concerning reorganization of banks, provides for the approval of the reorganization plan submitted by the Banking Commissioner on notice to all depositors and creditors and upon a judicial determination by the Chancellor. Again the statement is made at page 16 that had liquidation taken place, the plaintiffs would have received less as a result of the liquidation than they have already received from the fruits of reorganization. We insist that this is merely a conclusion and not supported by any facts. It is a well known fact that there have been many liquidations which have netted almost one hundred per cent and in many cases one hundred per cent to depositors and we submit that nowhere can it be shown that this would not have obtained in the defendant bank's case.

It is insisted at page 17 of the brief that plaintiffs have in no way been damaged. This cannot be taken for granted because, under the reorganization plan as it now exists, no creditor will know what loss they will suffer for many years to come as it will take a long time for the holding company, which holds twenty-five per cent of the defendant bank's assets, to liquidate them and we think that there is no denying this assertion because the mere fact that the bank examiners refused to consider the assets now in said holding company as liquid and as proper banking

assets, indicates that their liquidity will be a matter of years.

Furthermore, it is insisted that plaintiffs could have resorted to Chancery to seek an injunction against the adoption of the plan, were they prejudiced by its terms, or that they could have sought a writ of certiorari in the Supreme Court, and that it makes no difference in the rights of these plaintiffs or in the rights of any individual affected by the reorganization plan that the Act does not in and of itself provide for judicial review or affirmation. To this proposal we cannot agree. We submit that the plaintiffs were not obligated to do anything other than to object in the fashion in which they did and the fact that these safeguards are not provided for in the Act is one of the grounds on which the Act is unconstitutional.

At page 18 the Attorney General seeks to justify the Act under which the reorganization took place by the Mississippi statute in *Doty v. Love* (*supra*) and states that it would be absurd to claim that any plan is saved from invalidity only because it bears the court's stamp of approval. This argument, too, has no force, in our opinion, because the Mississippi Banking Act very carefully provides for the filing of a verified petition with the Chancellor setting forth the proposed reorganization plan after the Commissioner of Banking shall have approved the same. It further provides that the Chancellor shall issue an order to show cause upon creditors and depositors and give them an opportunity to voice their objections to the plan of reorganization and then, after the court shall have considered such objections, if it finds that they are not meritorious, it may approve the plan, so that there is a full, fair and careful investigation into all the angles of the plan of reorganization before the court finally

gives it its stamp of approval. The statement that the fairness and equitable nature of the plan adopted by the defendant in pursuance of the statute have never been changed, is untrue. Plaintiffs at all times objected to the fairness of the plan. (See affidavit of Grace F. Grosman, S. C. 64, par. 11.)

Section B.

POINT I.

Chapter 116, P. L. 1933, page 241, and Chapter 287, P. L. 1933, page 770, are unconstitutional.

The foregoing acts are amendments to the Trust Company Act which governed the charter of the defendant bank and provided by its 10th Section, 4 C. S., page 5659, in effect, that no change in the certificate of incorporation of a trust company incorporated under the act should be made whereby rights, remedies, or securities of existing creditors should be in any way impaired; and other sections, particularly Section 22 and Section 25, provide for proceedings where the company becomes unsafe and where the same was to be wound up by a receiver. The amendment to the Trust Company Act was passed in 1933 after the closing of the defendant trust company and subsequent to the making of the deposits by plaintiffs. The reorganization merely amended the existing charter of the defendant bank and did not create a new company.

The acts are unconstitutional because they violate the sections of the State and Federal constitutions in detail set forth in Section B of Part I of our brief, and reference is here made in support

of this contention to the following cases: *Moore v. Splitdorf Electric Co.*, 114 N. J. E. 358; *Baldwin v. Flagg*, 43 N. J. L. 495; *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596.

In the case of *Moore v. Splitdorf Electric Co.*, *supra*, Justice PERSKIE, speaking for the Court of Errors and Appeals, affirms the principle that a statute providing a method of reorganization for a failing corporation cannot require a creditor against his consent to accept securities in place of a share of the corporation's assets. See also: *Shams v. Nebraska* (1931), 48 Fed. Rep. (2d Ed.) 894.

POINT II.

The statute is unconstitutional as being in violation of the Fourteenth Amendment of the United States Constitution, Section I.

This section provides in part:

“* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The reason for this is that the statute requires only the determination of the corporation itself as to the propriety of the change in obligation to the creditor, and the consent of the Commissioner of Banking and Insurance. This clearly deprives the plaintiffs of their property without due process of law. No judicial forum is permitted for the purpose of reviewing the fairness of the plan or the fairness of the way it is being carried out. They have no opportunity, before the plan is put into effect, of contesting or disputing claims of other creditors, but must take the stock and participating certificates in common with others who

may not be entitled to them, or in an amount which may not be proper.

POINT III.

The statute in question cannot be sustained under the police power and that it was a statute passed during an emergency.

The statute is simply an amendment to the Trust Company Act and by its terms does not indicate that it is passed under any emergency. Without any emergency provision, no claim can be made to sustain its validity as an exercise of the police power on the part of the legislature. The police power might to some extent be applied to the business of banking, but it has its limitations, and the means must have a reasonable relationship to the end. The trend of the decisions in both Federal and State courts seems to be against any statute requiring a creditor to take a lesser amount for his debt as against his ratable share in the assets of his debtor. See: *Vanderbilt v. Brunton Piano Co.*, *supra*; the Minnesota Mortgage moratorium case, *Home B. & L. Assn. v. Blaisdell*, 54 Sup. Ct. 231, 78 L. Ed. 255; *Milner v. Gibson* (1933), 249 Ky. 594; 61 S. W. (2d) 273; *Nagel v. Ghingher*, 166 Md. 231, 171 Atl. 65; *Dorman v. Dell*, 254 Ky. 34, 52 S. W. (2d) 892.

Conclusion.

It cannot be denied that all of the acts of defendant in connection with the reorganization plan revolve around the constitutionality of Chapter 116, P. L. 1933, as amended.

We respectfully submit that this chapter as amended is unconstitutional in that it violates the rights and privileges accorded to citizens under the State and Federal constitution as in detail set forth in the foregoing brief, and that the judgment below should be affirmed.

Respectfully submitted,

GROSMAN & GROSMAN,
Attorneys for Plaintiffs-
Appellees.

CHARLES M. GROSMAN,
Of Counsel.

95 MAY.T.1935

New Jersey Court of Errors and Appeals

No. 95—MAY TERM, 1935.

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,
Plaintiffs-Appellees,

vs.

CLINTON TRUST COMPANY, a
New Jersey Corporation,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court
from Order Striking
Amended Answer
and directing entry
of judgment in favor
of the Plaintiffs.

Sat Below:
William A. Smith,
C. C. J.

SUPPLEMENTAL AND REPLY MEMO- RANDUM OF APPELLANT.

(Italics and the like ours, except where otherwise noted.)

I.

Although the matter is treated in the original brief, a few words further may not be out of place in connection with the suggestion, which has been made from time to time that the "right" of a depositor to have the assets of a banking institution, which cannot continue, liquidated, either by the Commissioner of Banking and Insurance or in Chancery, if the Commissioner of Banking and Insurance should decline to take over is a remedy of which the Legislature cannot deprive the depositor.

Under the act concerning trust companies, as amended by Chapter 255 of the Laws of 1931, P. L. 1931, p. 641, the right is given "*to the Commissioner of Banking and Insurance*" to take over the business of a trust company which is insolvent

or the business of which cannot be conducted with safety to the public. The statute then provides for a method of liquidation which is somewhat similar to that which would be pursued by the Court of Chancery where the Court of Chancery should take over the administration of the affairs of an insolvent corporation or one the business of which cannot be conducted with safety to the public. And the statute further provides for the intervention of the Court of Chancery upon application of the Commissioner for instructions or directions. The statute directs that the proceeds of the liquidation shall be held by the Commissioner "less the costs and expenses of administration and liquidation" for disposal by him "under the direction of the Court of Chancery."

We have already adverted to the fact (p. 23 of our original brief) that a trust company so taken over may "*with the consent of the Commissioner, resume business on such conditions as may be approved by him.*" Under section 24 of the act, as it was amended by chapter 255 of the Laws of 1931, P. L. 1931, at p. 649, if a trust company should become insolvent or should suspend its ordinary business for want of funds to carry on the same and the Commissioner should refuse upon demand of a creditor or stockholder, to take possession of the business and property of the trust company, the Attorney General or any creditor or stockholder might, by petition or bill of complaint, apply to the Court of Chancery for the appointment of a receiver. If a receiver is appointed by the Court of Chancery, then the administration is in the same manner as the administration of the assets of other insolvent corporations.

It is apparent that, under this statute, no right is conferred upon a depositor or other creditor in his own right. The privilege accorded to him

to make an application to the Court of Chancery is of the same nature as the privilege accorded to a creditor or stockholder in the case of an insolvent business corporation. He is permitted to act not for himself and in the right of his own claim but in the right of the public and, as Vice-Chancellor Stevenson put it in *Gallagher v. Asphalt Co. of America*, 67 N. J. Eq. 441, he acts, in effect, *pro hac vice*, the Attorney General.

The Vice-Chancellor had the matter before him in *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258 and again in 67 N. J. Eq. 441, and at page 444 of 67 N. J. Eq. he said:

“The view that I entertain of the character of this proceeding is that *it is more in the nature of a public action brought not in the name of the attorney-general but brought by direction of the state in the name of any person who, as stockholder or creditor, is so interested in the assets of the corporation as to have an interest in instituting the statutory suit.* We find the same principle illustrated throughout our jurisprudence. A criminal law is enforced, or a *quasi* criminal law, by *qui tam* actions, actions for penalties, where private prosecutors are allowed to intervene. The state relies upon the private individual to institute the action, *the primary object of which is the protection of the state.* I take it that in this case the substitution in New Jersey of the attorney-general as the necessary actor in this case by any stockholder or any creditor was made simply because the legislative policy could be, would be inevitably, carried out more fully in greater numbers of instances by leaving the power to institute the proceeding with a stockholder or a creditor—any stockholder, or any creditor; because that being so, as soon as the condition came into existence, which it is the intention of the act to prevent or to remedy, some stockholders or some creditor would have sufficient interest in the assets which

would be distributed as the result of the final decree to set the machinery of the court in motion to accomplish directly the object, and only essential object, of the suit, namely, the placing of the corporation under disabilities with reference to the exercise of its franchises. *That this is not a creditors' suit, but that it is such a quasi public proceeding, I think is well illustrated by the fact that the suit can be prosecuted to a final decree and the corporation can be placed under disabilities, and then an order can be made dissolving the corporation, precisely as has been done in this case, without administering any assets and without there being any assets capable of administration by this court.* I might say in this connection that Chancellor Walworth indicated this view of the New York statute within five or six years after it was first passed. I cited the case in my former opinion in this case. He said, in substance, that this was an instance where the creditor—I think at that time the stockholder was not permitted to bring suit in New York—the creditor was allowed to bring an action to secure a forfeiture of the corporate franchises.”

And at page 446 he said:

“In this connection it is worth while to note that, according to the well-settled doctrine of this court, while this suit is an action *inter partes* down to the time for the decree for an injunction, *it then ceases to be an action inter partes*, the complainant no longer controls the cause, and the stockholders and creditors have to be brought in. I never heard of a decree fixing the status of the corporation as one under disabilities, with reference to the exercise of its franchises being vacated without notice to all the stockholders and all the creditors of the corporation. That is the sort of a status you have as the result of a decree in this suit *in rem*. Very many of our chancellors have remarked—I think, certainly, the

idea is expressed in a number of reported cases—that in fact all of the stockholders and all of the creditors constitute a single party complainant in this proceeding. *This statement is based on the idea that the actor who originates the proceeding is not acting in a private capacity, merely coming into court with his own private grievance as a creditor and seeking a means of collecting his debt. Nor is he acting on his own behalf and as the representative of creditors with a common grievance which such creditors as a class, have against the defaulting debtor corporation. Nor is he acting, in case he is a stockholder, on behalf of the stockholders as a class for the redress of any injury to the rights of such stockholders. When a corporation is hopelessly insolvent, its stockholders are interested in a variety of ways in having its activities perpetually enjoined and its assets equitably administered. In the same case creditors have a very great interest, in some respects the same but in others widely different from that of the stockholders. The public at large, as has so often been pointed out, has a further distinct interest in preventing an insolvent corporation from contracting obligations and continuing its business operations in which it may receive new parties and thereby perpetrate fraud.”*

And at page 448 he said:

“That our statutory action against an insolvent corporation, the only essential object of which is to place the corporation under disabilities, is not in fact the personal action of the particular stockholder or creditor who is authorized to bring the action, and who may be induced to bring it from a variety of selfish motives, is illustrated by the nature of the final decree which the actor, the creditor, we may say, obtains in his suit. He obtains no decree which necessarily benefits him personally. Nor does he obtain any decree which he owns or controls as a representative of or

trustee for others. The decree, from the moment it is entered, is beyond his exclusive control and stands for the benefit of all the creditors and stockholders equally. This decree, while fixing the status of the complainant as a creditor for the purpose of qualifying him to sue, does not make it res adjudicata that he is entitled to \$1 of the assets. He is obliged, after the final decree for an injunction has been obtained upon his motion and through his instrumentality, to prove his claim against the assets precisely as all the other creditors must prove their claims, and his entire claim may be rejected. He may thus utterly fail to secure the object which he had in view in bringing the suit, but the statutory object of the suit—its only legal object—is fully accomplished.”

The Vice-Chancellor had the matter again before him in *Hoopes v. Basic Company*, 69 N. J. Eq. 679.

The case was affirmed by this Court in 72 N. J. Eq., page 425, upon his opinion, and I quote from his opinion as reported in 72 N. J. Eq. 426 at page 431:

“I stated to counsel, in postponing this case the other day, some of the leading principles which, I think, control, and which relate to the fundamental nature of this statutory action. I had occasion to discuss these principles at considerable length in the case of *Gallagher v. Asphalt Company of America*, 65 N. J. Eq. (20 Dick.) 258; 55 Atl. Rep. 259, in the same case in a subsequent opinion, reported in 58 Atl. Rep. 403, and more recently in the case of *Pierce v. Old Dominion Copper Mining and Smelting Co.*, 58 Atl. Rep. 319. It was because of the views which I expressed in these cases in regard to the nature of our statutory action that I laid this point over for further argument and further consideration. *We have here not a private action inter partes. The complainant, whether he is a*

stockholder or a creditor, acts as the representative of the public, and particularly of the whole body of stockholders and creditors of the corporation. It is a great mistake to suppose that this is a collection suit or a creditors' suit. The complainant, if he is a creditor, by his decree, whether he is a creditor or stockholder—by his decree against the corporation, resulting in its being wound up and its assets being distributed—gets nothing necessarily advantageous to himself. He is obliged afterwards to come humbly before the receiver and prove his claim, and it may be rejected, and he may never have any share awarded to him in the assets, and that fact, as I have pointed out in this case, very strongly indicates that Chancellor Williamson and Chancellor Vroom were entirely right in saying that this is an action in which, not the particular grievance of the complainant is redressed, but the grievance of the public, including the whole body of stockholders and creditors. Now, with that sort of an action, in which the actor appears as the representative of other interests, in which the actor is not prosecuting for a decree which entitled him necessarily to anything himself, the question was raised in my mind what the legislature meant originally, and what it means now, in saying that a stockholder, any stockholder, may file this bill in which the rights of the public are so directly concerned, in which the rights of all the stockholders and all the creditors are concerned, and in which finally the actor, this representative, the complainant, may take nothing at all. The result of my reflection upon the subject in the absence of any authorities, is that the legislature means to commit the institution of this suit to the parties who are interested as creditors or as stockholders. The legislature relies upon the selfish interest of the creditor or of the stockholder to have suit brought when public interests require it. That is a very common principle that runs all through our jurisprudence, and is an ancient principle. All qui tam

actions are based upon it. The original New York statute of 1925, upon which our act of 1829—the act to prevent fraud by incorporated companies—was modeled, made it the duty of the attorney-general to bring the suit. A creditor, also, was permitted to bring the suit, but not a stockholder. A little later the stockholder was enabled to appear as the actor. Our New Jersey statute from the start allowed the suit to be brought by either a stockholder or a creditor, while it conferred no power and imposed no duty upon the attorney-general of the state in relation thereto. The legislative theory appears to have been that the *public interests*, and the interests of stockholders and directors of corporations particularly, would be best cared for if reliance was had upon the selfish interest of some stockholder or some creditor to come forward when the corporation becomes insolvent and its operations become inimical to public interests.”

See also:

Pierce vs. Old Diminon Copper Co., 67 N. J. Eq. 399.

The doctrine as indicated by Vice-Chancellor Stevenson has never been departed from in this State.

It is obvious, I submit, that under the legislation respecting trust companies no right or remedy is conferred upon a depositor or other creditor in *his own right* and of such a nature as that it is not subject to change by the Legislature. Whatever privilege (and it was a privilege rather than a right conferred upon him) was the privilege of acting *in the interest of the public*.

This Court very recently, in *Tachna v. Pressed Steel Car Co.*, 112 N. J. Eq. 411, reversing the Court of Chancery, said with respect to the power of the Court of Chancery to appoint receivers of insolvent corporations, at page 413:

“The power vested in the court of chancery by section 65 of the Corporation act (see amendment, P. L. 1931, p. 545), *calls for a balancing of the convenience of the public, the creditors and stockholders of the corporation.* The counterpart of the section in question, without minor changes since made, was first embodied in our law under an enactment entitled, ‘An act to prevent frauds by incorporated companies.’ *The court should never intervene, unless it is reasonably satisfied that a corporate business cannot be conducted with safety to the public and its creditors and advantage to its stockholders.* P. L. 1931, p. 545.”

And at page 415:

“The two complainants hold seven \$1,000 slightly overdue debentures of the defendant company. It does not appear how, when or at what prices they acquired the same. The total issue was for several millions of dollars. The company had offered a plan of refinancing which appears to be acceptable to the other debenture holders; at least they did not intervene. Obviously, the complainants did not present a claim justifying the action taken. *Their interest in the corporation is far too small to justify a present liquidation which can only result in great loss to the public, creditors and stockholders.*”

This language clearly indicates that the so-called right given to a depositor or other creditor to apply to the Court of Chancery for the appointment of a receiver is not such a remedy as becomes a part of the contract which cannot be disturbed by the Legislature. Conferred for a *public* purpose, it may be withdrawn or controlled where the public interest requires.

Certainly the right which was conferred by the Trust Company Act as amended by chapter 255 of the Laws of 1931, P. L. 1931, p. 641, upon the

Commissioner of Banking and Insurance is not a right conferred upon a depositor or other creditor which becomes a part of his contract.

The Constitution of New Jersey forbids impairment *only* of a remedy for *enforcing* the contract. The remedies to which we have referred are *not*, in any sense remedies for *enforcing* the contract. They do not come into play until conditions have become such as that the *enforcement* of the contract has become impossible.

The only rights of a depositor or other creditor upon insolvency is, as indicated in our original brief, the right to a *fair* and *equitable* administration of the assets of the insolvent, which constitute a trust fund. I have considered this subject under Point I, subdivision F of my original brief (p. 56) and have there mentioned the cases of *Gibbes v. Zimmerman*, 290 U. S. 326, 332, 78 L. Ed. 342, 347, and *Doty v. Love*, Adv. Op. No. 11, 79 L. Ed. 632.

The language of the cases to which I have above referred, which was used in connection with ordinary business corporations, has greater application to banks which are *public* institutions.

There are two grounds upon which subsequent legislation may be sustained which affects the so-called rights of the depositor or other creditor as above indicated: (1) assuming that the so-called right is a remedy which becomes a part of the contract, banks being public institutions, the Legislature may interfere with those contract rights when the public interests require, which has been fully argued in the original brief; (2) that the so-called right is not a remedy of the depositor or other creditor and forms no part of the contract, which is partly argued in the original brief and here elaborated.

II.

I cannot close without referring to the great distinction between that class of cases, in which it is claimed that, because of "emergent" conditions or what not which affect the public, or usually a *section* of the public, the legislative authority may trample upon the contract or other rights of individuals for the benefit of the public or more likely a restricted class of the public, with which theory I have no sympathy and that class of cases, of which that at bar is one, in which the "emergent" conditions affect those interested in the subject matter. The legislation here involved is primarily for the benefit of the depositors and other creditors and is designed to give the will of the majority of those similarly interested in a trust *some* play and to prevent a few dissenters from causing injury to the whole.

III.

We have been served with a copy of the brief of respondents on appeal. We feel that to answer it would be but to repeat what we have already said. We note, however, that at several points respondents question our statements of fact as, for example, that the depositors, in the event of a liquidation would only have received forty cents on the dollar and then only after a four years administration and that the plan of reorganization was fair and equitable. Each statement we made is based upon the pleadings and the amended answer was stricken as *frivolous*. While this Court may sustain the action of the Lower Court erroneously striking an answer as sham if this Court conceive the answer to be frivolous, the reverse is not true, for whether an

answer is to be stricken as *sham* depends upon the *discretion* of the lower Court. If it strikes, the action is reviewable. If it refuses to strike, the action is *not* reviewable.

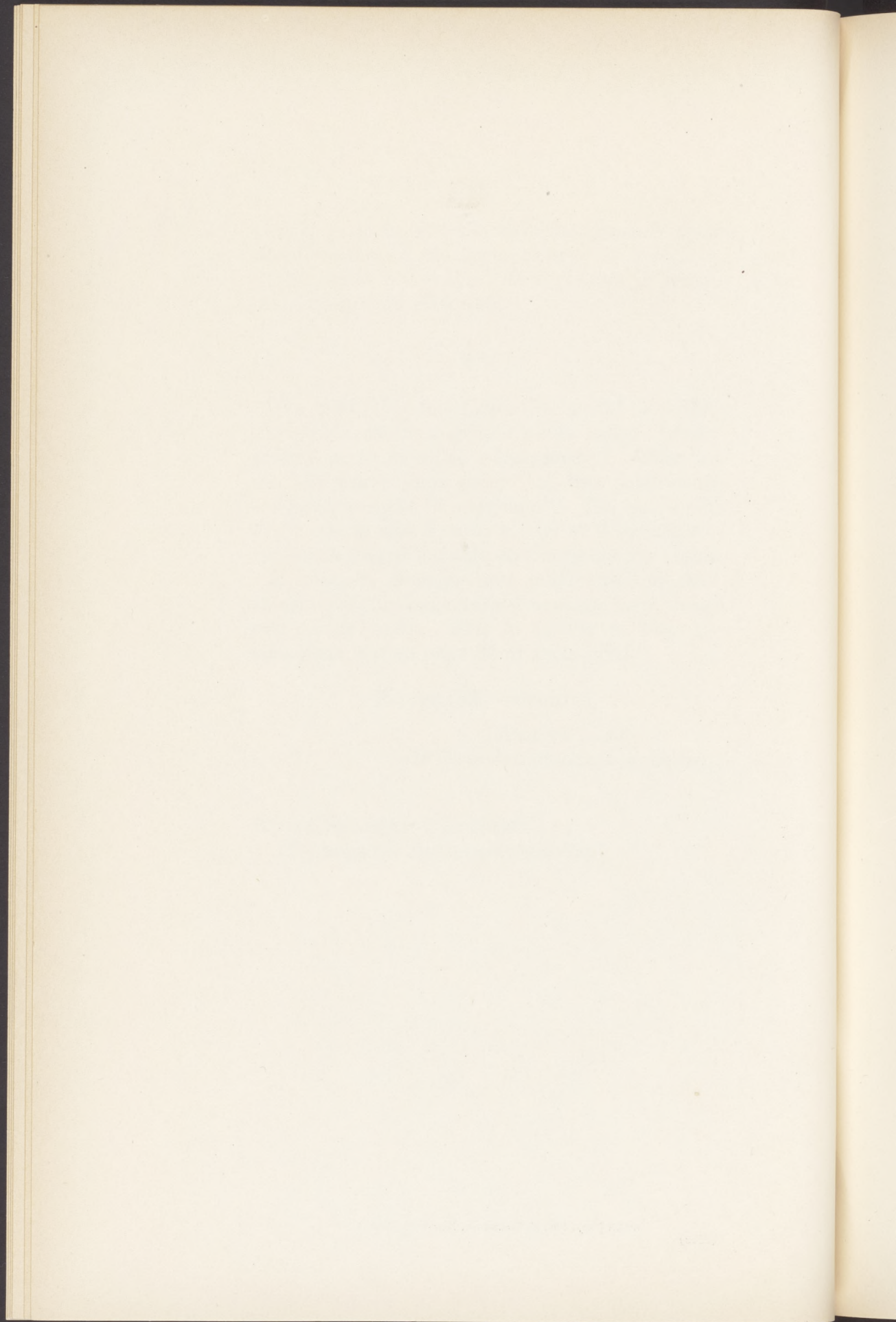
IV.

We insist that this legislation would be within the power of the legislature—so called “emergency” or no so-called “emergency”. When we use the word “emergency” in this subdivision we mean *general* “emergency”. The act would be proper at *any* time as a part of a scheme for the regulation of banking and to secure the rights and interests of depositors, other creditors, and stockholders in embarrassed banking institutions and of the public. This in answer to what respondents say on page 23 of their brief.

Respectfully submitted,

MERRITT LANE,
Of Counsel Defendant-Appellant.

BURKE, SHERIDAN & HOURIGAN,
Attorneys for Defendant-Appellant.





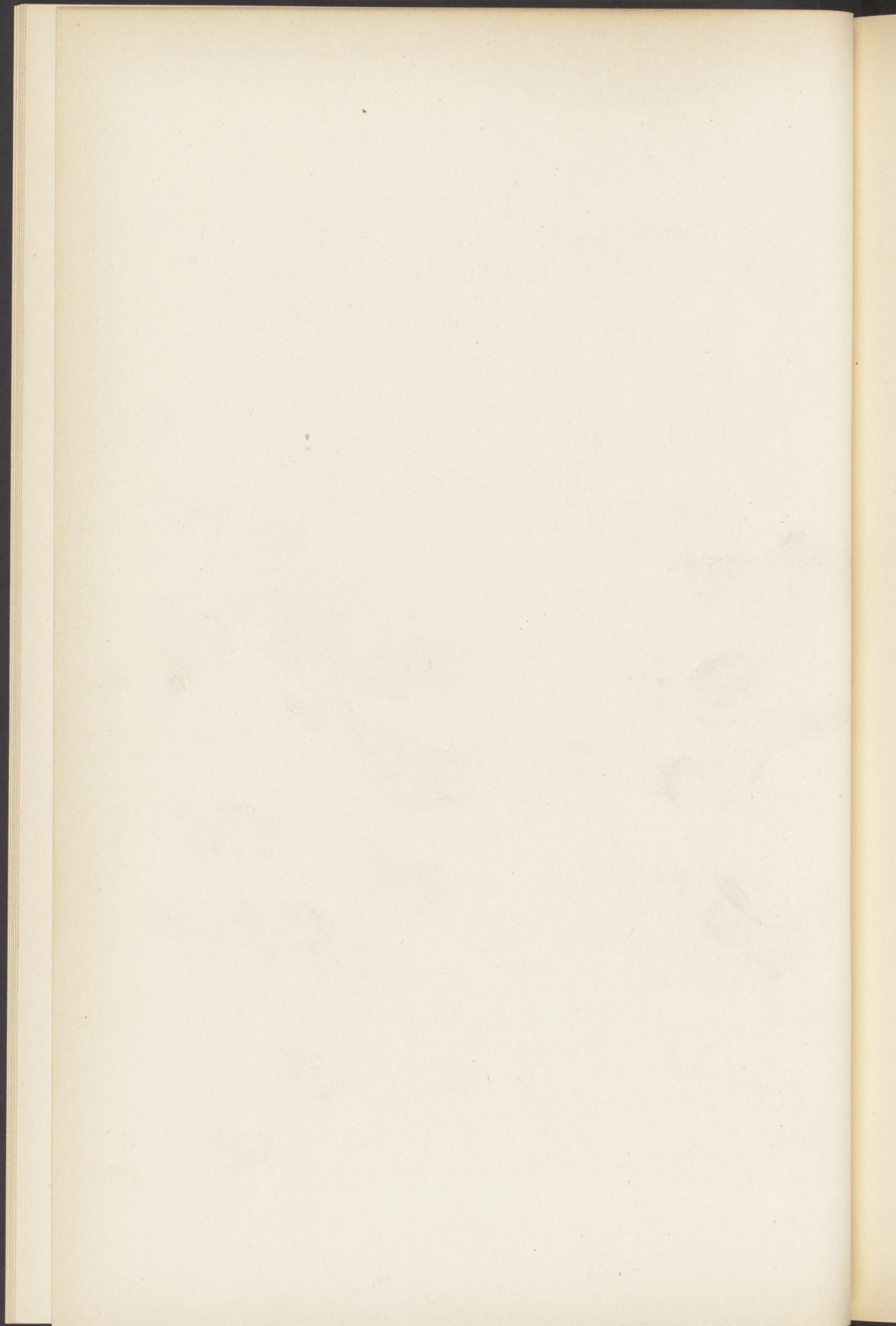


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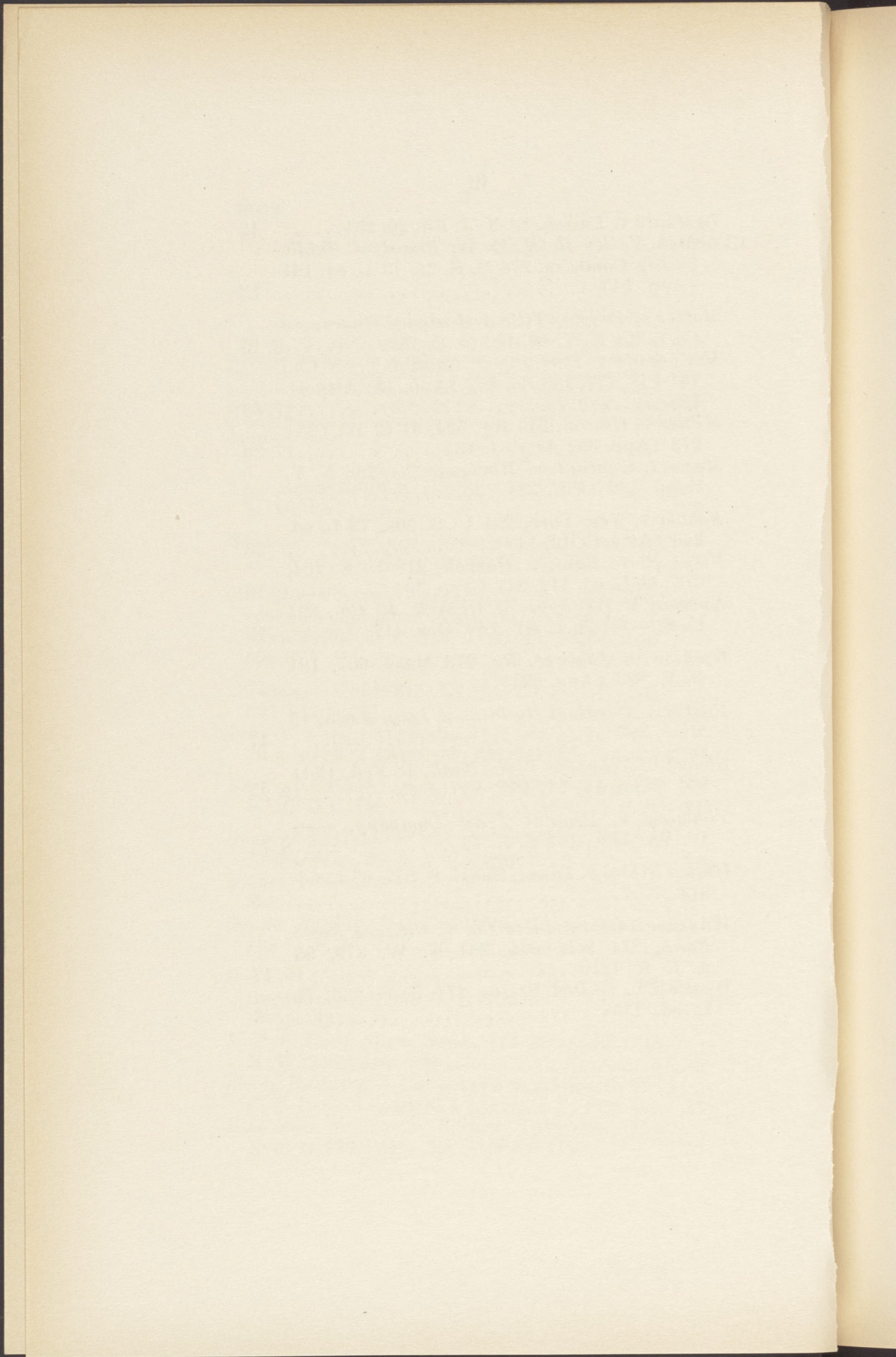
For convenience of reference, we have set forth in full, in the Appendices, the Statute (Chap. 116 of the Laws of 1933, as amended), and the decision of the United States Supreme Court in *Doty v. Love*.

TABLE OF CASES

NOTE: Certain cases cited by us are also cited, and in some instances set forth at length, in the Briefs of other counsel. We have, for convenience, added a reference to the pages in those briefs in which certain of such cases are more fully stated. The abbreviation "App." refers to the Appellant's Brief; "Atty.-G." to the Attorney-General's Brief; and "Plff." to the Plaintiffs-Appellees' Brief.

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New Jersey Court of Errors and Appeals

No. 95

May Term, 1935

SARAH F. BASEN and GRACE F.
GROSMAN, Executrices of the Es-
tate of ABRAHAM FISHMAN, de-
ceased,

Plaintiffs-Appellees,

against

CLINTON TRUST COMPANY, a New
Jersey corporation,

Defendant-Appellant.

On Appeal, etc.

BRIEF OF ARGUMENT ON BEHALF OF RECONSTRUCTION FINANCE CORPORATION AND FEDERAL DE- POSIT INSURANCE CORPORATION AS AMICI CURIAE

Statement

The appeal is from an order of the Essex County Circuit Court, striking the amended answer (Case, p. 4, *et seq.*) and directing entry of final judgment (Case, pp. 88, 89), in an action at law for that portion of moneys of plaintiffs-appellees on deposit with the defendant-appellant, Clinton Trust Company, prior to the Bank Holiday of 1933, which, in the subsequent reorganization of the Trust Com-

pany, was converted into stock by the terms of the Reorganization Plan.

The Trust Company, which was a member of the Federal Reserve System (Case, p. 9, l. 35), closed at the time of the State and National Bank Holiday, in March, 1933, pursuant to proclamations of the Governor of this State and the President of the United States. It reopened on March 19, 1933 (Case, p. 10, l. 15), under restrictions imposed under the so-called Altman Act; Laws of 1933, Chapter 27, P.L. page 43, amended Chapter 66, P.L. page 125.

The condition of the Trust Company was such that its reorganization was necessary (Case, p. 10, *et seq.*).

A reorganization plan was approved by the Commissioner of Banking and Insurance on December 19, 1933 (Case, p. 14, l. 10), also by the Federal authorities (Case, p. 14, l. 18), and ultimately by over 75% in amount of the depositors and at least two-thirds of the stockholders (Case, p. 15, l. 10).

The restrictions upon the defendant were modified to permit it to, and it did, reopen, to transact business under the reorganization plan, on May 7, 1934 (Case, p. 15, l. 35).

The plan provided, in general, that depositors should receive 50% of their deposits in cash upon reopening, and approximately one-half of the remaining 50% of their deposits in Class B preferred stock (having complete priority over the common stock allotted to existing stockholders), and one-half in a participation in the assets of a corporation organized to hold and liquidate certain ineligible assets of the Trust Company transferred thereto (Case, p. 13, l. 30).

The reorganization plan was adopted under the provisions of Chapter 116 of the Laws of 1933, P.L.

241; amended Chapter 195, P.L. 427, Chapter 287, P.L. 770, and Chapter 407, p. 1124. (Appendix I.) Under the terms of Section 8 of the statute, the non-assenting depositors were bound thereby.

Under the plan, the Reconstruction Finance Corporation purchased \$250,000 of Class A preferred stock (Case, p. 15, l. 20), and the Federal Deposit Insurance Corporation became guarantor under the scheme of temporary Federal Deposit Insurance of the deposits payable under the plan and new deposits made upon the resumption of business (Case, p. 15, l. 25).

Plaintiffs did not expressly consent to the plan; nevertheless, on July 19, 1934 (Case, p. 7, l. 15) plaintiffs withdrew one-half of their deposit. Their complaint, based on the non-payment of the balance of the deposit, was served September 19, 1934 (Case, p. 1).

Defendant Trust Company in its answer and amended answer set up legal restrictions under State and National law upon its right and duty to pay the amount claimed by plaintiffs, alleged facts upon which it was argued that plaintiffs had accepted the reorganization plan and which worked an accord and satisfaction or an estoppel, and that plaintiffs' remedy, if any, was in equity.

The learned Circuit Court Judge struck out the answer and subsequently, adhering to his former opinion, the amended answer, as frivolous and as stating no defense, and directed entry of summary judgment. The opinion (Case, p. 79, *et seq.*), reported in 13 Misc. 252, holds that the provision of the statute that the reorganization plan is binding upon the plaintiffs violates the Federal and State constitutions; and that the defense of estoppel is insufficient.

Leave was granted below to the learned Assistant Attorney General to appear as *amicus curiae* on

behalf of the Commissioner of Banking and Insurance, and to counsel for the Reconstruction Finance Corporation and (upon the argument of the motion directed to the amended answer) for the Federal Deposit Insurance Corporation to appear as *amici curiae* on their behalf.

The Reconstruction Finance Corporation as stockholder, and the Federal Deposit Insurance Corporation as guarantor, are affected by the result of the instant case, are similarly interested in other banking institutions in this State which have been reorganized and reopened under the statute, or the reorganization of which is pending, which will be affected by the final determination of this case, and are interested in the establishment of a precedent bearing upon the determination of similar questions arising under the laws of other states.

The questions of fact and law involved herein are so fully argued in the exhaustive and learned Briefs of Counsel for the Appellant and of the learned Attorney General that we have endeavored to state our views in condensed form.

For convenience of reference, we have set forth the Reorganization Statute, as amended, in full as Appendix I.

It will be argued that the decision of the Supreme Court of the United States, on April 1, 1935, of the case of

Doty v. Love, 294 U. S. , 79 L. ed.,
Adv. Ops. p. 632,

is determinative of this case. We have therefore set forth that decision in full as Appendix II.

Annotations to cases dealing with the legal questions arising out of the reorganization of banks will be found digested and annotated in

80 A.L.R. 1487;

92 A.L.R. 1337;

95 A.L.R. 1214.

Note: the case of

Moses v. Guaranteed Mortgage, 268 N. Y. Supp. 530

relied upon by plaintiffs (Brief, p. 31) is clearly overruled by

Matter of People (Title and Mortgage Guarantee Co. of Buffalo) 264 N. Y. 69, 190 N. E. 153.

ARGUMENT

I. Applicable Federal legislation bars recovery by the plaintiffs.

Defendant was and is a member of the Federal Reserve System (Case, p. 9, l. 35).

As such, it is subject to the dual control of Federal and State legislation and regulation.

Hiatt v. U. S., 4 Fed. (2d) 374; certiorari denied 268 U. S. 704, 69 L. ed. 1167.

United States v. Lanza, 260 U. S. 377, 67 L. Ed. 314.

Westfall v. United States, 274 U. S. 256, 71 L. ed. 1036.

The Trust Company was closed by virtue of the Proclamation of the Governor (Case, p. 22, l. 20)

and by the Proclamation of the President (Case, p. 19, l. 20).

On March 9, 1933, Congress enacted legislation (Act of March 9, 1933, Chapter 1, 48 Statutes at Large, 2; U. S. Code Annotated, Title 12, Sec. 95—1934 Cumulative Annual Pocket Part p. 43), which provided that

“during such emergency period as the President of the United States by proclamation may prescribe, no member bank of the Federal Reserve System shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury, with the approval of the President * * *”

This section made a violation of its provisions a misdemeanor punishable by fine of not more than \$10,000 or imprisonment for not exceeding ten years, and provided that

“Each day that any such violation continues shall be deemed a separate offense.”

By Proclamation of March 9, 1933, the President continued the Banking Holiday until further proclamation (Case, p. 23).

By Executive Order dated March 10, 1933, (Case, p. 77), the President authorized the Secretary of the Treasury, under regulations prescribed by him, to permit any member bank of the Federal Reserve System to perform a part or all of their usual banking functions (subject to certain prohibitions), and ordered that members of the Federal Reserve System should apply to the Secretary of the Treasury, through the Federal Reserve Banks, for a license to reopen.

By Proclamation dated December 30, 1933, the President relinquished the control theretofore exercised over non-members of the Federal Reserve System, but he has not revoked the Executive Order of March 10, 1933, although he has from time to time, by Executive Orders, modified certain restrictions relating to the export of currency, transactions in foreign exchange, and the like.

These Proclamations and Executive Orders are also to be found in said 1934 Cumulative Annual Pocket Part to the United States Code, at page 43.

It follows that every member of the Federal Reserve System now exercising the usual banking functions is so doing under license issued by the Secretary of the Treasury, subject to regulations, limitations and restrictions prescribed by him, under the authority of Chapter 1 of March 9, 1933. Generally speaking, of course, banks which were licensed to reopen for the unrestricted conduct of their usual functions are not at present under restrictions other than those still in effect relating to transactions in currency, foreign exchange, and the like.

The defendant in this case, however, never opened unrestrictedly by authority of either the State or the National Government. It was the reorganized bank which was licensed to reopen, as reorganized, with a radically modified capital structure and limited deposit liabilities. It did not reopen for the purpose of paying out or permitting the withdrawal of deposits for which it was liable prior to the Bank Holiday, in excess of the fifty per centum payable to depositors under the Reorganization Plan.

It is submitted that payment of the balance of the deposit of the plaintiffs, or of other depositors making the same claim, would violate the Fed-

eral law and the Proclamations and Executive Orders of the President made thereunder. It might, indeed, subject the defendant to heavy penalties.

The plaintiffs can not recover, therefore, unless it be demonstrated, and this court can therefore adjudge, that the Federal law is unconstitutional, or that the President exceeded his authority thereunder. As yet the plaintiffs have not argued the unconstitutionality of the Federal law, nor did the court below deal with this question in its learned opinion, notwithstanding that upon the oral argument upon the motion strike the amended answer this question, properly raised as a defense by the amended answer, was squarely presented to the Court.

II. The statute does not impair the contract between the plaintiffs and the Trust Company.

The contractual obligation of the Trust Company to the plaintiffs, upon the deposit liability, was at least suspended when the Trust Company closed and while it remained closed. Any impairment of contract was caused by the condition of the Trust Company and the consequent restrictions upon its functioning. The statute operates not upon the contract, but upon the liquidation of the Trust Company. When the statute came into operation, the plaintiffs' rights were equitable rights to a *pro rata* share in the proceeds of the administration of the Trust Company. The statute did not impair the contractual obligation; its purpose and effect was to *repair* it.

In the case of

Timmons v. Peoples Trust Company, 173
S. E. 79 (W. Va. 1934)

it was said:

"* * * Prior to the insolvency of a bank, the claim of an ordinary depositor is personal; but, after insolvency, his claim becomes communal and is subject to class treatment. Except in case of legal right of preference, 'the property of a debtor bank is the common pledge of all the creditors' * * * Where a common fund is involved courts will not usually permit a small minority of those interested to defeat the wishes of an overwhelming majority of their associates * * * Consequently we are of opinion that the plan of re-organization invaded no constitutional right * * *."

Plaintiffs had no vested right to the continuance of any particular mode of liquidation.

Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342;
Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690.

Whatever their rights at the time the statute was invoked, they certainly were not contractual in nature.

Grand Rapids & Indiana Railway Company v. Osborn, 193 U. S. 17, 48 L. ed. 598

holding a statutory right of purchasers of a railroad at foreclosure sale *to re-organize* as corporate successors to the rights of the former company "merely matters of law instead of contract."

Would a change in the Bankruptcy Law relative to procedure, or to the manner of realization of assets, or to the provisions for composition, effec-

tive as to estates then in administration, impair a contractual obligation?

III. Chapter 116 of the Laws of 1933 is a mere extension or development of provisions contained in the trust company law prior to the opening of the plaintiffs' deposit account, and therefore does not impair the obligation of the plaintiffs' contract.

The roots of the statutory scheme of liquidation of closed trust companies, enacted by the Act of 1933, are found in the legislation preceding the opening of the plaintiffs' deposit in the year 1932 (Case, p. 2). The contract between the plaintiffs and the defendant was in its origin subjected to the control by the State of the manner of liquidating the liabilities of defendant.

General Investment Co. v. American Hide & Leather Co., 98 N. J. Eq. 326;

12 *Corpus Juris* 988;

Wausau Malt Products Co. v. Citizens State Bank, 214 Wis. 654, 254 N. W. 379, 95 A.L.R. 1210.

The mere extension or development of the same essential power, whether by a separate statute or further amendment of the Trust Company Act, would not impair the obligation of the contract made subject to existing statutory provisions.

The Trust Company Act, as passed in 1899, contained provisions for proceedings against unsafe, delinquent and insolvent trust companies, and authorized the Commissioner of Banking and Insurance to take possession thereof. Section 22 provided that

“pending such possession by the commissioner or such proceedings by the attorney general, all the remedies at law or in equity of any creditor or stockholder against the said trust company shall be suspended.” (C.S. 5663.)

These provisions were amended in 1913 so as to extend the power of the Commissioner to liquidation of the trust company (Laws of 1913, Chapter 171, P.L. p. 290); (C.S. Cum. Supp. 1924, 3750). The section was again amended in 1931, still prior to the opening of plaintiffs’ account (Laws of 1931, Chapter 255, P.L. p. 641). As amended, Section 22 authorized the Commissioner to retain possession until the trust company should resume business or its affairs be finally liquidated, as provided, in changed language, for the stay of all judgments, decrees, levies and executions against the company, and also provided that

“Such trust company may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.”

This in rudimentary form is the same power of which Chapter 116 of the Laws of 1933 is an elaboration or development. The Act of 1933 requires, in addition to the consent and approval of the Commissioner, the approval of 75% of the depositors and two-thirds of the stockholders. Certainly the addition of this requirement did not impair the contract. Otherwise the Act of 1933 is largely concerned with the terms and conditions under which preferred stock may be authorized and issued, and certainly this by itself is no impairment of contract.

It is submitted that under the amendments of 1913 and 1931, subject to which plaintiffs’ contract

was made, the Commissioner could have authorized resumption of business under such a plan as was actually adopted in this case, and could have prescribed as a condition that, with the approval of a reasonable proportion of depositors and stockholders, the plan should become effective and no depositor should be entitled to enjoy any of the benefits of the plan, such as the withdrawal of a part of his deposit, except on condition that he should thereupon be bound by the plan. The depositor would therefore have been bound at least to the extent of being put to his election whether to be bound by the plan or to resort to a court of equity for a determination of his share of what might have been realized in case the liquidation had been completed.

The powers exercised under the Act of 1933 not being essentially different from those which theretofore were vested in the Commissioner, the statute does not impair the contract.

LaMonte v. Lurich, 86 N. J. Eq. 26, 28;
affirmed *per curiam*, p. 251.

IV. The statute does not unconstitutionally impair the obligation of the contract.

It is now established beyond question that contractual relations are, like other legal relations and rights, subject to the incidence of statutes enacted by virtue of legislative powers, whether the power be the police power, as in this case, or *e.g.*, the power of the Congress to regulate interstate commerce or the currency.

Norman v. Baltimore & Ohio R.R. Co.,
(Gold Clause case), 294 U. S. —, 79
L. ed. Adv. Ops. 417;

Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940.

If the enactment be a valid exercise of power, the incidental impairment of the contractual obligation is not unconstitutional.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 78 L. ed. 413;
Hourigan v. North Bergen Township, 113 N. J. L. 143.

V. The statute does not deny the plaintiffs due process of law.

The statute is not arbitrary or capricious or discriminatory. It is not confiscatory. It does not purport to deny an opportunity to be heard upon, or to obtain a judicial review of, any complaint against the fairness and equity of the plan or other grievance, of a dissenter. There is no denial of due process if the statute bears a reasonable relation to a legitimate end.

People v. Nebbia, supra.

The New Jersey statute does not deny resort to a court, and the remedies of certiorari or injunction were open to plaintiffs.

It is not necessary that the statute expressly preserve the right of judicial review, or point out the appropriate method of review. It is sufficient if the right to review is left unimpeded.

Lehigh Valley R.R. Co. v. Board of Public Utility Commissioners, 278 U. S. 24, 73 L. ed. 161.

VI. The act was a valid exercise of legislative power.

The whole question of unconstitutionality is conclusively settled by

Doty v. Love, 294 U. S. —, 79 L. ed. Adv. Ops. 632; affirming — Miss. —, 155 So. 331, 92 A.L.R. 1323.

The Mississippi statute and the reorganization plan there dealt with differ from ours in only two essential respects: (1) the statutory liability of stockholders was compromised; (2) the plan was approved by the court. The first is irrelevant; as to the second, see the preceding point.

The New Jersey statute was a valid exercise of the police power.

The banking function is peculiarly the subject of, and for a century or more has been made the subject of, legislation. The propriety and wisdom of its regulation can never again be called into question after the dark days of the Bank Holiday of 1933. Then, as never before, the vital relation of the banking function to the flow of commerce and industry was demonstrated.

The regulation of the administration and liquidation of closed banks is obviously within the legislative power. A reasonable choice of methods and procedure is within the legislative power.

The statute provides for the liquidation of slow assets, the recovery of deferred assets, and the making available of the assets to depositors, by a going concern. It was open to the legislature to select this as the most efficient, expeditious and beneficial method of liquidation. *Doty v. Love, supra*.

When the bank is closed the depositors become co-owners of the resources available for payment

of their deposit liabilities, and a mutuality of interest then arises. The regulation of the administration of properties or funds owned in common, and other associated interests, is a proper and a common subject of legislation. The subordination of the will of the individual to the common welfare of the group is fully justified by the co-relationship of those who hold interests in common.

Matter of People (Title & Mortgage Guarantee Co.) 264 N. Y. 69, 190 N. E. 153;
Timmons v. Peoples Trust Co., supra.

The public interest in the continuance of the bank as a semi-public agency is also a warrant for the legislation. At least under the conditions of 1933, a new bank could not readily be created in place of an existing one. The rehabilitation of the resources and the utilization of the organization of the existing bank was the obviously prudent and practical method of the restoration of the banking functions. Legislation, both National and State, was almost uniformly and universally adopted to that end. The cases cited in the briefs herein, from other states, sufficiently indicate the prevalence of similar statutes, making it unnecessary to enumerate and expressly cite the statutory enactments of other states.

The emergency of 1933, while not the source of the power, gave rise to conditions making the exercise of the power most patently proper and advisable. The cumulative effect of public fear and hysteria upon a weakened banking system threatened devastating consequences.

The provision for reorganization of closed banks is apt and beneficial at any and all times, in season and out of season. It was highly advisable and necessary in the emergency. The greater the pros-

tration of the banking system, the more reason for its rehabilitation.

We submit that the statute is valid now and will continue to be constitutionally valid in the future. It was obviously and manifestly so during the emergency.

The statute was not an emergency statute in the sense that it was passed to meet only a passing condition. The closing of a bank always gives rise to emergent conditions, which are the appropriate subject of legislation, unlike, let us say, statutes which deal with temporary conditions affecting the ability of private debtors to respond to private creditors, where the regulation of strictly private contractual obligations can be justified only during the passing emergency.

Hence there can be no necessity for the legislature to have established a period during which this statute should remain effective. For decades we have had statutes dealing with the liquidation of closed banks, insurance companies, building and loan associations, as well as mercantile corporations, and it is appropriate that they should remain on the books indefinitely.

Nor is it necessary for the legislature expressly to declare that an emergency exists. If the power of the legislature depends to any extent upon its adjudication of the existence of an emergency, reference to many other statutes passed at the same time, in the same session, establishes that the legislature had determined that a critical and emergent condition in corporate, public and private finance existed, and required legislative action.

See also

Bingham v. Savings Investment & Trust Co., 101 N. J. Eq. 413; 102 N. J. Eq. 302;
Noble State Bank v. Haskell, 219 U. S. 104,
 575; 55 L. ed. 112, 341;
Abie State Bank v. Bryan, *supra*;

- McConville v. Fort Pierce Bank & Trust Co.*, 101 Fla. 727, 135 So. 392;
Hoff v. First State Bank, 174 Minn. 36, 218 N. W. 238;
Re Opinion of Justices, 278 Mass. 607, 181 N. E. 833;
Wausau Malt Products Co. v. Citizens State Bank, *supra*;
Milner v. Gibson, 249 Ky. 594, 61 S. W. (2d) 273;
Dorman v. Dell, 245 Ky. 34, 52 S. W. (2d) 892;
Rocker v. Cardinal Bldg. & Loan Ass'n, 13 Misc. 397.

VII. The plan was fair and equitable.

Its approval by the Commissioner of Banking and Insurance and by the Federal authorities, by 75% of the depositors and two-thirds of the stockholders, raises an almost irrebuttable presumption in its favor.

Additional funds were provided by the Reconstruction Finance Corporation for the benefit of the depositors. For this new money it accepted Preferred stock "A" *subordinate* to 50% of the existing deposit liability.

Depositors received approximately 25% in Preferred stock "B", which was to be retired in full, with cumulative dividends, before any payment or distribution of any kind could be made to the holders of the common stock (Case, p. 43, l. 20; p. 60, l. 20).

For the remaining 25% of the deposit liability they received an interest in slow assets, specially set apart in a holding company, for the purpose of gradual liquidation (Case, p. 25, l. 30). They might conceivably be realized upon at a profit.

Thus they maintained their priority to the fullest extent, as against the existing (common) stockholders, as well as receiving the benefits of the contribution of the Reconstruction Finance Corporation, of the guarantee of the deposits payable under the Reorganization Plan by the Federal Deposit Insurance Corporation, the resumption of business with the approval and necessary aid of the Federal Reserve Bank, as well as the outstanding benefit derived from the right immediately to withdraw 50% of the deposits.

The statute being valid, plaintiffs can not sue at law. Even if the Plan were not fair and equitable, which certainly does not appear in this record, plaintiffs' only remedy against the compulsion of an invalid Plan would be in equity.

VIII. Plaintiffs are not entitled to a "conventional sale".

Plaintiffs had no such right prior to the enactment of the 1933 statute. Certainly they could not have claimed, and probably no one ever has claimed, that the Commissioner of Banking and Insurance could be forced to put up at public sale all of the assets of the Trust Company. That being so, the enactment of the reorganization statute does not create any right to such a sale, non-existent theretofore.

In a receivership of a private industrial company it may be that a creditor has a right to a "conventional sale" where the only alternative offered to him is a share in a reorganization under a plan which does not completely preserve his priority as against stockholders. In this case the depositors' priority over stockholders is, substantially and essentially, fully preserved.

The Trust Company being a semi-public institution, the legislature may legitimately provide another method of liquidation than by "conventional sale", inasmuch as a sale in bulk of the assets of closed banks would have resulted in more deflation, in the devaluation of the assets of going banks, in the aggravation of the banking crisis.

The assets of a bank are different in nature from those of the typical private commercial industrial company. They consist of many items which, to a large degree, tend to liquidate themselves by collection and payment rather than by sale. The plant and machinery of a manufacturing company does not so liquidate itself, and it must be offered for sale to be liquidated.

Certainly it can not be said that the Act of 1933 is unconstitutional merely because it does not provide for a conventional sale of all of the assets, to which plaintiffs were not entitled theretofore under the legislation existing when the contract was entered into.

If there is anything unfair or inequitable in the manner in which rights of plaintiffs have been dealt with, it could be remedied by a court of equity by the ascertainment of the fair liquidating value of the plaintiffs' claims. If plaintiffs' rights have been infringed in any way, their remedy is not by judgment at law upon the old deposit liability.

Shams v. Nebraska State Bank, 48 Fed. (2d) 894;

Coriell v. Morris White, Inc., 54 Fed. (2d) 255; reversed on another point, *sub nom. National Surety Co. v. Coriell*, 289 U. S. 426, 77 L. ed. 1300.

IX. Plaintiffs have accepted the Plan; or are estopped to deny acceptance.

This is not the case of an alleged estoppel based merely upon silence or non-action.

Plaintiffs, with full knowledge of the provisions of the Plan and its binding character under the statute, availed themselves of the benefit provided under, and only under, the Plan, to immediately withdraw 50% of the deposit.

It is submitted that this constituted an acceptance of the Plan.

In the oral argument below, the learned Circuit Court Judge treated this as the acceptance of that which was due, and therefore, in his opinion, without effect upon their rights.

But the moneys were not offered to the plaintiffs as a mere payment on account of a debt owing to them in its full amount. This is not the case of the acceptance by the creditor of a payment by the debtor and a forgiveness of the balance of the debt without consideration.

There was ample consideration for the waiver of the remainder of the debt. If the plaintiffs did accept the Plan, there was an accord and satisfaction—for they were entitled to stock for the remainder of the debt. There was a consideration in the advance of additional funds by the Reconstruction Finance Corporation, in the acceptance of the Plan by other depositors, creditors and stockholders, in the guaranty of the deposits under the Plan by the Federal Deposit Insurance Corporation, and in the resumption of business and the incurring of expense and new liabilities by the corporation itself.

But if this did not constitute an actual acceptance, it is submitted that plaintiffs are estopped to deny acceptance. The 50% of the deposit was withdrawn, so far as the record shows, without

protest on their part against the validity or effectiveness of the Plan. It would appear that the withdrawal was on July 19, 1934 (Case, p. 3, l. 25; p. 7, l. 15); the letter of protest, written on behalf of the plaintiffs (Case, p. 66), was dated on the following day, July 20, 1934, based upon another and untenable objection.

Plaintiffs' conduct was inconsistent with their present contentions, to the prejudice of the corporation and its other creditors and stockholders.

Certainly the corporation itself can defend on the ground of actual acceptance of the Plan by the plaintiffs.

It is submitted that the corporation can also raise the defense of estoppel. It represents, in and through itself, the rights and interests of all of its creditors and stockholders as a corporate body.

Strictly in its individual capacity, apart from its representation of its creditors and members, it incurred expense and new and additional obligations in the resumption of business, and accorded new rights as stockholders and new interests in the property set apart for liquidation, to its depositors.

In the case of

Eskeu v. Buckhannon (W. Va., 1934),
177 S.E. 433, the following plea was
sustained:

"Since the re-opening of the bank * * * at no time during the negotiations which culminated in the agreement under which the bank was reopened did the plaintiff protest or object, but that all during the time of such negotiations and up until the time of his bringing this suit, he acquiesced and approved; that he at no time moved for revision or modification of the banking commissioner's order, and

that, for more than a year prior to the bringing of this suit, the bank continued to carry on its business in accordance with the regulations of the banking commissioner when it was reopened, * * * by reason of all of which the plaintiff has waived such rights as he may have had as against the bank and is estopped from now making any objection or from recovering in this suit."

The court said:

"Obviously, the bank emerged from the direct control of the banking commissioner at least \$25,000 in cash better off than it was when it was declared insolvent, and further fortified by the agreement freezing the deposits of 95 per cent. of its depositors at the time of insolvency. This makes it appear that the plaintiff is attempting to assert his claim in full as against assets, not only greater in amount than those he would have had the right to look to at the time of insolvency, but rendered far more liquid by the agreement freezing the bank's depositor liabilities. In bringing about this improved condition of the bank, the plaintiff had no part whatsoever."

X. The Plaintiffs have mistaken their remedy, if any.

Wholly aside from the constitutionality of the New Jersey statute or the Federal statute, barring legal action upon the former deposit liability, defendant was not liable to the plaintiffs thereon, either in contract or quasi-contract, when this action was instituted.

Defendant was not then liable in quasi-contract because the full amount of the original deposit liability was not due and owing in equity and good

morals. Furthermore, there would be no way of ascertaining the amount due on quasi-contract, if any, in a court of law, upon the only possible theory of recovery, viz., the payment of the establishment of a lien upon the assets (subject to the rights of others therein) in the amount which would have been realizable upon complete liquidation.

Defendant should not be held to be now liable as upon an express contract to pay. The old contract was suspended by the closing, and the legal restrictions upon the conduct of the business, and has never been revived. Defendant, while having a legal existence under the same charter, is a reconstituted entity. The association of rights and interests within the corporate entity is entirely altered, and the reconstituted corporation has not in a proper factual sense expressly promised to pay the alleged liability. Its express promises to pay are limited to those which it reassumed under the Reorganization Plan.

Therefore, even if the statutory barriers be held unconstitutional, plaintiffs' remedy is in equity.

Shams v. Nebraska State Bank, supra.

May term, 1935.

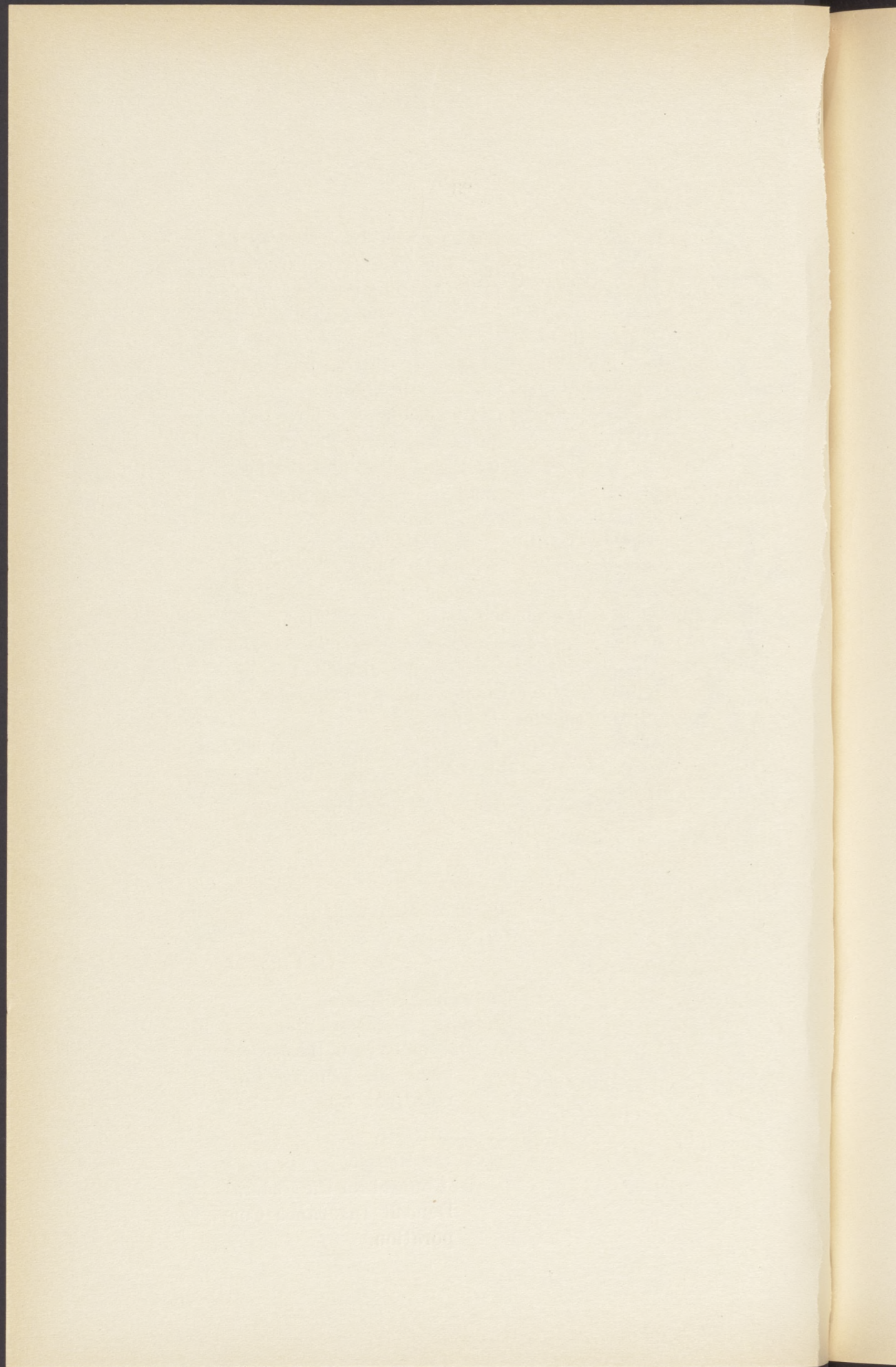
Respectfully submitted,

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APPENDIX I.**THE REORGANIZATION STATUTE, AS
AMENDED.**

Laws of 1933, Chapter 116, P.L. page 241, approved
April 12, 1933.

Section 3, amended by Chapter 407, P.L. page
1124, approved November 29, 1933.

Section 6, amended by Chapter 195, P.L. 427,
approved June 5, 1933.

Section 7, amended by Chapter 287, P.L. page
770, approved June 23, 1933.

AN ACT concerning banks, trust companies and
savings banks having shares of capital stock.

BE IT ENACTED *by the Senate and General As-
sembly of the State of New Jersey:*

1. Any State bank or trust company now or
hereafter incorporated or existing under any law
of the State of New Jersey and any savings bank
now or hereafter authorized to and which hereto-
fore has issued or may hereafter issue shares of
capital stock is hereby authorized, subject to the
approval of the Commissioner of Banking and In-
surance, to amend its charter or certificate of in-
corporation to provide for the issuance of one or
more classes of preferred stock.

2. Such amendment to a charter or certificate
of incorporation to provide for the issuance of the
preferred stock shall be made in the following man-
ner:

The board of directors shall pass a resolution
declaring that the issuance of such preferred stock

and said amendment are advisable and calling a meeting of the stockholders to take action thereon; the meeting shall be held upon not less than five (5) days' written notice, given by registered mail; if a majority in interest of the stockholders shall vote in favor of the issuance of such preferred stock and of such amendment, a certificate thereof shall be signed by the president or secretary under the corporate seal, acknowledged or proved as in the cases of deeds of real estate, and such certificate shall be submitted to the Commissioner of Banking and Insurance for his approval, and upon his approval shall be filed in the Department of Banking and Insurance, and upon the filing of the same the charter or certificate of incorporation shall be deemed to be amended accordingly.

The resolution of the board of directors and the certificate of amendment shall specify the amount and priority of each class of such preferred stock to be issued and the par value of each share thereof, and the rate of dividends to be paid thereon.

The resolution of the board of directors and the certificate of amendment may also contain provisions for the conversion of such preferred stock into common stock on such terms as to the directors and stockholders may seem desirable and subject to the approval of the Commissioner of Banking and Insurance, which terms and conditions, however, shall not provide for such conversion at a value less than the par value of such common stock, and may also provide for such increase in the authorized issue of common stock as may be necessary to permit of such conversion.

3. The rate of dividends to be paid on such preferred stock shall not exceed six per centum (6%) per annum and such dividends shall be cumulative, and the holders of such preferred stock shall have

such priorities and voting rights and such stock shall be subject to retirement or conversion into common stock in such manner and on such terms and conditions as may be provided in the said certificate of amendment or incorporation. Notwithstanding any other provision of law, after providing for all expenses, interest and taxes accrued or due from said bank, or trust company, dividends may be declared and paid upon any one or more classes of preferred stock of such bank or trust company out of profits; *provided*, that after giving effect to the payment of such dividends, the unimpaired capital of the bank or trust company paying the same is not less than the aggregate par value of its preferred stock of all classes at the time outstanding, or the minimum capital required by law for such bank or trust company, whichever sum is the greater.

4. All of the stock issued by any such bank, trust company or savings bank other than such preferred stock shall be designated and known as "common stock."

5. No dividends shall be declared or paid on common stock until the cumulative dividends on preferred stock shall have been paid in full, and if such bank, trust company or savings bank is placed in voluntary liquidation, or is liquidating under the authority of the Commissioner of Banking and Insurance after said Commissioner has taken possession of the property and business of such bank, trust company or savings bank, or if a receiver is appointed therefor, no payments shall be made to the holders of common stock until the holders of preferred stock shall have been paid in full the par value of such stock, plus all accumulated dividends.

6. Subscriptions to such preferred stock may be paid for either in cash or by an off-set in the same amount against any deposit, balance or balances on the books of such bank, trust company or savings bank, or partly by cash and partly by such off-set against deposit balance or balances, or may, with the approval of the Commissioner of Banking and Insurance, be paid for by assets in which such bank, trust company or savings bank may lawfully invest.

7. Any such bank, trust company or savings bank which has not been permitted or licensed by the Commissioner of Banking and Insurance, or by the Secretary of the Treasury, if said bank or trust company is a member bank of the Federal Reserve System, to perform all of its usual banking functions, may be reorganized for the resumption of its normal and usual banking business by the issuance of preferred stock as hereinabove provided, or otherwise. Any reorganization plan may provide for the issuance of preferred stock to all of the depositors and other creditors of such bank or trust company or savings bank, and may provide that each creditor and depositor must subscribe at least a certain percentage of his claim for said stock. Any reorganization plan shall become effective (1) when the Commissioner of Banking and Insurance shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe, and (2) when, after such notice of such reorganization as the Commissioner of Banking and Insurance may require, (a) depositors and other creditors of such bank, trust

company or savings bank representing at least seventy-five per centum (75%) of its total deposits and other liabilities as shown by the books thereof, and (b) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books thereof, shall have consented in writing to the plan of reorganization; *provided, however*, that claims of depositors or other creditors which under existing law are entitled to full and immediate payment, even though said bank, trust company or savings bank is operating on a restricted basis, shall not be included among the total deposits and other liabilities of said bank, trust company or savings bank in determining the seventy-five per centum (75%) thereof as above provided.

8. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, trust company or savings bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.

9. This act shall take effect immediately.

APPENDIX II.

DOTY v. LOVE

SUPREME COURT OF THE UNITED STATES.

No. 585.—OCTOBER TERM, 1934.

MRS. OSCAR C. DOTY, <i>et al.</i>, Appellants, <i>vs.</i> J. S. LOVE, Superintendent of Banks of the State of Mississippi, Appellee.	}	Appeal from the Supreme Court of the State of Mississippi.
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[April 1, 1935.]

Mr. Justice CARDOZO delivered the opinion of the Court.

A statute of Mississippi, adopted in 1932, permits the reopening of closed banks upon terms proposed by three-fourths of the creditors in number or in value if the plan is approved by the Superintendent of Banks and confirmed by the Court of Chancery. A bank has been reopened in accordance with this statute. The question is whether contractual rights have been impaired or rights of property annulled in contravention of the provisions of the Constitution of the United States.

The People's Bank & Trust Company of Tupelo, Mississippi, closed its doors on December 24, 1930. In accordance with the statutes then in force (Code of 1930, § 3817), the Superintendent of Banks took charge of the business and proceeded to liquidate it, his action being subject at all times to the super-

vision of the Court of Chancery. The bank owed about \$200,000 for public moneys on deposit. These were preferred claims under the laws of Mississippi, and were paid in full. It owed for bills payable and rediscounts \$457,500, amply secured by collateral. These also were paid in full, the security being unaffected by liquidation or insolvency. Out of the remaining assets, so far as they would serve, the liquidator would have to pay the general deposits (about \$1,450,000) as well as any other debts. There was also available for the protection of depositors the personal liability of the shareholders to the extent of the par value of their shares, a liability which under the statute was to be "enforced in a suit at law or in equity by any such bank in process of liquidation, or by the superintendent of banks, or other officer succeeding to the legal rights of said bank." Mississippi Code, § 3815. The share capital of the bank was \$200,000, and the personal liability of the shareholders would have added a like amount to the assets if all the shareholders had paid in full.

In the fall of 1932, after about two years of liquidation by the Superintendent of Banks, a movement was started by a large number of depositors to set the bank upon its feet. For help in that endeavor, they had recourse to methods made available by a statute adopted in May, 1932, which is quoted in the margin.* Laws of Mississippi, 1932, c. 251;

*"Section 1. Be it enacted by the Legislature of the State of Mississippi, That the Superintendent of Banks of the State of Mississippi be authorized to reopen any closed bank, with the approval of the chancery court of the county in which the bank is situated, or of the chancellor in vacation, when at least three-fourths of the general depositors and creditors therein, or any number of the general depositors and creditors therein provided they own at least three-fourths of the deposits in or claims against such bank, agree to the reopening thereof and sign what is commonly termed a 'freezing-of-deposits agreement', under which they agree to accept repayment of their deposits and claims over a period of years, for the full amount thereof or in reduced amounts, with or without

supplement to Mississippi Code of 1930, § 3817-1. The substance of the statute is that the Court of Chancery shall have power to reopen a closed bank in accordance with a plan proposed by at least three-fourths of the creditors and recommended by the Superintendent, if the court is satisfied that the plan is feasible and just. Upon the approval of such a plan, assenting and non-assenting cred-

interest, the period over which the deposits and claims are to be repaid and the rate of payment, together with the interest rate, if any, to be determined by the superintendent of banks, provided the superintendent of banks is convinced that such bank is in solvent condition and can repay the depositors the amounts of their deposits in accordance with the terms of the agreement for the repayment of same. But, before any such bank shall be reopened, the entire plan for the reopening of same, and all facts in connection therewith, shall be submitted by the superintendent of banks to the chancery court of the county in which the bank is situated, or to the chancellor in vacation, by proper petition, duly verified, such petition to contain a statement of the assets and liabilities of the bank and such other information as may be necessary to convey to the court or chancellor the true facts with reference to the condition of such bank, and a decree of the court or of the chancellor in vacation obtained approving the plan agreed upon for the reopening of such bank and authorizing the same to be reopened.

"Section 2. When any closed bank has been reopened as herein provided, the general depositors and creditors thereof who have not expressly agreed to accept the repayment of their deposits and claims in accordance with the freezing-of-deposits plan shall be bound to accept repayment of their deposits and claims on the same basis and at the same rate as those general depositors and creditors who have signed the freezing-of-deposits agreement, but this shall not apply to public depositors or to those depositors and creditors holding preferred claims, or secured claims, nor to correspondent banks holding bills payable of the closed bank. Proper provision must be made in the plan for the reopening of such bank to pay public depositors, depositors and creditors holding preferred claims and secured claims, and correspondent banks, on terms acceptable to them, but any arrangement so made shall not operate prejudicially to the rights of the general depositors and creditors of the bank.

"Section 3. That this Act shall not be construed to give the superintendent of banks the right to diminish the assets of a closed bank to the prejudice of the depositors and creditors thereof, and any assets that may be charged out as doubtful or as losses shall be held by the bank and collected for the benefit of its depositors and creditors, and all amounts so collected shall be held by the bank to be paid to them in accordance with the agreement for the repayment of their deposits and claims.

"Section 4. That this act shall be in force from and after its passage.

"Approved May 18, 1932."

itors shall be required to accept payment in accordance with its terms. The Superintendent shall have no power to diminish to the prejudice of creditors any assets that otherwise would be available for payment. Liquidation by the bank itself, though in a reorganized form, is to be substituted for liquidation at the hands of a statutory receiver.

Resorting to that statute, about eighty per cent. of the creditors signed a "freezing-of-deposits agreement" prescribing a time and method for the payment of the debts. The bank, when reorganized, was to have a capital of \$55,000 and a surplus of \$45,000, a total capital and surplus of \$100,000. Shareholders of the old bank, having shares of the par value of \$110,000, were to contribute the new capital (\$55,000, or 50% of their old holdings) in cash or its equivalent. In consideration of this payment, they were to be released from any other liability on the old shares, though the statutory liability would attach automatically to the new ones if the reorganized bank were to go under. Shareholders not contributing to capital (representing \$90,000 of the old shares) were to remain personally liable as if no plan had been adopted. Of the claims against the old bank as distinguished from those against the shareholders, twenty-five per cent. were to be assumed by the reopened bank; seventy-five per cent. were to be a charge upon certain assets which were to be placed in a pool and made to realize what they could. Assets having an estimated value in excess of the liabilities assumed were to be turned over to the reopened bank to enable it to make good its promise. This was the primary source of payment, though the covenant of assumption was to be back of it. Out of the assets so delivered deposits of \$5 or less, amounting in all to \$3,649.87, were to be paid in full. All other

claims then outstanding for deposits or other debts were to be ratably satisfied up to the limit of twenty-five per cent., five per cent. at once, and the remaining twenty per cent. in five per cent. instalments as the assets turned over to the reopened bank were converted into cash, the process of conversion being subject to the supervision of the court. Proceeds of collection in excess of the twenty-five per cent. were not to be retained, but were to be paid into the pool. Certain other assets having an estimated value of \$45,000 were turned over to the reopened bank for surplus or reserve. This amount was to be repaid out of the net earnings at the rate of \$7,500 a year by additions to the pool. No dividends were to be declared upon the shares of the reopened bank till all the liabilities assumed by it had been satisfied completely. The assets deposited in the pool were to be administered by the bank as a trust for the benefit of creditors. Many other details would have to be stated to exhibit the plan fully. For an understanding of the objections the outline given will suffice.

The Superintendent of Banks filed a petition in the Court of Chancery approving the plan and recommending its adoption. Notice of hearing was served by publication upon the 5,000 creditors affected, as well as personally upon some of them selected by the court as representing the interests of all. Only a few creditors opposed the granting of the petition. Some of these withdrew their objections at the close of the hearing with the result that the number of opponents was reduced to six. After full consideration, the court on May 15, 1933, entered a decree overruling the objections and reopening the bank in accordance with the plan. Two of the objecting creditors appealed to the Supreme Court of the state, invoking the protection of Ar-

title 1, § 10, and the Fourteenth Amendment of the Federal Constitution. The decree was affirmed, one judge dissenting. 155 So. 331. The case is here upon appeal. Judicial Code, § 237; 28 U. S. C. § 344.

If we look to the surface of the statute and no farther, there is not even colorable basis for the argument that the Constitution is infringed. All that the statute does upon its face is to change the method of liquidation. The assets of the business are to be devoted without impairment or diversion to the payment of the debts. As to this the statute is explicit. Act of 1932, Chapter 251, § 3. In the discretion of the Court of Chancery a reopened bank is to take the place of the state Superintendent for the purpose of gathering in the assets and discharging liabilities. The substitution may not be made unless the court is satisfied that the reopened bank is solvent and able to satisfy the debts to be assumed. Payment of the creditors is still the end to be attained, and resumption of business a means and nothing more. If debts are thereby swollen or assets made to shrink, the outcome is an unlooked for incident of a method of administration conceived to be more efficient than present sale and distribution. The Constitution of the United States does not confer upon the depositors a vested right to liquidation at the hands of a state official. *Gibbes v. Zimmerman*, 290 U. S. 326, 332.

The argument will not hold that the necessary operation of the statute is to subject dissenting creditors, who may be as many as one-fourth, to the will or the whim of the assenting three-fourths. The creditors favoring reorganization, though they be ninety-nine per cent., have no power under the statute to impose their will on a minority. They may advise and recommend, but they are powerless.

to coerce. Their recommendation will be ineffective unless approved by the Superintendent. Even if approved by him, it will be ineffective unless the court after a hearing shall find it to be wise and just. Upon such a hearing every objection to the plan in point of law or policy may be submitted and considered. The decree when made by the Chancellor will represent his own unfettered judgment. The judicial power has not been delegated to non-judicial agencies or to persons or factions interested in the event. Like statutes have been upheld by the courts of other states. *Dorman v. Dell*, 245 Ky. 34; *Milner v. Gibson*, 249 Ky. 594; *Nagel v. Ghingher*, (Md.), 171 Atl. 65; *McConville v. Fort Pierce Bank & Trust Co.*, 101 Fla. 727; *Smith v. Texley*, 55 S. D. 185; *Hoff v. First State Bank of Watson*, 174 Minn. 36; *Paul v. Farmers & Merchants State Bank*, 187 Minn. 411.

The Act of 1932 being valid on the surface, the question remains whether it has been so applied or interpreted in the adoption of this plan as to bring out defects that were lurking underneath. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289; *Merchants' National Bank v. Richmond*, 256 U. S. 635, 637; *Kansas City So. R. Co. v. Road Improvement District, No. 6*, 256 U. S. 658, 659.

The argument is made that some of the assets of the old bank are placed at the risk of the business of the new one. All this was done for the protection of existing creditors. The finding is that collections are made more promptly and readily by a going concern than by one in liquidation. Cf. *Christensen v. Merchants & Marine Bank of Pascagoula*, 168 Miss. 43, 57. For illustration, a live bank is much more efficient than a closed one in selling parcels of real estate or in carrying them while unsold at profitable rentals. Adequate pre-

cautions are embodied in the plan to assure the enjoyment of these benefits by the creditors and not by others. It is one of the terms of the decree that none of the profits of the business may be used for the new shareholders until every dollar's worth of assets turned over by the Superintendent has been paid to the creditors or delivered to the pool. The court may intervene upon a showing of unreasonable delay. There is no need to consider whether any of these safeguards might have been omitted without invalidating the plan. We take the record as we find it.

The argument is made that a cause of action upon contract has been destroyed or given away to the prejudice of depositors in that shareholders have been released from their personal liability in return for a contribution of capital to the regenerated business. This is said to constitute a denial of due process or an impairment of contract within the doctrine of *Ettor v. Tacoma*, 228 U. S. 148, and *Coombes v. Getz*, 285 U. S. 434. The answer is much the same as to the argument last considered. The effect of the release has been to make it possible for the bank to be reopened with the result to the creditors of economies and other benefits that would otherwise be lost. During about two years and a half of liquidation there had been collected from the whole body of the shareholders, representing 2,000 shares, a small percentage only of the total liability. The Superintendent expressed the belief that it might be possible in the course of many years and with great expense and labor to bring collections from these sources to a total of \$75,000. Through the method called for by the plan, capital in the sum of \$55,000 became available at once as additional security for the obligations assumed by the reorganized business. This capital was sup-

plied by the holders of 1,100 shares, whose maximum liability was \$110,000. The liability of the other shareholders (\$90,000 at the maximum) continued unimpaired for whatever it was worth. The Chancellor found from the evidence that in all probability the moneys thus obtained as contributions to capital could not have been collected by judgment and execution, and that the depositors would be the gainers by the substituted form of payment. He reached that conclusion after a trial in the county of the vicinage with his finger on the pulse of neighborhood conditions. On appeal to the Supreme Court his findings were confirmed. Cf. *Smith v. Texley, supra*, at page 195.

In such circumstances it is idle to speak of the release of liability as a gift or a sacrifice of valuable assets. The release was none of that, but a compromise of a liability of uncertain value upon terms beneficial to the creditors. So the trier of the facts has found. The title to the extinguished cause of action was not in the depositors, but in the Superintendent or the bank. If there had been no plan to reorganize, the Superintendent like a receiver might have compromised the cause of action and released it with the approval of the court. His authority was no less because the release was incidental to a project to rehabilitate a business for the good of all concerned. The jurisdiction of the Court of Chancery to give approval to a settlement by a receiver or other officer did not have its genesis in the Act of 1932 or in the procedure there prescribed. It existed in like measure when the liquidation of this bank was begun in 1930 and for many years before. Depositors were chargeable with notice of that power and became subject to its exercise in making their deposits.

In last analysis, then, the appellants' grievance, if they have any, is this and nothing more, that there was error of judgment to their prejudice in the approval of the plan with the compromise of liability as one of its important features. They refer us to nothing in the record to give support to that contention. The testimony as to the probable results of liquidation without the aid of a reopened bank was not contradicted or discredited. But the result would not be changed if the record in that respect were different. Error of judgment in the compromise of liabilities is not a taking of property or an impairment of contract in derogation of the restraints of the Constitution of the United States.

The appellants make the point that by the Act of 1932 a preference was accorded to the claims of correspondent banks, though such a preference did not exist under the statutes in force when the Superintendent went into possession. A sufficient answer is that in this case the correspondent banks were protected by collateral security which apart from the new preference would have required them to be paid in full.

The appellants also say that their constitutional rights were infringed by those provisions of the plan whereby a preference was granted to the holders of small claims. None of these claims (\$3,649.87 in the aggregate) was for more than \$5, and many, we were informed upon the argument, were for only a few cents. The Chancellor found by his decree that it would be more economical to pay these accounts in full than to incur the bookkeeping expenses incidental to a calculation of percentages whenever dividends were paid to others. Cf. *Nagel v. Ghingher, supra*, at page 69. The objecting creditors have not been damaged by that feature of the plan.

Finally the appellants say that the proceedings in the Court of Chancery are void for insufficient notice to the depositors and others. A sufficient answer is that the appellants appeared generally and were fully heard upon the merits.

The decree should be affirmed, and it is

So ordered.

COURT OF ERRORS AND APPEALS
OF NEW JERSEY

MAY TERM, 1935.

SARA F. BASEN and GRACE F.
GROSMAN, Executrices of the
Estate of Abraham Fishman,
deceased,

Plaintiffs-Appellees,

v.

CLINTON TRUST COMPANY, a New
Jersey corporation,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court from
Order Striking
Amended Answer
and directing
Entry of Judg-
ment in Favor of
the Plaintiffs.

Sat below :

WILLIAM A. SMITH,
C. C. J.

BRIEF OF DAVID T. WILENTZ,
ATTORNEY GENERAL,
As Amicus Curiae.

Preliminary.

This case is considered of sufficient importance to the people of the State of New Jersey to have warranted the filing of a petition to this Court by the Attorney General to appear and file a brief as *amicus curiae*. The Court below has declared Chapter 116, Laws of 1933, as amended by Chapter 287 of the Laws of 1933, in so far as it affects the reorganization of banking institutions, unconstitutional. The interests of the State demand that remedial legislation looking toward a

sound administration of the finances of its people, widely adopted and acted upon by numerous financial institutions, be sustained. With that consideration in mind, and with the purpose of sustaining the general legislative scheme Statewide in scope, rather than supporting the position of the particular defendant involved, this brief will confine itself to a discussion of the constitutionality of the legislation declared invalid. Special matters of defense going to the merits of the particular controversy, which have no general application to banking institutions as a whole, will not be considered here.

This Court will realize at once the consequences of an affirmance of the judgment below. Acting in reliance upon the statute, numerous institutions throughout the State, closed or doing business on a restricted basis since March, 1933, have reorganized and reopened and have been serving the needs of the people in their respective communities. Should the judgment be affirmed, the door would be thrown open to innumerable suits against the banking institutions involved, inevitably resulting in their suspending business, with the consequent chaotic conditions which obtained during the banking holiday of March, 1933.

Counsel realizes that hard cases tend to make bad law; that the consequences of a particular judgment generally should not be considered by the Court in moulding its decision. Where, however, the result of a particular case will vitally affect the interests of a considerable proportion of the population of the State, the matter is raised above the level of a controversy involving only the rights of individuals, and becomes one of general public concern. Counsel urges that where the public interest is great, it should be

balanced against individual interest and, in a proper case, such as that here presented, individual rights should be forced to yield. Counsel urges nothing revolutionary in presenting this thesis; he will attempt to show that private or individual rights have been subordinated to the common weal from the very inception of our present form of Constitutional Government.

In addition to the grounds upon which the Court below found the Act providing for the reorganization of closed banks unconstitutional, Counsel for the plaintiffs have urged that it is unconstitutional upon a further ground; namely, that it involves an unlawful delegation of legislative power to a ministerial officer. Counsel will attempt to establish that the Act involves no such unlawful delegation.

In presenting his argument, Counsel will attempt to establish the following propositions:

1. That the Act, in its application, involves no infringement of the due process clause of the United States Constitution, or of the contract clauses of either the New Jersey or the United States Constitutions.

2. That the Act, in its application, involves no delegation of legislative power contrary to the provisions of the Constitution of the State of New Jersey.

Statement of the Record.

The appeal (notice of appeal and grounds therefor, p. 90) is from a judgment (p. 89) and an order (p. 88) striking defendant's amended answer as frivolous. The judgment was signed April 2, 1935, and is for \$4,129.26 and costs. The

complaint is found on page 1, the amended answer, page 4, the notice of motion to strike the amended answer and for summary judgment, page 27.

Plaintiffs had made a motion to strike defendant's original answer which had resulted in an opinion of the Court (p. 79) directing that it be stricken. Defendant was permitted to file an amended answer, which it did (p. 4). Argument was then had upon the motion to strike the amended answer (p. 27). The Court adhered to its opinion delivered upon the motion to strike the original answer (p. 87), whereupon the order for summary judgment was made (p. 88).

The Facts.

The amended answer was stricken as frivolous. There can be no controversy here with respect to the facts, which are briefly as follows:

In July, 1932 the plaintiffs, as Executrices, deposited certain monies with the defendant. In March, 1933 the Commissioner of Banking and Insurance of New Jersey, acting under authority of Chapter 27, Laws of 1933, as amended by Chapter 66, Laws of 1933, placed the defendant upon a restricted basis, limiting withdrawal of funds on deposit. On March 19, 1933 the Commissioner of Banking and Insurance permitted defendant to open for restricted business. The defendant was not permitted to pay any amounts to its depositors, including the plaintiffs. While it was permitted to receive deposits, these deposits were earmarked. On May 7, 1934, as a result of the reorganization, the defendant reopened for unrestricted business. Before its reorganization the defendant was insolvent. Had its assets been liquidated in the ordinary way its depositors would not have received in excess of 40% of the

amounts of their deposits (Par. 6, Amended Answer, second defense, p. 10; Par. 2, fourth defense, p. 16; Par. 13, affidavit of Goodemoot, p. 76). The reorganization plan provided for the immediate payment of 50% of all deposits. Of the remaining 50% one-half was retained in payment of preferred stock issued to depositors and one-half retained in payment of participation certificates in eliminated assets, also issued to depositors (Exhibit 4, p. 24).

The plan was circulated amongst all interested, including plaintiffs. Claims of depositors and other creditors were duly passed upon. The Commissioner of Banking and Insurance declared the plan fair and equitable as to all depositors, other creditors and stockholders and in the public interest. No steps were taken by the plaintiffs although they had full knowledge, or by any other creditors or stockholders either to review the action of the Commissioner or to enjoin the putting into effect of the plan (Par. 9, Amended Answer, second defense, p. 14). The plan was duly approved by the requisite percentage of depositors, other creditors and stockholders.

Depositors and other creditors and stockholders surrendered their respective rights, whatever they were, and took in exchange the rights and securities to which they were entitled under the terms of the plan.

On May 7, 1934 the plaintiffs, with full knowledge of all the facts, withdrew from the defendant the sum of \$4,125.47, 50% of their deposit with interest. The securities provided for in the reorganization plan were tendered to the plaintiffs, who refused to take them (Par. 11, Amended Answer, second defense, p. 15). Plaintiffs did nothing further until they issued the summons and complaint on or about September 2, 1934.

The Law.

The provisions of the Constitutions of the State of New Jersey and of the United States, which, it is asserted by the plaintiffs, the Act offends, are as follows:

"The legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

N. J. Constitution, Par. 3, Sec. VII,
Article IV.

"No State shall * * * pass any * * * *ex post facto* law, or law impairing the Obligation of Contracts, * * *"

U. S. Constitution, Article I, Sec. 10.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

U. S. Constitution, Amend., Article
XIV, Sec. 1.

The pertinent sections of the Act found unconstitutional are as follows:

"7. Any such bank, trust company * * * which has not been permitted or licensed by the Commissioner of Banking and Insurance, * * * to perform all of its usual banking functions, may be reorganized for the resumption of its normal and usual banking business by the issuance of preferred stock as hereinabove provided, or otherwise. Any reorganization plan may provide for the issuance of preferred

stock to all of the depositors and other creditors of such bank or trust company * * * and may provide that each creditor and depositor must subscribe at least a certain percentage of his claim for said stock. Any reorganization plan shall become effective (1) when the Commissioner of Banking and Insurance shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe, and (2) when, after such notice of such reorganization as the Commissioner of Banking and Insurance may require, (a) depositors and other creditors of such bank, trust company * * * representing at least seventy-five per centum (75%) of its total deposits and other liabilities as shown by the books thereof, and (b) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books thereof, shall have consented in writing to the plan of reorganization; * * *

“8. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, trust company * * * whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.”

(Chapter 116, Laws of 1933, as amended by Chapter 287, Laws of 1933.)

ARGUMENT.

I. The act, in its application, involves no infringement of the due process clause of the United States Constitution, or of the contract clauses of either the New Jersey or the United States Constitutions.

While there are two distinct and separate provisions here involved, it has been the practice of the courts to treat both together. For the sake of convenience in presenting the argument, that practice will be followed here.

Both clauses, the due process and the contract clauses of the United States Constitution, have been before the United States Supreme Court on numerous occasions. An analysis of the cases will disclose certain well-formulated rules of construction, all of which establish that constitutional provisions are not absolute, but will be read in the light of the circumstances affecting particular cases. The principle has been succinctly presented in *Home Building and Loan Association v. Blaisdell* (1933), 290 U. S. 398, at page 428:

“To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. Justice Johnson, in *Ogden v. Saunders*, *supra* (12 Wheat. p. 286, 6 L. ed. 631), adverted to such a misdirected effort in these words: ‘It appears to me, that a great part of the difficulties of the cause arise from not giving sufficient weight to

the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings.' And after giving his view as to the purport of the clause—"that the States shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport",—Justice Johnson added: 'But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts, as over the form and measure of the remedy to enforce them'."

The Constitution does not act automatically to brand with illegality, every statutory provision falling within its purview. It is not a yardstick, fixed and rigid, but a pliable, elastic guide, capable of expansion and contraction, to include and exclude laws subjected to its test.

The end for which the Constitution was originally adopted has ever been uppermost in the minds of all the tribunals that have been called upon to interpret its provisions. The purpose of the Constitution is obvious. It has been classically stated by its framers in the preamble. The creation and the preservation of a predetermined social order was the end sought. Where the construction of a particular clause of the Constitution would lead inevitably to a destruction of the social structure sought to be created by it such a construction will be denied.

"Not only is the constitutional provision qualified by the measure of control which the State maintains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U. S. 251, 276, 77 L. ed. 288, 301, 53 S. Ct. 181, 87 A. L. R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

"While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the state."

Home Building and Loan Association v. Blaisdell, *supra*, page 434.

The restriction upon the privilege of the individual to insist upon a strict application of the Constitution where it would result in injury to the sovereign is further brought out in *People v. Nebbia* (1934), 291 U. S. 502, where the Court says (p. 523):

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

See also *Manigault v. Springs* (1905), 199 U. S. 473; *Union Dry Goods Co. v. Georgia Public Service Corp.* (1919), 248 U. S. 372; and *Noble State Bank v. Haskell* (1910), 219 U. S. 104.

In *Hourigan v. The Township of No. Bergen* (1934), 113 N. J. L. 143, at pages 149 and 150, this Court gave full recognition of the principle:

"It is a well-established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may be thereby affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is

and what is not necessary—a discretion which the courts will ordinarily not interfere with * * *. All contracts and all rights are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.”

Counsel has thus far concentrated upon an exposition of general principles. He does not urge that the cases cited are precedents which would bind this Court in the case before it. But, in arriving at a conclusion, in applying the provisions of the Constitution to a particular case, the principles formulated by this Court and by the United States Supreme Court must be given the greatest consideration. Too great emphasis cannot be placed upon the indisputable fact that the Constitutional prohibitions are not ironclad, but are composed of a maleable substance, which it is the duty of the Court to fashion in the interests of the social order.

Legislation concerning banking institutions falls within the principle above set forth. Banking institutions have always been regarded in a class separate and apart from all other corporations. They are recognized as being *sui generis*; as corporations quasi-public in nature.

“Banks have become indispensable agencies through which industry, trade, and commerce are carried on, and while they exist mainly for private profit, it cannot be denied that they are pre-eminently of a public nature and therefore

universally recognized as a corporation of a quasi-public nature and subject to statutory regulation for the protection of the public. See 3 R. C. L. 379, 5; *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. W. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487."

McConville v. Ft. Pierce Bank and Trust Co. (1931), 101 Fla. 727, 135 So. 392, 395.

The cases are replete with statements that banking institutions are so peculiarly vested with public interest and so within the control of the Legislature, that an incidental impairment of the obligation of contract effected by statute is insufficient to constitute the legislation invalid:

"Banks and banking are proper subjects of legislative control and strictly within the internal police power of the state. Thompson on Corporations (1st Ed.) Sec. 640; *Blaker v. Hood*, 53 Kan. 499, 36 P. 1115, 24 L. R. A. 854; *American Southern National Bank v. Smith*, 170 Ky. 512, 186 S. W. 482; * * * Contracts being subject to legislation enacted in the exercise of the police power, it is not invalid merely because of its incidental effect upon them. *St. Louis Poster Adv. Co. v. St. Louis*, 249 U. S. 269, 39 S. Ct. 274, 63 L. Ed. 599 * * * Where made by parties, either of whom is subject to statutory regulations, they must of necessity be subject to the exercise of the sovereign power of the government to enact legislation for the protection of the general welfare. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679 * * *."

Milner v. Gibson (1933), 249 Ky. 594, 61 S. W. (2d) 273, 278.

"The character of banking as an institution peculiarly calling for regulation and for the exercise of the police power in order to give adequate protection to the public is too well established to call for extended comment."

Wausau Malt Products Co. v. Citizens State Bank of Wausau (Wis. 1934), 254 N. W. 379, 380.

"The relations between savings banks and their depositors, so far as contractual in nature, have been entered into subject to future proper exercise of the police power by the enactment of wholesome and reasonable laws for the common good. Laws of that character do not impair the obligations of such contracts."

In re Opinion of the Justices (1932), 278 Mass. 607, 181 N. E. 833, 835.

It is further apparent from the language of the cases that the requirement of due process guaranteed by the Constitution presents no great obstacle. Due process has been defined by this Court as "equality in the determination of the rights of those affected." *Grobholz v. Merdel Mortgage Investment Co.*, 115 N. J. E. 411, 415. That prerequisite most obviously exists here. No claim is anywhere made by the plaintiffs that there was inequality in the determination of the rights of those affected. Again, in *People v. Nebbia*, *supra*, the Court says (p. 537):

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The

courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied * * *."

It cannot be argued seriously that the legislative purpose as it is expressed in Chapter 116 of the Laws of 1933, as amended, is not a proper one, nor can it be argued that the law has no reasonable relation to that purpose. It is submitted further that the provisions of the act are neither arbitrary nor discriminatory.

Counsel for the plaintiffs have argued that at the time the deposit was made by them the plaintiffs' right to the return of the deposit became vested in them by virtue of the contract between the parties; that in the event the defendant was unable or refused to return the deposit, the plaintiffs were vested with the right to sue for its return; that, in the event the defendant became insolvent, the plaintiffs became vested with the right to have the affairs of the defendant wound up in accordance with the then law. Reduced to its simplest terms, the plaintiffs' argument simply states that the only alternative to payment is liquidation. A very similar point has recently been passed upon by the United States Supreme Court. In *Doty v. Love* (1935), U. S.—79 L. ed. 632, a reorganization statute similar to the Act here in issue was scrutinized by the United States Supreme Court. The Court there says, in unmistakable language, that the Constitution of the United States does not confer upon depositors a vested right to liquidation by a particular method. Here, as in *Doty v. Love*, *supra*, all that the stat-

ute does is "change the method of liquidation." In both statutes payment of creditors is the end to be attained, and resumption of business a means and nothing more.

The facts in this case affirmatively show that had liquidation taken place as insisted upon by the plaintiffs, they would have received less, as a result of that liquidation, than they have already received through the fruits of reorganization. The parallel with *Doty v. Love*, *supra*, continues. There the Court refuses to rise to the defense of the appellants simply because the statute *might* result in an impairment of the obligation of contract or in the deprivation of property without due process. It must be shown to the satisfaction of the Court that the application of the Act did, in fact, result to the prejudice of the individual before the jurisdiction of the Court may be invoked. This is but a new application of the ancient maxim, *damnum absque injuria*, clearly stated by the Mississippi Supreme Court in *Dunn v. Love*—Miss.—155 So. 331, 335:

"In considering the constitutional guaranty against impairment of contract, courts now definitely look to substance rather than to form, realization upon the value or worth of the contract is the concern of the guaranty, not that any particular method for that realization should be observed or preserved. * * * unless the complaining depositor can show that he has been substantially injured in ultimate results, has in fact been actually hurt by the reorganization and the plan thereof, he has no right to complain whether upon constitutional or statutory or administrative grounds."

While the plaintiffs here may have suffered an infringement of a legal right, it must be taken as

a fact that they have in no way been damaged. They do not show that liquidation would have resulted in their receiving more than the sum given them and accepted by them. On the contrary, it must be taken as admitted that plaintiffs received more on reorganization than they would have received on liquidation. The vital inquiry hinges about "realization upon the value or worth" of the contract. The particular method, the mechanics provided for that realization, is secondary.

It has been stated that in *Doty v. Love, supra*, a statute substantially similar to Chapter 116, Laws of 1933, as amended, was considered by the Court. The statute in that case, unlike the statute in the instant case, provides that the reorganization plan be approved by the Mississippi Court of Chancery. Chapter 116, Laws of 1933, as amended, makes no express provision for approval or review by any tribunal. Ample protection for stockholders, creditors and depositors, is found, however, in the general body of the law of the State. Plaintiffs were given notice of the proposed reorganization plan and could have resorted to Chancery to seek an injunction against the adoption of the plan, were they prejudiced by its terms. Upon the approval of the plan by the Commissioner of Banking and Insurance they could have had the Commissioner's determination removed to the Supreme Court on a writ of certiorari. See *Garford Trucking, Inc. v. Hoffman*, 114 N. J. L. 522, 532. It can make no difference in the rights of these plaintiffs or in the rights of any individual affected by the reorganization plan that the Act does not in and of itself provide for judicial review or affirmation. On certiorari, or on application to the Court of Chancery, every safeguard would be afforded the plain-

tiffs as was afforded the appellants in *Doty v. Love, supra*. It is significant that the plaintiffs' failure to act before the plan was approved by the Commissioner of Banking and Insurance would in no way have prejudiced their rights to a judicial review. See *Garford Trucking, Inc. v. Hoffman, supra*, page 532.

Nor can the fact that the statute involved in *Doty v. Love, supra*, provides for judicial review of the plan of reorganization be considered as the basis of the Court's decision, the *ratio decidendi*. Such a view of the case would lead to the absurd conclusion that a plan which would otherwise be violative of the due process clause is saved from invalidity only because it bears the Court's stamp of approval. The decision must be based squarely upon the fairness and the equitable nature of the plan adopted in pursuance of the provisions of the statute; the only concern of due process. See *Grobholz v. Merdel Mortgage Investment Co., supra*, at page 415. The fairness and the equitable nature of the plan adopted by the defendant in pursuance of the terms of the statute have never been challenged.

So far as notice of proceedings before the Commissioner is concerned, it is a sufficient answer to say that the plaintiffs had actual notice of the proceedings both before and after the approval of the plan by the Commissioner. Counsel urges that *Doty v. Love, supra*, is dispositive of the point in issue; that there is no longer room for reasonable difference of opinion as to whether either the due process or obligation of contract clauses of the Constitution is offended by a reorganization statute of the nature here involved.

II. The act, in its application, involves no delegation of legislative power contrary to the provisions of the Constitution of the State of New Jersey.

Two provisions of the New Jersey Constitution are involved in the discussion of this point. The first is Article III, Section 1:

“The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.”

Article IV, Section 1, provides:

“The legislative power shall be vested in a senate and general assembly.”

The Constitution of the United States, Article I, Section 1, provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Counsel cites the provision of the United States Constitution, not because it is in any way controlling over state legislation, but because of the great similarity of the two documents, and, further, because the decisions of the United States Supreme Court, construing the Federal Constitution, afford valuable precedents.

Judge Story, in his work on the Constitution (Fifth Edition, Vol. 1, p. 393), says:

“But when we speak of a separation of the three great departments of government, and maintain that the separation is indispensable to public liberty, we are to understand the maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole power would subvert the principles of a free constitution.”

The generalization made by Judge Story has been particularized in the cases, so that there has gradually emerged a definite standard for construction.

In *Field v. Clark* (1891), 143 U. S. 649, the Court, in upholding the validity of an act conferring power upon the President to reduce the revenue and equalize duties on imports, makes the following statement (p. 693):

“The true distinction * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made.”

In *United States v. Grimaud* (1910), 220 U. S. 506, the Court considered an act of Congress establishing a forest reservation and giving power to the Secretary of Agriculture to "make such rules and regulations and establish such service as will insure the objects of such reservation." Violations of the Secretary's regulations were made punishable by fine and imprisonment. The defendant was charged with violating a regulation forbidding the grazing of sheep without a permit. In concluding that the Act was constitutional and did not involve an improper delegation of power by the Congress to the Secretary, the Court says (p. 517):

"From the beginning of the government various acts have been passed conferring upon executive officers the power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress has legislated and indicated its will, it could give to those who were to act under such general provisions, 'power to fill up the details' by the establishment of administrative rules and regulations * * *."

There have been no changes in the attitude of the United States Supreme Court on the point in discussion. The most recent expression seems to indicate that it is sufficient if the statute "furnishes a sufficient primary standard to govern the action of the commission." *United States v. Illinois Central Railroad Company* (1934), 291 U. S. 457, 464. See also *Interstate Commerce Commission v. Cincinnati, Etc., Railroad Co.*, 167 U. S. 479; *Kansas City, Etc. Railroad Co. v.*

United States, 231 U. S. 423; *Hampton & Co. v. United States*, 276 U. S. 394.

No attempt is here made to include citations of all the cases of the United States Supreme Court where the present question has been raised. In the cases that are here cited sufficient is contained to formulate the rule: there is no delegation of legislative authority in violation of the constitution when the statute is complete upon the subject it attempts to cover, but leaves its administration, the power to fill up the details, to another agency, even though in the process of administration the agent is called upon to exercise discretion.

The rule formulated is law in New Jersey. In *West Jersey and Seashore Railroad Company v. Board of Public Utility Commissioners* (1915), 87 N. J. L. 170, this Court had before it the question of the constitutionality of the Public Utilities Act of 1911 (P. L. 1911, p. 374). That Act created a Board of Public Utility Commissioners and vested it with powers to fix rates; to compel railroads to establish connections at junction points; to compel the construction of sidings; under proper circumstances to compel railroads to extend facilities. The Court says (p. 177):

"All these powers, although widely variant as to the matters to be affected, and the purposes to be accomplished, by their exercises, are similar in character, so far as the right to delegate them is concerned. That the legislature may itself directly exercise each and every of them, is of course, unquestionable, but it does not follow, therefore, that they cannot be delegated. The contrary is the fact. As early as 1825 it was de-

clared by Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 43, that congress certainly may delegate to others powers which it may rightfully exercise itself, and, so far as we are able to discover, the soundness of this proposition has never since been doubted. The distinction is accurately stated by the Supreme Court of Pennsylvania in *Locke's Appeal*, 72 Pa. St. 498, as follows: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact, or state of things, upon which the law makes, or intends to make, its own action depend.' "

This Court had no difficulty in sustaining the constitutionality of the Public Utilities Law. See also *Iowa Life Insurance Co. v. Eastern Mutual Life Insurance Co.* (1900), 64 N. J. L. 340, where a statute requiring reinsurance contracts to be approved by the Commissioner of Banking and Insurance, was held not unconstitutional as a delegation of legislative powers. *Public Service Railway Co. v. Board of Public Utility Commissioners* (1915), 87 N. J. L. 250. The cases in which powers conferred upon municipal corporations are in issue are not here mentioned, since those cases have been long considered *sui generis*. See *State v. Larson*, 10 N. J. Misc. R. 384, 386.

In *State v. Larson*, *supra*, the Court holds that the Aviation Act (Chapter 190, Laws of 1931) is unconstitutional. The Court says (p. 387):

"But, while the establishment of principles or standards of conduct is the essential function of the law-making body, which cannot be delegated, the application of those principles or standards, to

facts as they arise, and the determination as to whether or not those facts exist, is a function of law enforcement, which can, therefore, be delegated to an administrative body."

The Court, while recognizing the principle governing the case, found that the legislature had failed to provide a complete law. In this respect it is out of line with the decisions and is directly contra to *United States v. Grimaud, supra*.

The most recent case which Counsel has been able to find is *Garford Trucking, Inc. v. Hoffman, supra*. In that case the Supreme Court examined provisions of the financial responsibility law, Chapter 116, Laws of 1929, as amended. The Court found that the quasi-judicial powers exercised by the Deputy Commissioner of Motor Vehicles in revoking a license, were exercised by him merely as incidents to performance of his administrative powers. In the same manner, the Commissioner of Banking and Insurance, in passing upon a reorganization plan and in approving it as fair and equitable, is simply exercising a quasi-judicial power incidental to the performance of his administrative powers. Unless the legislature were able to delegate such duties, it would be impossible for it to perform the functions for which it was created. The details of administration must of necessity be placed in the hands of the administering officer.

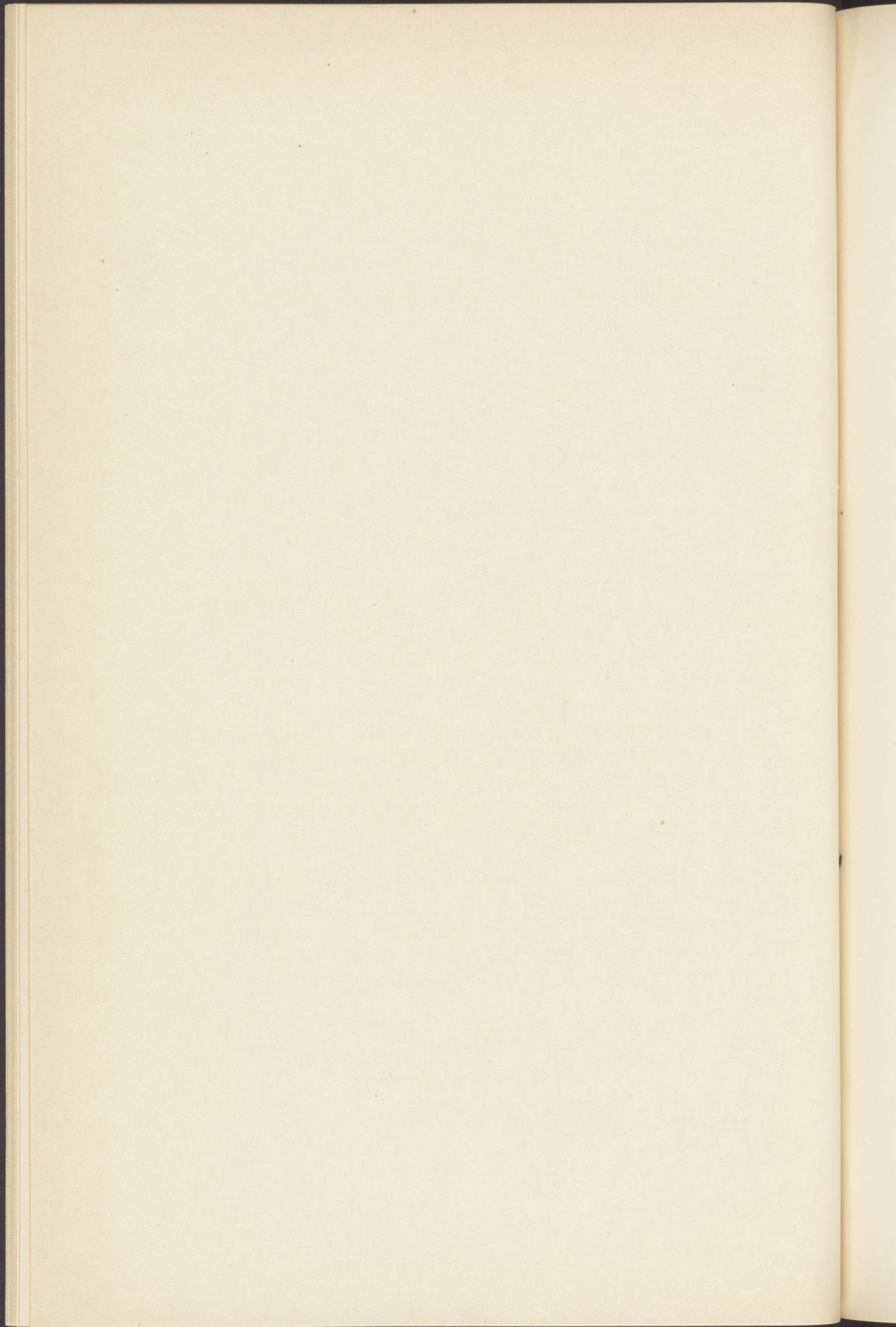
Counsel submits that the cases adequately support his contention that Chapter 116, Laws of 1933, as amended, involves no unconstitutional delegation of the legislative powers.

CONCLUSION.

It is respectfully submitted that Chapter 116, Laws of 1933, as amended, is constitutional and that the judgment below should be reversed.

DAVID T. WILENTZ,
Attorney General,
as amicus curiae.

LOUIS J. COHEN,
Assistant Attorney General,
of Counsel.



New Jersey Court of Errors and Appeals

No. 95.

MAY TERM, 1935.

SARA F. BASEN and GRACE F. GROSMAN,
Executrices of the Estate of Abra-
ham Fishman, deceased,
Plaintiffs-Appellees,

vs.

CLINTON TRUST COMPANY, a New Jer-
sey corporation,
Defendant-Appellant.

On Appeal,
etc.

**ANSWERING BRIEF OF PLAINTIFFS-APPEL-
LEES TO BRIEF ON BEHALF OF RECON-
STRUCTION FINANCE CORPORATION, AND
FEDERAL DEPOSIT INSURANCE CORPORA-
TION AS *AMICI CURIAE*.**

We will divide this brief into two Parts. Part A will be our answer to the brief of *Amici Curiae* and Part B will set forth such matters as we feel should be brought to the Court's attention which, in our opinion, are proper in this brief.

PART A.

Answer to "Statement."

The facts on which these proceedings are predicated are in detail set forth in the briefs now on file in this court and reference is made thereto.

On page 4 of the brief of *Amici Curiae*, the statement is made that the Reconstruction Finance Corporation and the Federal Deposit Insurance Corporation are affected by the result of the instant case and are similarly interested in other banking institutions in this State which have been reorganized and reopened under the statute in question. In our opinion, this should have no effect on the court's decision as matters are decided on legal grounds rather than from the standpoint of the financial interest which may be affected, and we are only concerned with the reorganization plan as it affects the rights of Appellees.

At page 5 cases are cited which will be hereinafter referred to and which we submit favor Appellees' position rather than that of the Appellant or *Amici Curiae*.

80 A. L. R. 1487.

At page 1490:

"In *Farmer's Bank v. Miller* (1928); Mo. App., 8 S. W. (2d) 92, the court held that the identity of a bank which had been closed by the State Banking Department was not changed where it was permitted to reopen under a plan whereby the old stockholders surrendered their stock and new shares were issued to new subscribers, who paid therefor.

"Under an Oklahoma statute, it was held, in *First State Bank v. Lee* (1917), 65 Okla. 280, L. R. A. 1918 B, 609, 166 Pac. 186, that the action of the bank commissioner in taking over an insolvent bank, selling its assets for the benefit of the depositors' guaranty fund, authorizing the purchasers of such assets to secure the cancellation of the stock of the insolvent bank and to have new certificates of stock issued to themselves, and granting authority to reopen under the same name and charter on repairing of the capital stock, did not, in fact or in legal effect, work a dissolution of the corporation or create a new one,

and did not operate to relieve the bank from its former debts or contractual obligations.

“Under a South Dakota statute providing for the reorganization and reopening of closed banks, on the request of depositors representing a stated percentage of the depositors, the court in the case of *Re: Farmers' Exchange Bank* (1929), 55 S. D. 190, 225 N. W. 307 held that a reorganized bank was not a new bank because there were some new stockholders and some new capital provided, where there were no new articles of incorporation and no new certificate of incorporation.”

92 A. L. R. 1337.

At page 1341 the following statements are found:

“That the constitutional rights of a depositor in a bank or trust company which becomes insolvent and is taken in charge by the commissioner of banking are not infringed by a plan of reorganization (under a statute providing that an insolvent bank might reorganize with the consent of the commissioner), concurred in by 85 per cent of the stockholders and depositors which plan provides that the deposits of depositors not agreeing thereto shall be liquidated by the bank as ‘liquidating agent,’ and distribution made to them ‘when the assets should be collected,’ is supported by *Timmons vs. People's Trust Co.* (1934), W. Va., 173 S. E. 79. It was said that in some states the statute required the plan of reorganization to be approved by a certain percentage of the depositors, varying from 75 to 90 per cent; that the statute in that state did not prescribe the manner of reorganization, but, being remedial, must be construed so as to advance the remedy intended; that the commissioner became the exclusive agent of the bank, its creditors, and stockholders; that because of his plenary powers the court could not treat his consent to a reorganization of the bank as a mere gesture, and that, in order to advance the remedy intended by

the reorganization, the court must hold that, unless arbitrary, unjust, or fraudulent, such consent is binding on the depositors as well as the bank. In the syllabus by the court it is said: 'Prior to the insolvency of a bank the claim of an ordinary depositor is personal, but after insolvency his claim becomes communal and is subject to class treatment. Where a fund is involved, courts will not usually permit a small minority of those interested to defeat the wishes of an overwhelming majority of their associates.' It seems that in this instance the reorganization plan required that a least $66\frac{2}{3}$ per cent of the stockholders should pay an assessment of 100 per cent upon their stock and at least ten per cent of the depositors, other than public depositors, should 'consent to a freezing of their deposits over a period of years,' with a provision, as above indicated, for the 'liquidation' of deposits of depositors, not agreeing to the plan, and payment made to them when the assets were collected."

Counsel cites the case of *Moses v. Guaranteed Mortgage*, 268 N. Y. Supp. 530, as being overruled by *Matter of People* (Title and Mortgage Guarantee Co. of Buffalo), 264 N. Y. 69, 190 N. E. 153. An examination of these cases fails to disclose to us how this opinion can be arrived at. In the *Moses v. Guaranteed Mortgage* case the court held that the granting of the power to the banking board of the state to sustain any provision of the Banking Law is a delegation of legislative function and was improper. While in the case of *Matter of People, etc. (supra)*, it was held that the Statute giving the Superintendent of Insurance the power to sustain, amend, rescind, alter, etc. the provision of any insurance law, is not a delegation of legislative functions but is simply in effect an administrative act and does not come under the delegation of judicial power to an administrative branch of the government.

Answer to "Argument."**Point "I."**

The cases cited by counsel are in our opinion not analogous to the case at bar because the cited cases deal with either state or federal crimes and as such, came under the jurisdiction of the state or federal government.

We cannot agree with the statement at page 8 that plaintiffs cannot recover unless it be demonstrated, and this court adjudge, that the Federal law is unconstitutional. Our contentions set forth in Appellees' brief fully cover this proposition and reference is made thereto.

Answer to Point "II."

Counsel states at page 8 that the statute operates not upon the contract, but upon the liquidation of the Trust Company and did not impair the contractual obligation. As stated to the Court in our oral argument, contractual rights exists between the parties as a result of which Appellees were entitled in the event of bankruptcy or insolvency to a ratable share of the assets of the Appellant based upon a liquidation thereof under the supervision of a court of competent jurisdiction. If the contract rights of Appellees were not abrogated, then certainly Appellant had no right to take away fifty per cent of their deposit, and it is only because of the statute in question that Appellant claims that they had the right to do so. A complete statement of Appellees' position is set forth in their brief on file in this court to which reference is made relative to this argument.

At page 9 the statement is made that plaintiffs had no vested right to the continuance of any particular mode of liquidation. We have no quarrel

with this statement but it is our contention that Appellees do have the right to have the reorganization plan passed upon by a court of competent jurisdiction; to have a judicial forum designated where they could appear and voice their objections to the fairness of the plan; to have all creditors' claims against Appellant looked into and passed upon as to their correctness by a court of competent jurisdiction, and to have a ratable share of the assets on liquidation under the supervision of a court.

Answer to Point "III."

We do not dispute the fact that Chapter 116 of the Laws of 1933 is an extension of the provisions contained in the Trust Company law, but we contend that it violates the contractual obligations of the Appellees; it confiscates the Appellees' moneys, and the law is unconstitutional for the reasons set forth in detail in Appellees' brief on file.

The cited case of *LaMonte v. Lurich*, 86 N. J. Eq. 26, is not analogous to the case at bar as it involves the liabilities of directors and not the relationship of debtor and creditor as in the instant case.

Answer to Point "IV."

We agree that contractual relations are, like other legal relations and rights, subject to the incidence of statutes enacted by virtue of legislative powers, but we contend that same must be reasonable and that the acts in question are not a reasonable exercise of police power nor do they come under the police power regulation. The cases cited under this point are dealt with at length in Appellees' brief on file.

Answer to Point "V."

We cannot agree with the statements under this point. Our answer is set forth in detail in Appellees' brief on file. We contend that we are not under any obligation to seek independent remedies but that the acts should have afforded us our remedy and given us a forum where we could have appeared to voice our objection to the plan, and so forth.

Answer to Point "VI."

The statements under this point were disposed of both in the oral argument and in Appellees' brief. We have shown therein in detail how *Doty v. Love*, 294 U. S., etc., cited in Appellant's brief, is absolutely contrary to the case at bar. The statute therein construed gave very forceful and careful protection to all creditors and depositors and provided for a full and complete hearing before the Chancellor on the fairness of the plan and all attendant features, none of which are afforded the depositor under Chapter 116 of the Laws of 1933.

Answer to Point "VII."

The argument under this point is fallacious. At the oral argument in this cause, counsel for Appellees informed the Court that the plan was not fair and was inequitable because of the fact that the old stockholders who were in charge of the bank up to the time of its closing, were given a third lien on the assets of the reorganized bank for their stock and have nothing to do with the holding company to which has been transferred the frozen and unliquid assets of the bank. Fur-

thermore, it can readily be seen that the securities of the reorganized bank which were in the portfolio of the bank are down to probably less than ten per cent of their normal value and as soon as there is any reasonable advancement in these securities, it will immediately greatly enhance the value of the stock of the original stockholders who are now Class C stockholders of the reorganized bank, while such an increase will be of absolutely no benefit to the innocent depositors who must stand by and see the old stockholders derive a profit while they, said depositors, are left with the frozen assets in the holding company as their only security for the twenty-five per cent of the cash which they put in the bank. We are not obligated to go into equity for our relief. We submit that in accordance with the decision of the court below, in the event of insolvency, we are entitled to a declaratory judgment against the assets of the insolvent bank and thereafter to a ratable share of the assets in the proportion which said assets bear to all legitimate claims.

Answer to Point "VIII."

It is contended at this point of the brief that plaintiffs have no right to a "conventional sale." We do not have any quarrel with this argument nor do we insist that there must be a conventional sale for the Appellees to obtain their rights, but we do feel that Appellees were entitled to an orderly liquidation of the Appellant under the supervision of a court of competent jurisdiction and that if the Appellant had been reorganized after due and proper notice and public hearing in a court of competent jurisdiction and the rights of the respective parties carefully inquired into by the court, that in such event Appellees would be bound by the result of the court's determina-

tion, and if these safeguards had been provided in Chapter 116, Laws of 1933, the law would have been constitutional.

We take issue with the statement in the last sentence at page 18 that in the instant case the depositors' priority over stockholders is, substantially and essentially, fully preserved. We refer to our argument under Point "VII" as being dispositive of and not substantiating this contention.

Answer to Point "IX."

Appellees deny the contention under this point that they are estopped because they took half of their deposit. It is an undisputed fact that Appellant notified Appellees that there had been placed to their credit one-half of the deposit in a new savings account subject to withdrawal by them; that, at all times protesting to the unfairness of the plan, these Appellees withdrew one-half of the deposit so placed at their disposal. The Reconstruction Finance Corporation and Federal Deposit Insurance Corporation cannot set up the theory of estoppel as they are not parties to the action. (See Appellees' brief.)

The cited case of *Eskew v. Buckhannon* (W. Va., 1934), 177 S. E. 433, is not analogous to the case at bar. In the cited case the plaintiff acquiesced and continued to acquiesce for more than a year after the reopening of the bank. He was therefore guilty of *laches*, and his conduct was not in anywise comparable to the Appellees'.

Answer to Point "X."

It is here contended that there would be no way of ascertaining the amount due on quasi-contract through the payment or the establishment of a lien upon the assets in the amount which would have

been realized upon complete liquidation. To this our answer is that plaintiffs were entitled to a ratable share of the assets of the Appellant on liquidation and even if Appellant did not go into liquidation, this share could have been ascertained by an examination into the assets of the Appellant by a court of competent jurisdiction.

PART B.

Citations which we think will assist the Court in determining that Appellees' position is sound and that the judgment of the lower court should be affirmed.

POINT I.

Chapters 116 and 287 of the Laws of 1933 are unconstitutional.

The laws in question violate those sections of the State and Federal Constitutions relating to the impairment of contractual rights; the taking of property without due process of law, and the delegation of judicial power to an administrative branch of the government.

The arguments and cases in support of the foregoing contentions are in detail set forth in Part I, Section B of Appellees' brief and reference is made thereto.

POINT II.

Depression or emergency legislation arguments cannot be used to abrogate state and federal constitutional guarantees for if such were the case, chaos would ensue.

This is most forcefully presented for this honorable Court's consideration in the following recent cases decided by the United States Supreme Court:

Continental Illinois National Bank & Trust Co. of Chicago v. Chicago, R. I. & P. Ry. Co. et als. and companion cases, Nos. 479 to 490 inclusive (Decided April 1, 1935; 55 Supreme Court Reporter 595-610).

The Court held that Sec. 77 of the Bankruptcy Act is constitutional.

Mr. Justice SUTHERLAND, speaking for the court, at page 608 says:

"We find no substance in the contention of the petitioning banks that section 77, as applied by the court below to permit an injunction restraining the sale of the collateral, violates the Fifth Amendment. The basis of the contention is that since, by the terms of the pledge, the pledgees are empowered on default to sell the collateral, at such times as they may select, section 77, as thus applied, deprives them of their property—that is to say, impairs or destroys their contractual rights—without due process of law.

"The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648, it was said *that among other acts*

which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens.' The broad reach of that statement has been restricted (Legal Tender Cases, 12 Wall. 457, 549, 550, 20 L. Ed. 287); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. Legal Tender Cases, *supra*; Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 480-482, 484, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Highland v. Russell Car & Snowplow Co., 279 U. S. 253, 261, 49 S. Ct. 314, 73 L. Ed. 688."

The foregoing case has been cited by counsel for Appellant in oral argument in connection with the proposition that bankruptcy abrogates contractual relationship. This case is not analogous to the case at bar in that in the cited case it appears that a judicial forum was designated and hearings were held in open court at which all interested parties appeared and were heard at great length.

POINT III.

The National Industrial Recovery Act has recently been declared unconstitutional in the following cited case.

A. L. A. Schechter Poultry Corporation, et al. v. United States, Nos. 854, 864 (decided May 27, 1935; 55 Supreme Court Reporter 837-854).

Mr. Chief Justice HUGHES delivered the opinion of the Court and excerpts of the opinion are herein cited. At page 843 the Court says:

“THE QUESTION OF THE DELEGATION OF LEGISLATIVE POWER.—We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. . . . The Constitution provides that ‘All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.’ Article 1, Section I. * * * The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. * * * But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, 293 U. S. 388, page 421, 55 S. Ct. 241, 79 L. Ed. .”

At page 846 the Court says:

“The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or pre-

scribe. If the Codes have standing as penal statutes, this must be due to the effect of the executive action. *But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.* See *Panama Refining Company v. Ryan*, *supra*, and cases there reviewed."

Mr. Justice CARDOZO (concurring) says, at page 853:

"Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the imprimatur of the President that begets the quality of law. *Doty v. Love*, 294 U. S. , 55 S. Ct. 558, 79 L. Ed. . When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers." * * *

"What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. *This is delegation running riot.*"

POINT IV.

Private property rights cannot be taken without compensation. (Constitution of the United States, Article I, Section 8, Amendment 5.)

Louisville Joint Stock Land Bank v. Radford, No. 717 (decided May 27, 1935; 55 Supreme Court Reporter 854-869).

Mr. Justice BRANDEIS delivered the opinion of the Court and excerpts therefrom are herein quoted:

“This case presents for decision the question whether subsection (s) added to Section 75 of the Bankruptcy Act by the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, 11 USCA sec. 203 (s), is consistent with the Federal Constitution. The federal court for Western Kentucky (*In re Radford* (D. C.) 8 F. Supp. 489) and the Circuit Court of Appeals for the Sixth Circuit (74 F. (2d) 576) held it valid in this case; and it has been sustained elsewhere.”

At page 859 the Court says:

“Statutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this court when, as in *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co. v. Kavanaugh*, 294 U. S. , 55 S. Ct. 555, *when it appeared that this substantive right was substantially abridged.*”

At page 860 the Court says:

“In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*, 294 U. S. . . ., 55 S. Ct. 595, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act (11 U. S. C. A., sec. 205) the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this court said: ‘The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton v. New*, 283 U. S. 318, 321, 51 S. Ct. 465, and cases cited.’ ‘The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.’ ”

At page 869 the Court says:

“The province of the Court is limited to deciding whether the Frazier-Lemke Act (11 U. S. C. A., sec. 203(s)) as applied has taken from the bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 161, 33 S. Ct. 1033, 57 L. Ed. 1427; *Citizens’ Savings & Loan Association v. Topeka*, 20 Wall. 655, 662, 664, 22 L. Ed. 455; in re *Dillard*, 7 Fed. Cas., page 706, No. 3912. As we conclude that the act as applied has done so, we must hold it void; for the Fifth Amendment commands that, however great the nation’s need, private property shall not be thus taken for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property

of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

See also:

Rathbun v. United States, No. 667 (Decided May 27, 1935; 55 Supreme Court Reporter, 869-875).

Respectfully submitted,

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