INDEX

ORDER.

Filed July 5, 1933.

In Chancery of New Jersey

Between	
WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,*	*On Petition, &c.*
and	*Order.*
MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als., Defendants.*	

An order to show cause having been made herein, returnable on the 13th day of June, 1933, and the Court having continued the argument on sub-paragraph D of paragraph two of said order to June 22, 1933, and it now coming on to be heard in the presence of John Toolan, solicitor of the petitioner, and in the presence of Philip M. Brenner, Max Levy, Louis A. Mazey, C. Clifford Brangs, James J. Curran, Stephen V. R. Strong, John P. Kirkpatrick, Freeman Woodbridge, Francis P. Coan, Warren R. Schenck, Herman R. Aneckstein, Thomas E. Hagerty, J. H. Thayer Martin, and Douglas M. Hicks, appearing as solicitors for various classes of defendants named in the said order to show cause, and the Court having considered

the allegations in the petition and the argument of respective counsel, and sufficient reason appearing therefor; it is on this 22nd day of June, 1933,

ORDERED, ADJUDGED and DECREED and William H. Kelly, Commissioner of Banking and Insurance, the petitioner herein be and he hereby is instructed in respect to the various questions submitted by him in this said petition as follows:

1. That said Middlesex Title Guarantee and Trust Company, had authority to guarantee titles to real estate, to guarantee mortgages and to issue and guarantee mortgage participation certificates.

2. That persons holding guaranteed mortgages or guaranteed participation certificates are not entitled to be paid the full amount of their respective guarantees, before any of the assets of said bank are available for distribution among general creditors.

That persons holding guaranteed titles are not entitled to be paid the full amount of their claims before any of the assets of the said bank are distributed to general creditors.

That persons holding guaranteed mortgages have no preferential or prior right except as to the specific mortgage guaranteed and assigned to them.

Persons holding guaranteed participation certificates have no preferential or prior right except as to the specific mortgage held by the trust company as security for said participation certificates.

That a holder of the guaranteed titles have no priority or preference.

Order.

3. That the petitioner herein has the lawful right and authority, if in his judgment it appears advisable to do so, to transfer and assign any mortgage (including the bond secured thereby and the insurance policy) held by the trust company, against which guaranteed participation certificates have been issued, to any person or corporation designated by all of the persons holding certificates participating in said mortgage, in exchange for a release, releasing and discharging the trust company for its guarantee of principal and interest, signed by all of said certificate holders.

4. That petitioner has the right, on behalf of the trust company, to release its right to collect interest of one half of one per cent on guaranteed mortgages in exchange for a release of the trust company's guarantee as to principal and interest of said mortgages.

5. That general creditors do not have any legal right to prevent the transfer of mortgages and the execution of mutual releases between the trust company and persons holding guaranteed mortgages or guaranteed certificates.

6. Persons holding guaranteed certificates in form shown in Schedule D. annexed to petition and in Exhibit No. 1 annexed to this order and decree have a preferential and prior right and equity in the specific mortgage referred to in their certificates.

7. Persons holding guaranteed certificates participating in a mortgage have a prior and preferential right in the property encumbered by said mortgage, in the event the mortgage is foreclosed and said property purchased by petitioner at the sheriff's sale.

Order.

Persons holding certificates participating in a mortgage so foreclosed become general creditors to the extent of their actual loss, determined in a manner that shall hereafter be prescribed by order of this Court.

8. Petitioner has lawful right and authority to pay foreclosure costs and expenses with unpledged assets of said bank.

9. That the interest received from mortgages should not be pooled. The interest from each mortgage should be segregated and remitted to the person holding the guaranteed mortgage or the person holding certificates participating in a particular mortgage held by the trust company.

10. Persons holding checks issued prior to February 14, 1933, in payment of interest due on guaranteed mortgages or guaranteed certificates have a priority and preference and are entitled to be paid the amount of said checks forthwith and without any further order of this Court, providing said interest on said mortgages has actually been collected from the mortgagors. If interest has not been collected from the mortgagors (respective), no priority or preference will be given the holders of said checks unless and until said interest is collected.

11. That all monies collected as interest should be segregated and forwarded forthwith at the rate of five and one-half per cent. per annum, semi-annually, to the persons holding guaranteed mortgages or to the persons holding guaranteed participation certificates in mortgages held by the trust company and upon which the interest has been paid by the mortgagors;

the remaining one--half of one per cent. interest received by petitioner in a separate and distinct fund until the further order of this Court.

12. That persons holding guaranteed titles do not have any prior or preferential claim over general creditors.

13. The petitioner is obliged to keep all property insured where the trust company has issued a guarantee of the mortgage or where the trust company holds the mortgage and has issued guaranteed certificates against said mortgage, where the mortgagor has failed or refused to insure said property.

Petitioner may charge the cost of such insurance against the assets of the bank, other than mortgages held to secure participation certificates, but is entitled to be reimbursed for the costs of such insurance out of any interest collected by petitioner on the mortgage encumbering the property for which such insurance is procured.

14. There is no obligation on the part of the petitioner to pay taxes or redeem properties that have been sold for taxes or to pay arrearages of taxes or to pay taxes where the property is being advertised for sale for non-payment of taxes, where said property is encumbered by a mortgage guaranteed by the trust company or against which the trust company has issued guaranteed certificates.

15. Petitioner has the right and authority, in lieu of foreclosure, to accept a conveyance of the property encumbered by a mortgage against which participation certificates have been issued,

providing the mortgagor and all other persons legally and equitably liable for the payment of the said mortgage are insolvent. Petitioner cannot, however, release the mortgagor or any other person legally and equitably responsible for the payment of said mortgage except with the consent of all persons holding certificates participating in said mortgage.

Any property so conveyed to the petitioner shall be held in trust for the use and benefit of the certificate holders participating in the mortgage encumbering said property and said certificate holders shall have a prior and preferential right to said property.

16. Petitioner, where complainant in a foreclosure suit, may use the amount of the decree in bidding at the sheriff's sale of the property foreclosed. The prior right and interest of certificate holders shall attach to the decree and also the property, if purchased by petitioner, shall be held for the benefit of certificate holders.

17. Holders of guaranteed mortgages, or of guaranteed certificates, are not obliged to elect as to whether or not they shall accept and retain their particular mortgage or certificate, or surrender same and file a claim as general creditor, for the full amount of their guarantee.

18. All other questions and matters set out in said petition and in the order to show cause obtained thereon and not herein adjudicated are hereby reserved for the decision of this Court, and the hearing on the order to show cause is continued to July 5, 1933, at 2 o'clock in the afternoon, daylight savings time, at Chancery Chambers, State House Annex, Trenton, New Jersey.

And it is further ordered that all parties to these proceedings do show cause on July 6, 1933, on further hearings of the other matters herein reserved why an order, or orders, should not be made directing holders of guaranteed mortgages and guaranteed mortgage participation certificates to contribute in such manner and to such extent as court may direct toward the cost of administering the Trust estate.

LUTHER A. CAMPBELL,
C.

Respectfully Advised,

MALCOLM G. BUCHANAN,
V.-C.

SCHEDULE "A."

CERTIFICATE OF INCORPORATION
of
THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY.

This is to certify that we, GEORGE W. LITTERST, HOLMES V. M. DENNIS, JR., ANTHONY VIEHMANN, DANIEL L. MORRISON, CHARLES D. ROSS, W. FRANK PARKER and GEORGE A. VIEHMANN, do hereby associate ourselves into a corporation 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)" and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names.

FIRST: The name of the Company is THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY.

SECOND: The location of the principal office in this State where the business of the Company is carried on is No. 360 George Street, in the City of New Brunswick, in the State of New Jersey. The name of the agent therein and in charge thereof upon whom process against the corporation may be served is George W. Litterst.

THIRD: The objects for which this corporation is formed, are, 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 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;

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.

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;

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 of debts due the corporation under sales, judgments or mortgages, or in settlement or par-

tial settlement of debts due the corporation by any of its debtors;

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;

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;

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 persons, corporation or party;

To take, accept and execute any and all such legal trust, 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, and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept;

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 committed 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 committed 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;

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, but it shall have no right to issue bills to circulate as money;

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

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;

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;

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

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;

Generally to execute trusts of every description not inconsistent with the laws of this state or of the United States;

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;

And in addition to exercise any and all general powers conferred by the "Act concerning corporations (Revision of 1896)" so far as the same are not inconsistent with "An Act concerning trust companies (Revision of 1899)."

FOURTH: The total authorized capital stock of this company is One Hundred thousand dollars, divided into one thousand shares of the par value of One Hundred dollars each.

FIFTH: The names and residences of the incorporators and the number of shares subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the Company will commence business, are as follows:

Names	*Residence*	*Number of Shares*
George W. Litterst	Metuchen, N. J.....	50
Holmes V. M. Dennis, Jr.	New Brunswick, N. J.....	50
Anthony Viehmann	New Brunswick, N. J.....	50
Daniel L. Morrison	New Brunswick, N. J.....	50
Charles D. Ross	New Brunswick, N. J.....	50
W. Frank Parker	New Brunswick, N. J.....	50
George A. Viehmann	New Brunswick, N. J.....	700
	Total.....	1,000

SIXTH: The period of existence of this Company shall be perpetual.

In Witness Whereof we have hereunto set our names and affixed our seals this 29th day of December, A. D. 1906.

GEORGE W. LITTERST (SEAL)
HOLMES V. M. DENNIS, Jr. (SEAL)
A. VIEHMANN (SEAL)
D. L. MORRISON (SEAL)
CHAS. D. ROSS (SEAL)
W. FRANK PARKER (SEAL)
GEO. A. VIEHMANN (SEAL)

Signed, Sealed and Delivered
in the Presence of:

Alfred S. March.

State of New Jersey, }
County of Middlesex. } ss.:

Be It Remembered that on this 29th day of December, One thousand nine hundred and six, before me, an Attorney at law personally appeared, George W. Litterst, Holmes V. M. Dennis, Jr., Anthony Viehmann, Daniel L. Morrison, Charles D. Ross, W. Frank Parker and George A. Viehmann, who I am satisfied are the persons named in and who executed the foregoing Certificate, to whom I first made known the contents thereof, and thereupon they severally acknowledged to me that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

ALFRED S. MARCH,
Attorney at Law, State of New Jersey.

STATE OF NEW JERSEY

DEPARTMENT OF BANKING AND INSURANCE

TRENTON

David O. Watkins, Commissioner Jan 7, 1907

I hereby approve the form of the foregoing Certificate of Incorporation of THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, of the City of New Brunswick, County of Middlesex, State of New Jersey, and it appearing to me that the establishment of such trust company will be of public service, I hereby annex thereto my approval thereof, pursuant to Section 3 of "An Act concerning Trust Companies (Revision of 1899)," approved March 24th, 1899.

DAVID O. WATKINS,
Commissioner of Banking and Insurance.

ENDORSED

"Received in the Clerk's Office of the County of Middlesex, on the 8th day of January, A. D. 1907 at 10 o'clock in the forenoon and recorded in Book F of Incorporations for said County, on pages 509 &c.

JNO. H. CONGER,
Clerk."

ENDORSED

"Filed, January 9, 1907, David O. Watkins, Commissioner of Banking and Insurance."

SCHEDULE "B."

Number..... Mortgage Number.....

FIRST MORTGAGE PARTICIPATION CERTIFICATE

Guaranteed by

THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY
New Brunswick, N. J.

The Middlesex Title Guarantee and Trust Company, hereinafter called "Assignor," has received from.....of the.....of..... and State of.....the sum of.....Dollars and for and in consideration of said sum, The Middlesex Title Guarantee and Trust Company, does hereby assign, transfer and set over unto the said.....hereinafter designated as "assignee" the sum of.....Dollars, out of and from a certain Indenture of Mortgage, bearing date the.....day of.....19.. made by..... to The Middlesex Title Guarantee and Trust Company, for the sum of.....Dollars, and recorded in Book.....of Mortgages for Middlesex County, on pages.....etc., and now owned by The Middlesex Title Guarantee and Trust Company; it being the intention of this instrument to permit the assignee to participate in said mortgage and the accompanying Bond given therewith, to the extent of.....Dollars, which amount the said assignor guarantees payment thereof as herein provided.

The Middlesex Title Guarantee and Trust Company further, and in consideration of this assignment, hereby guarantees to the registered holder of this certificate, or.....the payment

of the sum of money first above mentioned, on or after the.....day of.....19...., upon demand, with interest, and the surrender of this certificate, and further guarantees the payment of the interest thereon at the rate of 5½% per annum, payable on the first day of.....and.... in each and every year, and until this Participation Certificate is finally paid.

The Company does hereby expressly reserve the right to enter into and execute with the record title owners, proper extension and/or extensions of the payment of the principal amount of the said mortgage; and does hereby agree to notify the registered holder of this certificate of the date to which said payment of the principal sum has been extended.

The Company agrees to pay to the Participating Certificate holders registered of record, the interest on the due dates herein specified and the Company is hereby authorized to receive the interest and principal from the mortgagor for the Participating Certificate holders, and give receipt therefor.

The Company may take up and cancel this Certificate at any time on thirty days' notice in writing to the registered holder of this Certificate, by mailing such notice to the address furnished by the said registered holder, at which time it agrees to pay the principal and accrued interest to the expiration date of said notice.

This Certificate may be assigned by endorsement, but only when such assignment is registered on the books of the Company.

In Witness Whereof The Middlesex Title Guarantee and Trust Company has hereunto affixed its seal and caused these presents to be

signed by its duly constituted officers this..... day of.....19....

THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY

By.....
President

.....
Treasurer.

SCHEDULE "C."

Number..... Mortgage number.....

FIRST MORTGAGE PARTICIPATION CERTIFICATE

Guaranteed by

THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY

New Brunswick, N. J.

THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, hereinafter called "Assignor," has received from..... of the.....of.....and State of..... the sum of..... Dollars and for and in consideration of said sum, the Middlesex Title Guarantee and Trust Company, does hereby assign, transfer and set over unto the said..... hereinafter designated an "assignee" the sum of.....Dollars, out of and from a certain Indenture of Mortgage, bearing date the..... day of..... 19.... made by..... to The

Middlesex Title Guarantee and Trust Company, for the sum of.....Dollars, and recorded in Book.....of Mortgages for Middlesex County, on pages.....etc., and now owned by The Middlesex Title Guarantee and Trust Company, it being the intention of this instrument to permit the assignee to participate in said mortgage and the accompanying Bond given therewith, to the extent of..... .....Dollars, which amount the said assignor guarantees payment thereof as herein provided.

The Middlesex Title Guarantee and Trust Company further, and in consideration of this assignment, hereby guarantees to the registered holder of this certificate, or..... the payment of the sum of money first above mentioned, on or after the.....day of..... 19.... upon demand, with interest, and the surrender of this certificate, and further guarantees the payment of the interest thereon at the rate of 5½% per annum, payable on the first day of..... and..... in each and every year, and until this Participation Certificate is finally paid.

The Company agrees to pay to the Participating Certificate holders registered of record, the interest on the due dates herein specified and the Company is hereby authorized to receive the interest and principal from the mortgagor for the Participating Certificate holders, and give receipt therefor.

The Company may take up and cancel this Certificate at any time on thirty days' notice in writing to the registered holder of this Certificate, by mailing such notice to the address furn-

nished by the said registered holder, at which time it agrees to pay the principal and accrued interest to the expiration date of said notice.

This certificate may be assigned by endorsement, but only when such endorsement is registered on the books of the Company.

IN WITNESS WHEREOF The Middlesex Title Guarantee and Trust Company has hereunto affixed its seal and caused these presents to be signed by its duly constituted officers this..... day of..... 19.....

THE MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY,

By.....
President.

.....
Treasurer.

Order—Schedule D.

SCHEDULE "D"

STATEMENT OF THE MIDDLESEX TITLE GUARANTEE & TRUST COMPANY

At the Close of Business February 11, 1933

RESOURCES

Loans		
Demand Loans	$ 61,002.50	
Notes Discounted	529,619.24	
		$ 590,621.74
Investments		
Bonds	$ 491,759.75	
Bonds and Mortgages	3,642,961.13	
		4,134,720.88
Other Assets		
Title Plant	$ 24,000.00	
Accounts Receivable	4,779.75	
Sundry Collections	15.90	
Guar. Mtg. Int. Receivable	78,343.11	
Other Real Estate	41,431.88	
Banking Room and Vault	23,000.00	
		171,570.64
Cash		
Cash on Hand	$ 28,738.74	
Exchange Items	3,256.97	
Coupons	53.01	
Guaranty Trust Co.	41,161.79	
Nat. Bank of New Jersey	92.12	
1st Nat'l Bank, Highland Park	230.65	
		73,533.28
Current Expense Account		
Banking Dept.		
Interest Paid	$ 8,778.80	
Expenses	6,035.04	
		14,813.84
Title Dept. Expense	$ 1,419.75	
		1,419.75
Profit and Loss	$ 211.35	
		211.35
TOTAL		$4,986,891.48

Order—Schedule D.

LIABILITIES

Capital		$ 100,000.00	
Surplus		100,000.00	
Undivided Profits		60,000.00	
			$ 260,000.00
Deposits			
Demand—Subject to Check		$ 331,977.05	
Demand—Special		17,807.17	
Demand—Certif. of Deposit		1,200.00	
Time—Regular		854,898.23	
Christmas Club		13,643.00	
Vacation Club		12,568.00	
Christmas Club—1932		93.50	
			1,232,186.95
Other Liabilities			
Certified Checks		$ 758.92	
Treasurer's Checks		1,594.06	
B. & M. Dept. Checks		7,193.45	
			9,546.43
Participation Ctfs. Issued		$3,098,344.84	
			3,098,344.84
Reserve for Taxes and Insurance		$ 1,807.78	
Bills Payable		369,914.64	
			371,722.42
Current Income Accounts			
Interest Received		$ 8,675.15	
Commissions		155.62	
Premiums Guar. Mtgs.		5,936.47	
Safe Deposit Rents		73.50	
			14,840.74
Title Dept.		$ 250.10	
			250.10
TOTAL			$4,986,891.48

Petition.

PETITION.

Filed December 1, 1933.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,* *and* MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als.*, *Defendants.*	*On Petition, &c.* *Petition.*

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The petition of John W. Beattie, Dr. Louis M. Heckman, Fred Ruck, William D. Eden, Lloyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association, respectfully show unto your Honor as follows:

1. By a verified petition dated the twenty-second day of May, 1933, William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, filed his petition wherein among other things he prayed that this Court may take jurisdiction of the administration and liquidation of the Middlesex Title Guarantee and Trust Company and also prayed that this Honorable Court

advise the said petitioner as to certain questions arising in the administration of said trust, concerning which the said petitioner was in doubt.

2. Among the said questions concerning which the said petitioner sought the aid and counsel of this Honorable Court was the following:

> Did the Middlesex Title Guarantee and Trust Company have any right or authority in law or under its certificate of incorporation to guarantee titles to real estate, mortgages, or to issue and guarantee mortgage participation certificates?

3. In accordance with the prayer of the said petition this Honorable Court made an order to show cause in the said matter dated May 24, 1933 and returnable June 13, 1933 directing and requiring the defendants named therein to show cause why an Order or Orders should not be made determining among other things whether or not guarantees under the mortgage participation certificates and mortgages are valid.

4. The argument on the rule to show cause was duly adjourned from June 13th to June 22nd, 1933.

5. By Order dated the twenty-second day of June, 1933, this Honorable Court ordered, adjudged and decreed that William H. Kelly, Commissioner of Banking and Insurance be and he hereby is instructed in respect to the various questions submitted by him in this said petition, among others, as follows:

> That said Middlesex Title Guarantee and Trust Company had authority to guarantee titles to real estate, to guarantee mortgages and to issue and guarantee mortgage participation certificates.

Petition.

6. Your petitioners further respectfully show that they are advised that the said Order is in this and other respects erroneous and ought to be reviewed, reversed and set aside for that they are advised and verily believe, that the said Middlesex Title Guarantee and Trust Company had no right or authority in law or under its certificate of incorporation to guarantee mortgages, or to issue and guarantee mortgage participation certificates and that this Honorable Court should have so advised William H. Kelly, Commissioner of Banking and Insurance, and have so ordered, adjudged and decreed in the premises. For all of which errors and imperfections in the said decree appearing on the face thereof, your petitioners are desirous of having the decree of this Honorable Court reviewed.

Your petitioners, therefore pray, that a rehearing of the said issue may be had, and that an Order may be entered by this Honorable Court ordering that said decree may be reviewed, reversed and set aside, and that your petitioners have such other and further relief as may be equitable and just.

And your petitioners will ever pray, etc.

Respectfully submitted,

RUSSELL FLEMING,
Solicitor for and of Counsel with John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Loyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association.

Petition.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } SS.:

John W. Beattie, being duly sworn according to law, on his oath deposes and says:

That I am one of the petitioners named in the foregoing petition.

I have read the foregoing petition and the contents thereof are true except as to those matters alleged on information and belief and as to those matters I believe them to be true.

JOHN W. BEATTIE.

Sworn and subscribed to before me this 29th day of November, 1933.

ETHEL M. FERGUSON,
Notary Public of N. J.

ORDER TO SHOW CAUSE.

Filed December 1, 1933.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,* *and* MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als.*, *Defendants.*	*On Petition, &c.* *Order to Show Cause.*

This matter being opened to the Court by Russell Fleming, solicitor for and of counsel with John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Loyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association and upon reading and filing the verified petition filed on behalf of the said petitioners and the Court having duly considered the matter;

It is, thereupon, on this first day of December, 1933, on motion of the said Russell Fleming, solicitor for and of counsel with the aforesaid petitioners, Ordered that Edward Allen, Jr., Mary Burke Connolly, Children's Industrial

Home, Corporation of Christ Church, Edwin E. Dawson, and New Brunswick Fire Insurance Company, who hold more than 10% in amount of all guaranteed mortgages, as representative of the class or persons who hold guaranteed mortgages, and Edwin Allen, Jr., Rectors, Wardens and Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Emma T. Buttler, Ella F. Carson, Mary Burke Connolly, Children's Industrial Home, Corporation of Christ Church, Trust Department of the National Bank of New Jersey, Margaret S. Cook, Samuel Cohn, Edwin E. Dawson, Ralph J. Faulkingham, George H. Payson, Trustee, Reverend George H. Payson, John Richard Roeder, Trustees of Rutgers College of New Jersey, National Bank of New Jersey, Trustee for Richard B. Fisher and Sarah J. Stoddard being persons who hold more than 10% in amount of all guaranteed mortgage participating certificates, and William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, show cause before the Chancellor at the Chancery Chambers, State House, Trenton, N. J., on the twenty-second day of December, 1933, at ten-thirty o'clock in the forenoon, or as soon thereafter as the Court can hear the matter why so much of the decree heretofore entered in this cause wherein it is ordered, adjudged and decreed and William H. Kelly is instructed that the said Middlesex Title Guarantee and Trust Company had authority to guarantee mortgages, and to issue and guarantee mortgage participation certificates, should not be reviewed, reversed, and set aside and an Order entered by this Court ordering, adjudging and decreeing that the said William H. Kelly, Commissioner of Banking

and Insurance be instructed, that the said Middlesex Title Guarantee and Trust Company had no right or authority in law or under its certificate of incorporation to guarantee mortgages, or to issue and guarantee mortgage participation certificates.

It is further Ordered that a certified copy of this order and of the petition on which it is based, which said order and petition may be certified by the solicitor for the petitioners herein, be served upon the said William H. Kelly, Commissioner of Banking and Insurance or upon John E. Toolan, Esq., his solicitor, and also upon the said Edwin Allen, Jr., Mary Burke Connolly, Children's Industrial Home, Corporation of Christ Church, Edwin E. Dawson, and New Brunswick Fire Insurance Company, as representative of the class of persons who hold guaranteed mortgages and the said Edwin Allen, Jr., Rectors, Wardens and Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Emma T. Butler, Ella F. Carson, Mary Burke Connolly, Children's Industrial Home, Corporation of Christ Church, Trust Department of the National Bank of New Jersey, Margaret S. Cook, Samuel Cohn, Edwin E. Dawson, Ralph J. Faulkingham, George H. Payson, Trustee, Reverend George H. Payson, John Richard Roeder, Trustees of Rutgers College of New Jersey, National Bank of New Jersey, Trustee for Richard B. Fisher and Sarah J. Stoddard, as representative of all persons holding guaranteed mortgage participating certificates by service upon their respective solicitors, or (as to such of them, if any as have not appeared in this suit), by mailing true copies to

them of the petition and of this order within five days from the date hereof.

LUTHER A. CAMPBELL,
C.

Respectfully advised,

MALCOLM G. BUCHANAN,
V.-C.

CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

96/417

Between

WILLIAM H. KELLY, Commissioner, &c.,
Petitioner,

and

MIDDLESEX TITLE GUARANTEE AND TRUST CO., *et al.*,
Defendants.

Conclusions.

ON PETITION FOR INSTRUCTIONS, &c. ON REHEARING.

Mr. John E. Toolan, for Commissioner of Banking and Insurance.

Mr. Russell Fleming, for Depositors' Committee.

Mr. Douglas M. Hicks, for Bond and Certificate Holders' Committee.

Mr. Clifford C. Brangs, for New Brunswick Fire Insurance Co., holding mortgages and participation certificates.

BUCHANAN, *V.-C.*

The issue before the Court on this rehearing is as to whether the Middlesex Title Guarantee & Trust Co. (hereinafter called the "Middlesex Co.") had the right and power to guarantee to those who purchased from it real estate bonds and mortgages, or certificates of participation in such bonds and mortgages, the payment of

the principal and interest thereof, or whether such guarantees actually made by it were *ultra vires* and were and are therefore absolutely void.

The Middlesex Co. was incorporated in January, 1907, under the provisions of the "Act Concerning Trust Companies" (*Rev.* of *1899*). Its business consisted chiefly of five main divisions— (1) Guaranteeing titles to real estate; (2) Becoming surety on fidelity bonds; (3) Acting as trustee, corporate and fiscal agent, executor, and in other fiduciary capacities; (4) Receiving moneys of depositors subject to check and purchasing commercial paper (understood by the ordinary layman as banking business); and (5) Purchasing or investing in real estate bonds and mortgages and selling such bonds and mortgages and certificates of participation in such bonds and mortgages, with its own direct obligation to purchaser for the payment of principal and interest.

Recently it became insolvent and on February 14th, 1933 its affairs were taken over by the Commissioner of Banking & Insurance, under the provisions of the amendment of 1931 (*P. L. 1931, p. 641*), and thereafter the Commissioner filed his petition in this Court asking instructions as to divers questions arising in his administration of this trust estate in his charge for liquidation, and bringing all parties in interest before the Court, either personally or by class representation.

Among the questions so presented was the one now *sub judice,* which was at that time determined in favor of the power of the corporation and the validity of the guarantees; a determination at that time concurred in by the majority

of counsel interested—including counsel for the Commissioner. Thereafter, because of recent and subsequent determinations in the courts of other States apparently in conflict with the determination of this Court, a rehearing on the point was asked and granted. The conclusion heretofore reached, however, remains unchanged thereby, and is re-affirmed.

Among the powers conferred by the statute (*P. L. 1899, p. 450*) (and included in its certificate of incorporation) are the general powers conferred by the General Corporation Act of 1896, so far as they are not inconsistent with the provisions of the Trust Company Act (§ *6*), and certain special powers, including (§ 6, subsection 10) the power

> "To purchase, invest in, and sell * * * bond 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, * * *"

The power to guarantee the bonds and mortgages which it has the right to sell seems clearly an appropriate and convenient power—and one reasonably requisite for the effectual exercise of the right to sell such bonds and mortgages. It was so held by the Supreme Court in 1911, in *McCauley* v. *Ridgewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327, on an issue precisely similar to the present; and that determination has continued to be the law of this State, and to be acted upon as such by various trust companies, by the members of the bar, and by the public generally (who have invested enormous sums in the aggregate in these securities), for more than twenty years thereafter—which would in itself alone be a cogent reason for a similar determination here.

See also *Jesselsohn* v. *Boorstein,* 111 N. J. Eq. 310, 162 Atl. 254.

Moreover, the statute expressly gives the power to give the obligation of the company for money borrowed, or received on deposit or for investment. To every depositor or investor who turns over money to the company, it has the right to give its own direct obligation for the repayment thereof with interest. It is not perceived that there is any essential difference, from the standpoint of the question of *ultra vires,* between the giving by the company of its own direct bond or promise to pay, with the real estate bond and mortgage as security therefor, and the turning over by the company of the bond and mortgage, plus its own obligation or promise to pay, if the mortgagor defaulted.

Counsel argues that the issuance of these guarantees is the doing of the business of an insurance company—insuring payment of bonds and mortgages—and that that can validly be done only by a company organized under the Insurance Company Act. It is sufficient to point out that the Middlesex Co. was not acting as a general insurer of payment of bonds and mortgages; its guarantees were solely of the bonds and mortgages which it owned and sold. If this be deemed insurance, it is nevertheless authorized, as already pointed out.

Reliance is also placed on several cases from other States: (a) *Reichert* v. *Metropolitan Trust Co.,* 266 Michigan 123. The Michigan statute as to trust companies differs from the New Jersey statute; but even if this case be deemed contrary to the present holding, it cannot be concurred in by this Court. (b) *In re Bankers Trust Co.,* 27 Fed. (2nd) 912. The Georgia statute involved

in this case is similar to our own, but the guarantees were made without consideration and simply for the accommodation of other parties. In such circumstances they would probably be held invalid in this State; but the Middlesex Co.'s guarantees were not accommodation guarantees. They were in consideration of the purchase by the investor of the bonds and mortgages, and in further consideration of annual payment to the Middlesex Co. of one-half of one per cent. of the principal. (c) *Ward* v. *Joslin,* 186 U. S. 142. In this case the guarantee was not a guarantee of the payment of securities negotiated by the company. In the case of the Middlesex Co. the contrary is true. The Supreme Court in *Ward* v. *Joslin,* says that the company "may guarantee paper owned by them or paper which they negotiated in due course of business and the proceeds of which they receive." No difference in principle can be perceived between the sale of these mortgages plus the vendors guarantee, and the sale of bills or notes with the trust company's guarantee by endorsement or the sale of real estate (owned by it) by deed of general warranty. The power of the trust company to do either of these latter things will scarcely be questioned.

It need scarcely be added that the power to sell, and guarantee, a whole bond and mortgage, implies also the power to sell and guarantee a bond and mortgage in fractional interests. The validity of the guarantee of the participation certificates is equally established.

It is further urged that even if the company be deemed authorized to guarantee the bonds and mortgages sold by it, nevertheless it had no right to involve in such transactions more than

the amount of its capital and surplus—by analogy with a limitation in the later Insurance Act. This argument is deemed unsound. By express authority, the statute authorizes the bonds or obligations of the company to be given "for moneys borrowed, or received on deposit or for investment."

Decree may be entered accordingly.

ORDER DISCHARGING ORDER TO SHOW CAUSE.

Filed March 6, 1934.

IN CHANCERY OF NEW JERSEY.

Between	
WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,*	*On Petition, &c.*
and	*Order Discharging Order to Show Cause.*
MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als., Defendants.*	

This matter being opened to the Court by Russell Fleming, solicitor for and of counsel with John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Loyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association, and it appearing to the Court that, by a verified petition, dated the twenty-second day of May, 1933, William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, filed his petition wherein, among other things, he prayed that this Court may take jurisdiction of the administration and liquidation of the Middlesex Title Guarantee and Trust Company and also prayed that this Court advise

the said petitioner as to certain questions arising in the administration of said trust concerning which the said petitioner was in doubt.

And it further appearing that among the said questions concerning which the said petitioner sought the aid and counsel of this Court was the following:

> Did the Middlesex Title Guarantee and Trust Company have any right or authority in law or under its certificate of incorporation to guarantee titles to real estate, mortgages, or to issue and guarantee mortgage participation certificates?

And it further appearing that by Order dated the twenty-second day of June, 1933, it was ordered, adjudged and decreed that William H. Kelly, Commissioner of Banking and Insurance be and he hereby is instructed in respect to the various questions submitted by him in the said petition, among others, as follows:

> That said Middlesex Title Guarantee and Trust Company had authority to guarantee titles to real estate, to guarantee mortgages and to issue and guarantee mortgage participation certificates.

And it further appearing that by Order dated the first day of December, 1933, on motion of the said Russell Fleming, solicitor for and of counsel with the aforesaid petitioners, it was ordered that Edward Allen, Jr., Mary Burke Connelly, Children's Industrial Home, Corporation of Christ Church, Edwin E. Dawson, and New Brunswick Fire Insurance Company, who hold more than 10% in amount of all guaranteed mortgages, as representative of the class or persons who hold guaranteed mortgages, and Edwin

Order Discharging Order to Show Cause.

Allen, Jr., Rectors, Wardens and Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Emma T. Buttler, Ella F. Carson, Mary Burke Connolly, Children's Industrial Home, Corporation of Christ Church, Trust Department of the National Bank of New Jersey, Margaret S. Cook, Samuel Cohn, Edwin E. Dawson, Ralph J. Faulkingham, George H. Payson, Trustee, Reverend George H. Payson, John Richard Roeder, Trustee of Rutgers College of New Jersey, National Bank of New Jersey, Trustee for Richard B. Fisher, and Sarah J. Stoddard, being persons who hold more than 10% in amount of all guaranteed mortgage participating certificates, and William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, show cause before the Chancellor at the Chancery Chambers, State House, Trenton, N. J, on the twenty-second day of December, 1933, at ten-thirty o'clock in the forenoon, or as soon thereafter as the Court can hear the matter why so much of the decree heretofore entered in this cause, wherein it is ordered, adjudged and decreed and William H. Kelly is instructed that the said Middlesex Title Guarantee and Trust Company had authority to guarantee mortgages, and to issue and guarantee mortgage participation certificates, should not be reviewed, reversed, and set aside and an Order entered by this Court ordering, adjudging, and decreeing that the said William H. Kelly, Commissioner of Banking and Insurance be instructed that the said Middlesex Title Guarantee and Trust Company had no right or authority in law or under its certificate of incorporation to guarantee mortgages, or to issue and guarantee mortgage participation certificates.

Order Discharging Order to Show Cause.

And it further appearing to the Court that service was duly made of the said Order to Show Cause and that the matter came on regularly to be heard on the twenty-second day of December, 1933 in the presence of John E. Toolan, Esq., solicitor for William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey and Douglas M. Hicks, Esq., solicitor for defendants, Edwin Allen, Jr., Mary Burke Connolly, Children's Industrial Home, Edwin E. Dawson, Rectors, Wardens and Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Ella F. Carson, Trust Department of National Bank of New Jersey, Margaret S. Cook, George H. Payson, Trustee, Rev. George H. Payson, John Richard Roeder, Trustees of Rutgers College of New Jersey, National Bank of New Jersey, Trustee for Richard B. Fisher and Sarah J. Stoddard and Clifford Brangs, Esq., solicitor for defendant, New Brunswick Fire Insurance Co., and the Court having heard the arguments of counsel and having duly considered the matter and having filed conclusions in writing;

It is, on this sixth day of March, 1934, ORDERED, ADJUDGED and DECREED that the Order to Show Cause in this matter, dated the first day of December, 1933, be and the same is hereby discharged.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

MALCOLM G. BUCHANAN,

V.-C.

PETITION OF APPEAL.

Filed April 14, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between WILLIAM H. KELLY, Commissioner, &c., *Petitioner,* *and* MIDDLESEX TITLE GUARANTEE AND TRUST CO., *et al.*, *Defendants.*	*On Appeal from Court of Chancery.* *Petition of Appeal.*

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Lloyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association, respectfully show that your petitioners find themselves aggrieved by an Order made in the Court of Chancery, by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, upon the advice of the Honorable Malcolm G. Buchanan, one of the Vice-Chancellors, bearing date the sixth day of March, 1934, wherein the Chancellor discharged an Order to Show Cause dated the first day of December, 1933, which said Order to Show Cause directed the Commissioner of Banking and Insurance and the other parties named therein to show cause why so much of the decree bearing

date the 22nd day of June, 1933, heretofore entered in this cause wherein it was ordered, adjudged and decreed that William H. Kelly, Commissioner of Banking and Insurance was instructed that the said Middlesex Title Guarantee and Trust Company had authority to guarantee mortgages and to issue and guarantee mortgage participation certificates should not be reversed and set aside and an order entered by this Court, ordering, adjudging and decreeing that the said William H. Kelly, Commissioner of Banking and Insurance be instructed that the said Middlesex Title Guarantee and Trust Company had no right or authority in law or under its certificate of incorporation to guarantee mortgages or to issue and guarantee mortgage participation certificates.

And your petitioners humbly appeals from the whole of said Order of the Chancellor, which orders and instructs as aforesaid, upon the ground that the same is erroneous, because the said Middlesex Title Guarantee & Trust Company did not have any right or authority in law or under its certificate of incorporation to guarantee mortgages or to issue and guarantee mortgage participation certificates and the said Middlesex Title Guarantee & Trust Company did not have the right to use the depositors' money for that purpose.

Your petitioners, therefore, pray that the whole of said order be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

RUSSELL FLEMING,
Solicitor for and of Counsel
with Appellants.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

96/417.

Between	
WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,*	*On Appeal, &c.*
and	*Amended Notice of Appeal.*
MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als.*, *Defendants.*	

John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Lloyd E. Gehman, Wilfred J. Slaars and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association, hereby appeal from so much of a certain decree of the Chancellor Luther A. Campbell, upon the advice of Vice-Chancellor Malcolm G. Buchanan, bearing date the twenty-second day of June, 1933 in this cause wherein it was ORDERED, ADJUDGED and DECREED and William H. Kelly, Commissioner of Banking and Insurance was instructed that the said Middlesex Title Guarantee and Trust Company had authority to guarantee mortgages and to issue and guarantee mortgage participation certificates and upon which said decree the Chancellor Luther A.

Campbell upon the advice of Vice-Chancellor Malcolm G. Buchanan, made an Order to Show Cause, dated the first day of December, 1933, which said Order directed the Commissioner of Banking and Insurance and the other parties therein named to show cause why so much of the decree bearing date the twenty-second day of June, 1933, hereto referred to should not be reversed and set aside, which said Order to Show Cause was on the sixth day of March, 1934 by Chancellor Luther A. Campbell upon the advice of Vice-Chancellor Malcolm G. Buchanan discharged, to the Court of Errors and Appeals in the last resort in all causes.

RUSSELL FLEMING,
Solicitor for and of Counsel with John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Lloyd E. Gehman, Wilfred J. Slaars, and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association.

I conceive there is good cause for appeal in the above entitled cause.

RUSSELL FLEMING,
Solicitor for and of Counsel with John W. Beattie, Louis M. Heckman, Fred Ruck, William D. Eden, Lloyd E. Gehman, Wilfred J. Slaars, and John S. Van Doren, constituting the executive committee of the Middlesex Title Guarantee and Trust Company Depositors' Association.

Amended Notice of Appeal.

Due and legal service of a true copy of the Amended Notice of Appeal, is hereby acknowledged this 14th day of April, 1934.

JOHN E. TOOLAN,
Solicitor for William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey.

DOUGLAS M. HICKS,
Solicitor for defendants, Edwin Allen, Jr., Mary Burke Connolly, Children's Industrial Home, Edwin H. Dawson, Rectors, Wardens & Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Ella F. Carson, Trust Department of National Bank of New Jersey, Margaret S. Cook, George H. Payson, Trustee, Rev. George H. Payson, John Richard Roeder, Trustees of Rutgers College of New Jersey, National Bank of New Jersey Trustee for Richard B. Fisher and Sarah J. Stoddard.

C. CLIFFORD BRANGS,
Solicitor for Defendant, New Brunswick Fire Insurance Co., on guaranteed mortgages only.

Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner,* *and* MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als.*, *Defendants.*	*On Appeal from Court of Chancery.* *Stipulation under Rule No. 19.*

Appeal of Middlesex Title Guarantee and Trust Company Depositors' Association.

Pursuant to Rule No. 19 of the Court of Errors and Appeals it is hereby agreed that the State of the Case shall be abridged and shall contain the following documents:

1. Order of the Court of Chancery dated from June 22nd, 1933.
2. Exhibits as follows:

   Schedule A. Certificate of Incorporation of the Middlesex Title Guarantee and Trust Company.

   Schedule B. Form of first mortgage participation certificate with extension agreement.

   Schedule C. Form of first mortgage participation certificate without extension agreement.

Stipulation.

Schedule D. Statement at the close of business on February 11th, 1933.

3. Petition.
4. Order to Show Cause dated December 1st, 1933.
5. Opinion of Vice-Chancellor Buchanan.
6. Order Discharging Order to Show Cause dated March 6th, 1934.
7. Petition of Appeal.
8. Amended Notice of Appeal.

It will be noted that hereinafter set forth in the record appears statement of the Middlesex Title Guarantee and Trust Company at the close of business February 11, 1933. In this statement among the resources appears the following item: Bonds and Mortgages, $3,642,961.13; and among the liabilities: Participation Certificates issued, $3,098,344.84. Different methods were followed in preparing the previous statements of this Trust Company, and in the years 1925 to 1929, inclusive, the amount of guaranteed mortgages and mortgages against which participation certificates had been issued were included in the statement as resources, and on the liability side appeared the amount of mortgages and certificates sold. A change was made in the practice in 1930. Prior to that time the liability of the Trust Company was shown by including mortgages and certificates sold, with some such designation as "Bonds of the Company Outstanding" or "Mortgage Bonds Sold."

All the mortgages guaranteed and sold by Trust Company and all the mortgages in which participation certificates were issued were actu-

ally the property of the Trust Company, and were sold for cash with a guarantee of payment.

RUSSELL FLEMING,
Solicitor for John W. Beattie, *et als.*, constituting the Executive Committee of the Middlesex Title Guarantee and Trust Company Depositors' Association.

JOHN E. TOOLAN,
Solicitor for William H. Kelly, Commissioner of Banking and Insurance.

DOUGLAS M. HICKS,
Solicitor for Defendants,
Edwin Allen, Jr., *et als.*

C. CLIFFORD BRANGS,
Solicitor for Defendant,
New Brunswick Fire Insurance Co.

New Jersey Court of Errors and Appeals

Between WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, *Petitioner-Defendant,* *and* MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, et als., *Defendants-Appellants.*	*On Appeal from Court of Chancery.* *On Appeal of Middlesex Title Guarantee and Trust Company Depositors' Association.*

This brief is filed on behalf of Edwin Allen, Jr., Mary Burke Connolly, Children's Industrial Home, Edwin E. Dawson, Rector, Wardens & Vestrymen of All Saints Church, George H. Bissett, Stanley C. Brasefield, Ella F. Carson, Trust Department of National Bank of New Jersey, Margaret S. Cook, George H. Payson, Trustee, Rev. George H. Payson, John Richard Roeder, Trustees of Rutgers College of New Jersey, National Bank of New Jersey, Trustee for Richard B. Fisher and Sarah J. Stoddard, and others represented by Committee for Owners of Middlesex Title Guarantee and Trust Company Securities.

The issue involved is not whether the Trust Company had authority to guarantee mortgages or participating certificates in mortgages generally, but whether on the sale of such mortgages, or interest in mortgages belonging to it, it had the right to guarantee purchasers to the extent of the moneys paid the Trust Company by them.

I.

By Statute and Under its Certificate of Incorporation Trust Company Had the Right to Guarantee To Purchasers of Mortgages and Mortgage Participating Certificates the Repayment of Monies Paid By Them To Trust Company.

Trust Company was incorporated under Trust Company Act (S.C. 7) with power to purchase, invest in and

sell * * * bonds and mortgages and other securities (S. C. 10) and in addition (S.C. 11) to exercise any and all general powers conferred by the Corporation Act (Revision of 1896) so far as same were not inconsistent with the Trust Company Act.

The Trust Company Act (*Compiled Statutes, Page* 5657, *Section* 6, *Sub-section* 10) reads as follows:—

> "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, but it shall have no right to issue bills to circulate as money;"

The right to sell these bonds and mortgages carried with it the right to guarantee payment.

McCauley vs. Ridgewood Trust Co., 81 N. J. L. 86, 79 Atl. 327.

This case before Chief Justice Gummere and Justices Trenchard and Minturn, with the opinion written by Justice Trenchard, was decided in 1911 and is directly in point.

As pointed out by Vice Chancellor Buchanan (S.C. 31), the principles upon which the decision was reached have continued to be the law of this State from the time the case was decided and have been acted upon by trust companies, the members of the bar and the public generally.

Solicitor of the appellants argues that it should be disregarded as involving a single instance. We fail to find anything in the opinion of the court which justifies this statement and in fact it might be logically assumed that the guarantee of payment was as to all the bonds secured by the mortgage in question.

The principles of law laid down in this decision are applicable no matter what the amount or number of transactions involved.

The opinion calls attention to *Subdivision* 10 *of Section* 6 *of Trust Company Act,* which we have already quoted in full, and says:—

> "When the express power is given to the trust company 'to purchase, invest in and sell' bonds, it is manifest that it is appropriate and convenient for it to have power to become a guarantor or indemnator with respect to bonds in order to carry into effect such expressed power and to obtain the best price for the sale of the bonds."

Opinion further calls attention to the decision in *Ellerman vs. Chicago Junction Railway Company,* 49 N. J. E. 217, 241, to the effect that the word "necessary" when used in the Corporation Act, limiting powers of corporations to those enumerated and such as shall be necessary to the exercise of such powers, does not mean simply power which is indispensable.

The reference to the Ellerman case includes quotations from the opinion of Chief Justice Beasley in the Court of Errors and Appeals in *State, Railroad Co. vs. Hancock,* 35 N. J. L. 537, on 545, 546, 547, as follows:—

> "Power necessary to a corporation does not mean simply power which is indispensable."
>
> "A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one."
>
> "In short, the term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the Legislature had in view at the time of the enactment of the charter."
>
> See also *Jesselsohn vs. Boorstein,* 111 N. J. E. 310, 162 Atl. 254.

As under its Certificate of Incorporation, the laws of New Jersey and the decisions of our own State it appears that the Trust Company had power on sale of its mortgages to guarantee payment of them to their purchasers, it is respectfully suggested that any further discussion as to the general principles of ultra vires is unnecessary.

II.

Cases Cited for Appellant Distinguished From Instant Case.

Certain cases are cited by appellant under points VII (Pg. 17), XI (Pg. 45) and XIII (Pg. 48) in relation to which we beg leave to comment as follows:

First we wish to call attention to the analysis of a number of these cases found in the opinion below (S. C. 32, 33).

Reichert, State Commissioner of Banking and Insurance vs. Metropolitan Trust Company, 266 Michigan 123, is quoted at length in appellant's brief.

This suit was instituted by the Michigan State Commissioner of Banking and Insurance.

In the instant case the Trust Company operated under the supervision of our Department of Banking and Insur-

ance and, subject to its examination and control, carried on the business of selling and guaranteeing its mortgages for many years.

The statute of Michigan, as pointed out by Vice Chancellor Buchanan (S. C. 32), differs from our New Jersey statute.

Public policy is mentioned in the Michigan case as being one of the reasons for the decision of the court. Such a reason is well recognized as being weak and resorted to only when legal reasons fail to exist. It must be remembered that at the time the Michigan case was decided, March 2, 1933, every bank in the State of Michigan was closed, and it may well be that this very distressing condition may have had some influence on the court. It would seem to us that under the circumstances now existing in New Jersey that public policy would be more of a reason for upholding the guarantee than for setting it aside in view of the fact that apparently numerous trust companies in this state have issued guarantees of mortgages, or of mortgage certificates, and that any decision holding them invalid would consequently result in great confusion.

The opinion in the Michigan case states that the rules of law might be different if it were an isolated case and the liability under the guarantee had been set up as a contingent liability in the Company's statement.

In the instant case the liability was set up in published statements (S. C. 20 and 45), and the reasoning that a guarantee of one mortgage would be good and the guarantee of a number of them would be invalid fails to appeal as good reasoning. The suggestion might warrant the statement that the guarantee of a single mortgage for $1,000,000.00 would be good but that separate guarantees of one thousand mortgages of $1000.00 each and their consequent sale to one thousand different persons would be invalid. This does not seem to rest upon a sound foundation.

Appellants' brief also cites "In re *Bankers Trust Company,* 27 Federal, 2nd, 912" as sustaining his contentions. However, we wish to point out that in this decision the court says:

> "Consequently the transactions were accommoda tion endorsements or suretyships and guarantees for consideration moving to another."

and further on in the opinion:

> "There is no question of innocent holder involved. Even as to the accommodation endorsements it is evident from the face of the paper that the Bankers Trust Company is lending its credit while another gets the consideration of the transaction."

Clearly this is not the same situation, nor are the facts at all similar with those in connection with the Middlesex guarantees.

Ward vs. Joslin, 186 U. S. 143, is also cited in the brief filed on behalf of Depositors' Committee. The court in this case found as a matter of fact that the guarantee in question "was not a guarantee of the payment of securities negotiated by the company." In the opinion of Chief Justice Fuller appears the following relative to the right of a company to issue a guarantee:

> "They may guarantee paper owned by them or paper which they negotiated in due course of business and the proceeds of which they receive."

This case, therefore, instead of sustaining the opposite view is authority for the right of the Middlesex to guarantee in view of the fact that the guarantee issued by the Middlesex was of securities owned by them and the proceeds of which they received.

Bowers vs. Lawyers' Mortgage Company, 285 U. S. 183, and *United States vs. Home Title Insurance Co.,* 285 U. S. 191, appear more than once in appellants' brief.

Both of these cases were on the question as to whether the companies were liable to the federal capital stock tax or whether they could claim exemption as insurance companies. In speaking of the nature of respondent's business in the Lawyers' Mortgage Company case and the guarantees issued by it, the court said:

> "Respondent's business is one which may be and is in fact carried on by corporations under the New York banking laws."
>
> "In the case before us respondent's charter authority extended not only to the business of insurance but also to other lines, including that of investment with or without guarantees as it might choose. As above shown, the element of guaranty involved in its transactions in the taxed years are not sufficient to make it an insurance company."

Other cases cited for appellants contain extracts from the opinions showing that the transactions were in the nature of accommodation endorsement and the lending of the credit of the company for the benefit of third parties.

III.

Rights of Third Parties Are Not Involved.

The guarantees were for the benefit of the Trust Company and not for the benefit of any third parties. The mortgagors were not consulted, were not parties to the guarantees nor interested therein.

The parties to the transactions were the Trust Company and the purchasers of securities owned by the Trust Company, and the guarantees were given for the benefit of Trust Company. They brought about the sales of its mortgages, made funds available for other investments, and by reason of the charges connected with the making of loans and the retention of the one-half of one per cent of the annual interest produced an income and profit for the benefit of the Trust Company and those interested in it.

Attention has been called to Act of the Legislature relating to the incorporation of companies with the right to insure the payment of bonds and mortgages.

Appellants' brief (11) quotes from Section VIII of Insurance Company Act as to power of insurance companies to issue policies covering loss or damage by reason of the nonpayment of principal and interest of bonds and mortgages.

The bonds and mortgages referred to in this Act are not limited by the Act to bonds and mortgages owned by the insurance company, and the Act is intended to give these insurance companies power to insure against loss on other mortgages not owned by them nor upon which they would be liable except because of their policy of insurance.

To aid in disposing of bonds secured by mortgage, practice has grown up of adding to the obligation of the mortgagor an independent guarantee of insurance by an insurance or liability company.

No guarantees of insurance of this character are involved in the present case.

All mortgages guaranteed and sold by Trust Company and all the mortgages in which participation certificates were issued were actually the property of the Trust Company and were sold for cash with a guarantee of payment (S. C. 45, 46).

If the Trust Company came into possession of certain real estate and desired to sell this real estate, clearly they would have the right to give a warranty deed for it, and

by reason of such warranty would become guarantors of the title and liable for any breach of such guarantee.

IV.

Relative Rights of Depositors and Mortgage and Certificate Holders.

There is not and has not been any claim on the part of mortgage and certificate holders that their claims were superior to those of depositors.

Depositors and guaranteed mortgage and guaranteed participation certificate holders are all creditors of the Trust Company.

The Trust Company owes to each depositor the amount of his deposit, subject to any set-offs or counter-claims, and owes to each holder of its guarantee the amount it received from him on the sale and guarantee of the mortgage or certificate in the mortgage less the amount realized from such security.

Both classes as to the amounts so due are general creditors and entitled to share equally in such dividends as may become available for such creditors.

It was a well known fact and shown by the filed and published statements of the Trust Company that it was largely engaged in the business of loaning monies on bonds and mortgages and selling the mortgages or participating interests therein with its guarantee of payment. Many of the depositors had themselves purchased these mortgages or certificates, and the business was apparently a profitable one from the Trust Company's standpoint.

Just how much of the funds which may ultimately be available for dividends was the result of this portion of the Trust Company's business could only be ascertained by an analysis of its work and transactions over many years, but whatever its source, certainly general creditors of the same class should participate equally in its distribution.

The publicity which attended the mortgage business of the Trust Company raises the question as to whether or not the depositors or any other class of creditors are in a position to question the validity of its guarantees. The contracts have been executed. The mortgage and certificate holders have parted with their money.

7 C. J. Pg. 588, paragraph 221, says:—

> "If an ultra vires contract has not been executed by either party, it cannot be enforced * * * But on the

> other hand, where the party contracting with a bank is ignorant of the fact that the contract is ultra vires, it has been held that this defense cannot be used against him; and where the contract is in excess of corporate powers to the knowledge of both parties, and it has been executed by one of them, and justice, public policy, and sound morals require its execution by the other, while there can be no enforcement of, and recovery on, the contract itself, the party who has benefited from its execution can be compelled to return the money or other property which he has received."

Above quotation correctly sets forth the law in this State.

Camden and Atlantic R. R. Co. vs. Mays Landing &c R. R. Co., 48 N. J. L. 530.

Merchants Refrigerating Co. vs. Fenchel Realty Co., 156 Atl. 275/9 N. J. Misc. 971.

Bethlehem Steel Co. vs. Uppercu Corp., 168 Atl. 127/11 Misc. 548.

Many of the holders of guaranteed mortgages and guaranteed certificates have released the Trust Company from the terms of its guarantees and taken over their securities. In other cases settlement is being made through the instrumentality of the Home Owners' Loan Corporation, but there are other cases where it is evident that there will be some loss on foreclosure and liquidation, and it is on the amounts of these losses that the holders of guarantees should be paid their pro rata share of funds available for general creditors.

It is respectfully insisted that the decision of the Court of Chancery is correct and that the holders of these guarantees should be permitted to file claims for the amounts respectively due them and receive dividends on the amount of their respective losses.

Respectfully submitted,

DOUGLAS M. HICKS,

Solicitor for and of Counsel with Edwin Allen, Jr., et als, and Committee for Owners of Middlesex Title Guarantee and Trust Company Securities.

New Jersey Court of Errors and Appeals

Between

WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey,
Petitioner-Defendant,

-and-

MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, et als,
Defendants-Appellants.

On Appeal from Court of Chancery

MEMORANDUM ON BEHALF OF PETITIONER-DEFENDANT.

JOHN E. TOOLAN
Solicitor of Petitioner-Defendant
First National Bank Building
Perth Amboy, N. J.

New Jersey Court of Errors and Appeals

Between WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, Petitioner-Defendant, -and- MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, et als, Defendants-Appellants.	On Appeal from Court of Chancery MEMORANDUM ON BEHALF OF PETITIONER-DEFENDANT.

The Commissioner of Banking and Insurance of the State of New Jersey, pursuant to authority conferred upon him by statute, took possession of the business and affairs, property and effects of the Middlesex Title Guarantee and Trust Company on the 14th day of February, 1933. Thereafter the Commissioner filed a petition in the Court of Chancery, praying that that Court assume jurisdiction over the trust and instruct the Commissioner as trustee respecting his legal rights in the administration of the numerous trusts.

The right of the Middlesex Title Guarantee and Trust Company to guarantee principal and interest of bonds and mortgages and of participation certificates was raised early in the liquidation. The question was submitted to the Court of Chancery.

That honorable Court determined that the Middlesex Title Guarantee and Trust Company had the right under the statute and its certificate of incorporation to guarantee mortgages and participation certificates. That decision is the subject matter of this appeal.

The conflicting interests, with the depositors on the one side and the persons holding guaranteed mortgages or guaranteed certificates on the other, are represented before this Court by capable counsel. We conceive it to be the duty of the Commissioner as trustee to discharge his trust under the law as declared by our courts. The Commissioner as trustee has no personal interest in the ultimate decision. One's sympathies naturally incline toward the depositors. The briefs submitted by counsel for the respective interested parties substantially cover the subject. We believe that there is little that we can do. We, therefore, on behalf of the Commissioner, assume a neutral position and shall not become an advocate for or in behalf of either of the contending forces.

Respectfully submitted,

JOHN E. TOOLAN,

Solicitor for and of Counsel
with the Petitioner-Defendant.

New Jersey Court of Errors and Appeals

Between

WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey,
Petitioner-Defendant,

and

MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY, a corporation, *et als.*,
Defendants-Appellants.

On Appeal from Court of Chancery.

Appeal of Middlesex Title Guarantee and Trust Company Depositors' Association.

BRIEF ON BEHALF OF MIDDLESEX TITLE GUARANTEE AND TRUST COMPANY DEPOSITORS' ASSOCIATION

Facts.

This is an appeal from a decree the Court of Chancery wherein His Honor the Chancellor, on the advice of the Hon. Malcolm G. Buchanan, one of the Vice Chancellors, in answer to a petition filed by William H. Kelly, Esq. Commissioner of Banking and Insurance of the State of New Jersey, in accordance with the provisions of Chapter 255 of the Laws of 1931, Ordered, Adjudged and Decreed that the Middlesex Title Guarantee and Trust Company had the right and authority in law to guarantee mortgages and to issue and guarantee mortgage participation certificates.

The single issue involved in this appeal therefore, is the question:

> **Did the Middlesex Title Guarantee and Trust Company have any right or authority in law or under its certificate of incorporation to guarantee mortgages or to issue and guarantee mortgage participation certificates?**

The Middlesex Title Guarantee and Trust Company was incorporated under and pursuant to an Act entitled "An Act concerning Trust Companies" (Revision 1899), and the several supplements thereto and amendments thereof. Said certificate of incorporation, a copy of which is annexed to the original petition filed in this cause, was filed with the Department of Banking and Insurance on January 9, 1907.

POINT I.

The powers of a corporation are strictly limited to those granted in its charter or by the statutes under which it is organized and those which are necessarily implied.

In *Stockton* v. *Central Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 19 L. R. A. 97, Chancellor McGill said:

> " 'It is a cardinal rule of the law of corporations,' said Vice Chancellor Van Fleet, in National Trust Co. *v.* Miller, 6 Stew. Eq. 162, 'that a corporation created by statute can exercise no power and has no rights except such as are expressly given or necessarily implied.' "

In *Jersey City Gas Light Co.* v. *Consumers Gas Co.*, 40 N. J. Eq. 427, 428, Vice-Chancellor Van Fleet held:

> "It is a cardinal rule of construction that all public grants are to be strictly construed,

and that whatever is not plainly granted shall be understood to be withheld."

In *National Trust Co.* v. *Miller,* 33 N. J. Eq. 155, 162, Vice-Chancellor Van Fleet held:

"It is a cardinal rule of the law of corporations that a corporation created by statute can exercise no power, and has no rights, except such as are expressly given or necessarily implied. Huntington *v.* Savings Bank, 96 U. S. 388; Grant on Corp. 13; Aug. & Ames on Corporations, Sec. 111; Green's Brice 29. This rule, for a long time, has formed part of our statutory system. R. S. 133, Sec. 3; Rev. 177, Sec. 3; Trenton Mutual Life & Fire Ins. Co. *v.* McKelway, 1 Beas. 133. Nor can the powers of a corporation be in the slightest degree enlarged or extended by the assent of its stockholders, or by any action they may take. In Black *v.* Delaware and Raritan Canal Co., 9 C. E. Gr. 455, the Court of Errors and Appeals affirmed that no majority of stockholders, however large, has a right to divert one cent of the joint capital to any purpose not consistent with and growing out of the original fundamental purpose of the corporation. And the Supreme Court of the United States has recently declared, following a judgment of the house of lords, in which the present lord chancellor (Selborne), and the late lord chancellor (Cairns), and Lords Chelmsford, Hatherly and O'Hagan concurred, that the broad doctrine is now established that a corporation, not within the scope of the powers conferred on a corporation, cannot be made valid by the consent of every one of the shareholders, nor can it, by any partial performance, become the foundation of a right of action. Thomas *v.* West Jersey R. R. Co., 101 U. S. 71. While it must be admitted that this doctrine has not received the sanction of every eminent judge who has been called upon to enforce it, yet I think it is now vouched for by such august authority, and is so manifestly

> supported by sound reason and the highest considerations of policy, that it must hereafter be accepted, universally, as expressing the true rule of judgment in such cases."

Mr. Justice Van Syckel, delivering the opinion of the Supreme Court in *Watson* v. *Acquackanock Water Company,* 36 N. J. L. 195, said:

> "It is a familiar principle that corporations being the creatures of legislation, are precisely what their organic act makes them, and beyond that nothing. They must act strictly within their limited sphere, and for every function they claim to exercise, they must find authority in legislative grant. 2 Cr. 127.
>
> The power, therefore, which the defendant is now seeking to use, must, if it has any existence, be found in its charter."

The case referred to by Justice Van Syckel, (*supra*) is that of *Head* v. *Province Insurance Company,* 2 Crauch. 127, 6 U. S. 127 (U. S. Supreme Court 1804). wherein Chief Justice Marshall said:

> "Without describing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporation act has made it, to derive all its powers from that act, and to be capable of exerting its faculities only in the manner which that act authorizes.
>
> To this source of its being, then, we must recur to ascertain its powers—" page 166 star page 167.

Fogg v. *Ocean City and Ocean City Utilization and Sewerage Company,* 74 N. J. Law 362, 65 Atlantic 885, raised the question as to whether the Ocean City Utilization and Sewerage Com-

pany, a corporation organized under the General Corporation Act of 1896, had the authority to lay sewers in the public streets. Its charter gave it the right "to construct, maintain and operate a system of sewerage" in Ocean City.

The New Jersey Supreme Court, however, consisting of Justices Hendrickson, Swayze and Trenchard, held that the corporation did not have authority to lay sewers in the public streets. The Court said:

> "The new company is organized under the general corporation act of 1896 and, while its purpose is undoubtedly lawful within the meaning of the supplement of 1899 (Act March 24, 1899, P. L., p. 473), it can have no powers not conferred by the act under which it is organized. That act contains no provision authorizing a corporation organized thereunder to lay sewers in the public streets, and the provisions of the certificate of incorporation authorizing it to construct, maintain, and operate a system of sewerage in Ocean City cannot confer upon it a power not given by the act. The fact that the Legislature has provided for the incorporation of sewer companies to construct, maintain, and operate a system of sewerage in the municipalities of this state, and has by that act required a compliance with certain conditions intended to protect the public, is proof that it was not the intent that such a power should exist under the general corporation act."

The Supreme Court of New York State, in *Kavanaugh* v. *Commonwealth Trust Co.,* 118 N. Y. S. 758, 64 Mic. Rep. 303, held:

> "The Trust Company has those powers only that are conferred upon it by its charter and the banking law of the State of New York, and are strictly limited to the exercise of such powers in such manner and by such agents as its charter and the law

permits. Its charter is a contract between the state and the stockholders, which will be construed strictly, and no powers will be implied. Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14. Corporations are artificial creations. Trust companies are organized with restrictions and privileges intended to secure the institution and its stockholders against loss. Speculative undertakings, entered into by a trust company, subject to hazard and contingency of gain or loss, are *ultra vires,* and a perversion of the powers conferred by its charter. Undertakings are *ultra vires* when they involve adventures or undertakings outside and not within the scope of, or the powers given by, their charters. The acts under which they are organized were framed in view of the rights of the public and the interest of the stockholders. Jemison *v.* Citizens' Savings Bank of Jefferson, Tex., 122 N. Y. 135, 140, 141, 25 N. E. 264, 9 L. R. A. 709, 19 Am. St. Rep. 482."

POINT II.

The powers of a corporation organized under a legislative charter are only such as the statutes confer, and the enumeration of them implies the exclusion of all others.

In *Thomas* v. *West Jersey Railroad Co.,* a New Jersey corporation, 101 U. S. 71, 82, Mr. Justice Miller, delivering the opinion of the United States Supreme Court, said:

"* * * the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The Court of Errors and Appeals in *Colgate* v. *United States Leather Company*, 75 N. J. Eq. 229, 72 Atl. 126, 129, speaking through Chancellor Pitney, laid down the rule as follows:

> "The purpose for which a company is organized is primarily to be sought and found in its charter or certificate of incorporation * * *. This statement of the objects of the company is not only a limitation of the franchises that are derived by the corporation from the state, but is likewise a limitation of the purposes to which the corporators as between themselves have agreed that the joint capital shall be devoted."

In *Black* v. *Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455 (Court of Errors and Appeals, 1873), held:

> "The rule of construction is settled, that what is not clearly granted is withheld. In Townsend *v.* Brown, 4 Zab. 87, Chief Justice Green says, that 'it is a rule of construction no less wise and clear, that in all cases of public grants, the interpretation shall be most favorable to the public, and most strongly against the grantee. The rule is founded in wisdom. All experience teaches that public rights are yielded to private interests with great alacrity.' * * * And in a later case, reported in 1 C. E. Green, 372, the same great jurist says, that 'any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public. The corporation takes nothing that is not clearly given by the act.' In language equally strong, the Court, in 9 Harris 22, holds, that 'in the construction of a charter, to be in doubt, is to be resolved, and every resolution which springs from doubt is against the corporation.' This is the rule sustained by all the courts in this country and in England."

POINT III.

No corporation shall possess or exercise any other corporate powers except such incidental powers as may be necessary to the exercise of the powers given by its charter.

By "an Act Concerning Corporations," approved April 7, 1875, Revision of the Statutes of New Jersey, 1709-1877, the Legislature provided as follows:

> "3. In addition to the powers enumerated in the first section of this act, and to those expressly given in its charter, or in the act or certificate under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given."

By P. L. 1896, p. 278, 2 N. J. Comp. Stat. 1899, Par. 2, the Legislature provided as follows:

> "No corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be *necessary* to the exercise of the powers so given." (Italics mine.)

How can this Court hold that the guaranteeing of mortgages was necessary to the exercise of the powers given to a trust company?

POINT IV.

The Court has no right to add words to the legislative grant in order to widen the powers conferred upon a corporation.

Corporations are artificial persons created by the State, and the Legislature has absolute control to grant or withhold any rights or powers which it may deem to the public interest to grant or to withhold. The Legislature also has the

absolute right to grant certain powers only to corporations organized under a particular statute and the Court has no right to enlarge the corporate powers thus granted by the Legislature.

> "It is well settled that the creation of corporations is under the absolute control of the legislature."
> *Riddle* v. *Commissioner of Banking and Insurance*, 100 Atl. 692.

See also

> *State, ex rel., Hull* v. *Kelsey, Secretary of State*, 53 N. J. Law 590, 22 Atl. 342.

In *Steward* v. *Lehigh Valley Railroad Co.*, 38 N. J. Law 505, 513, Mr. Justice Dixon, delivering the opinion of the Court of Errors and Appeals, in construing a charter, said:

> "The Court has no right to add to the words of the legislature, or to substitute other words for them in order to widen the power conferred, * * * The duty of the court is one of interpretation merely."

POINT V.

The Legislature never gave the right to the Middlesex Title Guarantee and Trust Company to guarantee mortgages or to issue and guarantee mortgage participation certificates.

As hereinbefore stated the Middlesex Title Guarantee and Trust Company was organized under "An Act concerning trust companies" (Revision 1899), 4 N. J. Comp. Stat. 5654. Section 10 of paragraph 6 of this Act gives to such corporations the power "to purchase, invest in, and sell stocks, promissory notes, bills of exchange, bonds and mortgages and other securities." This, of course, does not give them the right to guarantee mortgages either issued by

themselves or by third parties. By no stretch of the imagination can the words "purchase, invest in, or sell" be deemed the equivalent of "guarantee."

Section 14 of said paragraph 6 gives them the power "to exercise the powers conferred on and to carry on the business of a safe deposit company, to provide and guarantee titles to land * * * etc., provided, such powers and purposes are enumerated in the certificate of incorporation." This right the Middlesex Title Guarantee and Trust Company possessed by virtue of the first sub-division of the third paragraph in its charter. The trust company also provided in its charter that it should have all the general powers conferred by the "Act Concerning Corporations," revision of 1896. This power also was in accordance with Section 6 of the Trust Company Act.

There is nothing, however, in the "Act Concerning General Corporations" or the "Act Concerning Trust Companies" or the "Act Concerning Safe Deposit Companies" which gives any corporation organized under any of these three Acts the authority to guarantee the payment of the principal and the interest of mortgages.

The right to guarantee mortgages at the time the Middlesex Title Guarantee and Trust Company was incorporated existed only by virtue of the provisions of "An Act to provide for the regulation and incorporation of Insurance Companies and to regulate the transaction of insurance business in this State." P. L. 1902, p. 407, 2 N. J. Comp. Stat. 2838. This Act provides as follows:

> "Ten or more persons may become a corporation for the purpose of making any of

> the following kinds of insurance, to wit: I. Fire, II. Marine, III. Life, IV. Accident, V. Liability, VI. Explosion, VII. Breach of Duty.
>
> VIII. Against loss or damage on account of encumbrances upon or defects in titles to real property, and against loss by reason of the non-payment of principal and interest of bonds and mortgages. A company organized under this Act, to transact the business authorized by this sub-division, shall have the right, with its capital and surplus, to take, buy, sell and deal in first mortgages on real estate, and to issue bonds, debentures and certificates against such mortgages."

This is precisely the very power which the Middlesex Title Guarantee and Trust Company was exercising, although it was not chartered as an insurance company.

By Section 8 of the Insurance Company Act a deposit must be made with the Commissioner of Banking and Insurance and by Section 9 a certificate of authority to do business under this Act must be first obtained.

It needs no argument to prove that the requirements of a corporation organized under the Insurance Act are entirely different from the requirements of a corporation organized under the Trust Company Act. The two are entirely separate and distinct and the powers conferred by the Legislature are entirely separate and distinct. As before pointed out, our Courts have uniformly held that the only powers which a corporation can exercise are those granted to it by its charter or by statute or which *necessarily* flow as an incident from the granting of such powers. And the only powers that a charter can contain are those specifically designated and set out in the particular law under which the corporation in question

is incorporated. *Read* v. *Atlantic City*, 49 N. J. L. 558. Obviously a corporation organized under the General Corporation Act to sell furniture or automobiles cannot issue life insurance, nor can a corporation organized under the Insurance Act engage in commercial banking. So it follows that a corporation organized under the Trust Company Act cannot exercise powers specifically enumerated and given to corporations organized under the Insurance Company Act.

By P. L. 1912, p. 333, as amended by P. L. 1913, p. 171, and as amended P. L. 1914, p. 137, N. J. Comp. Stat. Supplement 1911-1915, p. 808, Section 8 of the Insurance Company Act was amended to read as follows:

> "VIII. Against loss or damages on account of encumbrances upon or defects in titles to real property and against loss by reason of the non-payment of principal and interest on bonds and mortgages. A Company organized under this act to transact the business authorized by this sub-division shall have the right, in addition to the other powers of investment given by this act, *with its capital and surplus,* to take, buy, sell and deal in first mortgages on real estate and to issue bonds, debentures and certificates against such mortgages; and may use in its name the words 'Guaranty Company' instead of the word 'Insurance Company' as hereinafter required generally for corporations formed under this act." (Italics mine.)

Chapter 192 of the Laws of 1920, p. 337, which is a supplement to "An Act Concerning Investments," approved March 23, 1899, gives an executor, administrator, guardian or trustee the right to loan money on shares or parts of a mortgage.

Chapter 81 of the Laws of 1927, which is a further supplement to "An Act Concerning In-

vestments," gives this right "to any executor, administrator, guardian or trustee." This Act also contains the following provision:

> "Any trust company, title guarantee company or bank incorporated under the laws of this State and being under the jurisdiction and supervision of the Department of Banking and Insurance of this State and authorized by its charter to transact the business of loaning money on bond and mortgage upon improved real estate, which are first liens thereupon, may issue participation certificates or coupon bonds with a guarantee of payment of principal and interest and secured by a trust mortgage or trust agreement deposited with another trust company, bank or title guarantee company organized under the laws of this State, or a national bank authorized to do business in this State, which trust mortgage or agreement may include a number of bonds and mortgages and shall designate them as a series set apart as security for such participation certificates or coupon bonds and refer to them by brief description of dates, parties, amounts, reference to location of property, maturity and rate of interest. Such trust agreement or mortgage shall contain suitable provisions for substitution and extension of mortgages and bonds secured thereby and it shall not be necessary to insert such details in the participation certificates or coupon bonds other than by reference to such trust mortgage or agreement."

The scheme sanctioned and permitted by the Legislature is, of course, an entirely different one from that procedure followed by the Middlesex Title Guarantee and Trust Company because the latter did not issue any participation certificates or coupon bonds with a guarantee of payment of principal and interest, which was secured by a trust mortgage or trust agreement deposited with another trust company, bank or title guar-

antee company organized under the laws of this State, or a national bank authorized to do business in this State, as required by the foregoing statute. It simply bought the bond and mortgage of a third party and assigned them with a guaranty of payment of both the principal and the interest.

Here, then, we have an instance where a corporation did something not authorized by the Act under which it was incorporated, but which right was specifically given to corporations organized under an entirely different Act and lastly the corporation not even doing what it might have done under the 1927 Act.

In 1931 the Legislature gave the right to State banks to issue guaranteed mortgages under certain conditions. This law known as Chapter 368 of the Laws of 1931, p. 899, is a supplement to "An Act concerning banks and banking (Revision of 1899)," and is as follows:

> "A Supplement to an act entitled 'An act concerning banks and banking' (Revision of 1899), authorizing banks to guarantee or insure titles to land.
>
> Be it Enacted by the Senate and General Assembly of the State of New Jersey:
>
> 1. Any State bank created or doing business under the laws of the State of New Jersey, which has been duly authorized to exercise trust powers, shall have the power to examine titles to land and to issue guarantees against loss or damages on account of encumbrances upon or defects in titles to real property and against loss by reason of non-payment of principal and interest of bonds and mortgages; *providing such change shall have been made, or shall hereafter be made, in the manner prescribed by section seven of said act;* and further provided, that the capital and surplus of said bank shall

not be less than eight hundred thousand dollars ($800,000); and provided further that said bank shall have heretofore taken over such title and mortgage guaranteed business from a trust company now or heretofore doing business in this State. (Italics mine.)

2. This act shall take effect immediately. Approved April 28, 1931."

This law, of course, does not apply to trust companies, but only to banks organized under the Banking Corporation Act of 1899, 1 N. J. Comp. Stat. 164, because "An Act Concerning Banks and Banking" specifically provided as follows: 1 N. J. Comp. Stat., p. 176, Sec. 35. "The provisions of this Act shall be applicable to, and the word 'bank' when used in this Act, shall be construed to include all corporations, other than trust companies and savings banks—and authorized to carry on the business of banking in the State of New Jersey" (P. L. 1898, p. 448).

POINT VI.

The Middlesex Title Guarantee and Trust Company did not have the implied authority to guarantee mortgages or to issue guaranteed mortgage participation certificates.

It will be remembered that the bonds and mortgages in question are those of third parties which the Trust Company had purchased.

In *Jesselshon* v. *Boorstein,* 111 N. J. Eq. 310, 162 Atl. 254, Vice-Chancellor Backes summed up the law as follows:

"A corporation cannot, of course, lend its credit or pledge its property purely as an accommodation to a stranger, National Bank *v.* Young, 41 N. J. Eq. 531, 7 A. 488; Whitehead *v.* American Lamp & Brass Co., 70 N. J. Eq. 581, 62 A. 554; Heidler *v.* Horner &

> Co., 97 N. J. Eq. 505, 128 A. 237. But that it may, in self-preservation, to protect its stock interest in another or a subsidiary company, is well established by the authorities. Ellerman *v.* Chicago Junction Rys. & Union Stockyards Co., 49 N. J. Eq. 217, 23 A. 287; Whitehead *v.* American Lamp & Brass Co., *supra;* State Bank of Pairfax *v.* Pacific Elevator Co., 159 Minn. 94, 198, N. W. 304; Modoc County Bank *v.* Ringling, *et al.* (C. C. A.), 7 F. (2d) 535; General Investment Co. *v.* Bethlehem Steel Co. (D. C.), 248 F. 203; Second Nat. Bank of Parkersburg *v.* U. S. Fid. & Guaranty Co. (C. C. A.), 266 F. 489."

In the case at bar, the trust company was certainly lending its credit or pledging its property purely as an accommodation to a stranger. This it could not do. It cannot be said that it was acting in self-preservation, to protect its interest in another or subsidiary company.

> "Obtaining, negotiating and guaranteeing mortgage loans is not a banking business." 1 Mitchie on Banks and Banking, 682, Kiggins *v.* Mundy, 19 Was. 233, 52 Pac. 855; Investment Co. *v.* Rathburn, 4 Sawy. 32, Federal Case, 10, 555; Selden *v.* Trust Co., 94 U. S. 419."

An investigation has been made at the office of the Commissioner of Banking and Insurance to ascertain under which Legislative Act the various mortgage and title companies now doing business in this State have been organized, and it has been found that all of these mortgage and title guarantee companies are operating under the Insurance Company Act and that not one of them have been organized under the Trust Company Act. The annual report of the Commissioner of Banking and Insurance of the State of New Jersey for the year ending December 31, 1932, contains a list of 45 title and mortgage insurance companies all of which have been organized under

the Insurance Company Act. This list appears upon pages 60-61 of part 2 of the said report which is printed and is a public record of this State. See also *Camden Mortgage Guaranty and Title Co.* v. *Haines,* 160 Atl. 413, 110 N. J. Eq. 461.

POINT VII.

The guaranteeing of the payment of the principal and interest of mortgages of a third party is not only ultra vires but is against public policy.

It seems anomalous to hold that if a depositor in the Trust Company had $5,000 in a Savings Account and also had a "guaranteed mortgage," for $5,000, and the bank became insolvent, his $5,000 in the Savings Account could be used to guarantee the $5,000 "guaranteed mortgage." Yet this is what the Court below has determined.

A leading and recent case upon this subject is *Reichert, State Commissioner of Banking and Insurance* v. *Metropolitan Trust Co.,* 266 Michigan 123, 247 N. W. 128, decided by the Supreme Court of Michigan on March 2, 1933. The opinion is as follows: Potter, Justice:

> "This case having come on to be heard in the circuit court upon more than 70 petitions objecting to the allowance of several claims as common claims instead of as preferred claims, and to the disallowance of claims on guaranteed bonds, was not passed upon or decided by the trial court, but questions were certified to this court under rule 78 as follows:
>
> "Question No. 1:
>
> "Facts.
>
> "The Metropolitan Trust Company was incorporated on April 22, 1925, under the

Trust Company Act 108, of the Public Acts of 1889, as set forth in Michigan Compiled Laws of 1915, sections 8044 and 8077. Article III of the Articles of Association, of the trust company, reads as follows:

"'The purpose of the incorporation is in and by its corporate name, to take, receive and hold and repay and reconvey and dispose of any effects and property, both real and personal, which may be granted, committed, transferred or conveyed to it with its consent, upon any terms, or upon any trust or trusts whatsoever, at any time or times, by any person or persons, including married women and minors, body or bodies corporate, or by any court, including the federal courts in the state of Michigan, to administer, fulfill and discharge the duties of such trust or trusts, for such remuneration as may be agreed on, to act as general agents or attorneys for the transaction of business, the management of estates, the collection of rents, interest, dividends, mortgages, bonds, bills, notes and securities, for moneys; to act as agent for the purpose of issuing, negotiating, registering, transferring or countersigning, the certificates of stock, bonds or other obligations of any corporation, association or municipality, and to manage any sinking fund therefor on such terms as may be agreed upon, to accept and to execute the offices of executor, administrator, trustee, receiver or assignee or guardian of any minor, incompetent person, lunatic or any person subject to guardianship; to loan money upon real estate and collateral security, and execute and issue its notes and debentures, payable at a future date and to pledge its mortgages on real estate and other securities as security therefor; to take and receive from any individual or corporation on deposit for safekeeping and storage gold and silver plate, jewelry, money, stocks, securities and other valuable and personal property and to rent out the use of safes or other receptacles upon

its premises upon such terms and for such compensation as may be agreed upon; to become sureties for administrators, guardians, or other trustees or persons in cases where, by law or otherwise, one or more sureties are required; to guarantee or insure to grantees the validity of titles in real estate transfers, at a rate of compensation and upon such terms as may be agreed upon; to lease, purchase, hold and convey all such personal estate as may be necessary to carry on its business as well as such personal estate as it may deem necessary to acquire in the enforcement or settlement of any claim or demands arising out of its business transactions and to execute and issue in the transaction of its business all necessary receipts, certificates and contracts which shall be signed by such person or persons as may be designated by the by-laws of the corporation; to invest its capital stock in the manner provided by law; to lease, hold, purchase and convey real estate for the purposes and in the manner provided by section 10 of said act and to accept real and personal estate in trust, as in said section provided, and to do all other acts and things authorized by the said chapter, to be done by corporations organized under its provisions, and all acts supplementary thereto or amendatory thereof.'

"The trust company loaned its general funds out to the public. Among the securities accepted under these loans were many mortgages upon real estate. Certain of these mortgages were sold by Metropolitan Trust Company, as an individual, to the Metropolitan Trust Company, as trustee, accepting in payment therefor from the said trustee certificates of participation in trust form issued by such trustee, and bearing the title 'Metropolitan Trust Company Guaranteed First Mortgage 6% Collateral Bonds.' The trust company then guaranteed the payment of and proceeded to sell these certificates of participation to the public. Four

series of these guaranteed certificates, totalling $600,000.00 face value, were sold; series A, bearing 6% interest, being dated September 1, 1926, series B, bearing 6% interest, being dated May 1, 1927, series C, bearing 5½% interest, being dated February 1, 1928, and series D, bearing 5% interest, being dated May 1, 1928, copies of these certificates are attached hereto and marked Exhibit A, B, C, and D, for further reference. Such 'Guaranteed First Mortgage Collateral Bonds' were outstanding upon date of suspension of the trust company in the amount of $410,300.00. No payments under the guaranties were to be made until within eighteen months after the respective due dates. The eighteen months have not yet expired.

"Validation certificates were obtained from the Michigan Securities Commission permitting the sale of these bonds.

"There were five additional series of bonds issued, which were not guaranteed by the trust company.

"Metropolitan Trust Company suspended business June 18, 1931; on June 20, 1931, a temporary receiver was appointed, and, on July 16, 1931, permanent receivers were appointed.

"No default of any kind had occurred on any of the guaranteed issues aforesaid prior to the appointment of permanent receivers. After the appointment of permanent receivers, Highland Park Trust Company was appointed successor trustee to Metropolitan Trust Company and all of the mortgages securing said guaranteed participation issues were assigned to the successor trustee, who has since administered the trust.

"On August 4, 1931, an order was entered requiring claimants to prove their claims within four months from the date of said order and providing that no claims would be received after December 4, 1931. This

time was subsequently further extended by a court order to January 4, 1932.

"Holders of guaranteed bonds filed their proofs of claim for the full par value of their bonds. No default occurred on the part of the trust company in turning over all funds collected on the mortgages, but defaults have since occurred in the payment of the interest on such bonds and, in some instances, in the payment of the principal.

"During the time that the company acted as trustee for these bond issues, it loaned or advanced out of its general funds, or commingled general and trust funds, $5,800.25 to itself as trustee for use in retiring $5,137.50 in principal of bonds and paying $662.75 in interest due on coupons. The retired bonds have been cancelled and are in the possession of the receivers.

"Subsequent to the appointment of the receivers, and before the appointment of a successor trustee, they collected some funds from the underlying security of the bonds and offset this amount against the indebtedness of the trustee to the company. The receivers' right to such set-off has been contested. The successor trustee has also contested the right of the receivers to recover from the successor trustee the balance of this advance.

"Questions of Law.

"(a) Was the guaranty of Metropolitan Trust Company on such bonds *ultra vires?*

"(b) If the foregoing question is answered in the affirmative, is the defense of *ultra vires* now available to the receivers as against the holders of the bonds upon which claims have been filed?

"(c) If the foregoing questions are answered in the negative, can the holders of these bonds prove their claims as contingent claims in view of the fact that the eighteen month period after default has not

expired and the loss, if any, has not been yet determined?

"(d) If question (c) is answered 'yes,' must the receivers delay the payment of any and all dividends until such time as there can be a final closing of the receivership estate?

"(e) Where the trust company paid to some of the holders of bonds and/or coupons under guaranteed bonds series 'A,' 'B,' 'C,' and 'D,' principal and interest without respect to collections from mortgages securing same, said payments being made from general corporate bank accounts of said trust company and not from any segregated trust fund, were such payments in partial satisfaction of the liability of the said trust company as guarantor?

"(f) If the answer to question (e) is 'yes,' would the trust company out of collections subsequently received by it as trustee from said mortgages constituting the corpus of such trust estates be entitled to repayment or set-off for moneys so advanced if such repayment or set-off preferred said trust company over holders of bonds and/or coupons who did not participate in the payments as made by the trust company?

"(g) Would a successor trustee be entitled to all collections made by the receivers of the trust company from mortgages constituting the corpus of trust estates after June 18, 1931, without deductions for payments made to holders of bonds by the trust company prior to its closing?

"Question No. 2:

"Facts.

"In the conduct of its business, Metropolitan Trust Company was custodian of various funds which it held in trust as receiver, trustee or agent. Said funds so held were commingled with other trust funds and with the general funds of the company.

"On the day the company suspended business, it had cash on hand outside checks and cash items in the amount of $4,022.94.

"In its general banking accounts, it had $47,059.39 of which $45,966.09 was on deposit with the National Bank of Commerce of Detroit. The trust company owed this depositary $86,700.58. Promptly upon the closing of the company, the depositary set off the $45,966.09 against the company's indebtedness. As a result, the total cash that came into the hands of the receivers totalled $5,116.24. All of the cash on deposit in these general banking accounts consisted of general funds of the company commingled with trust funds.

"In addition thereto, the company had a separate bank account for estate balances in the sum of $17,444.88, which was not commingled with other general funds of the company. This latter amount came into the hands of the receivers merely for distribution to the beneficiaries or successor fiduciaries when they were appointed.

"The total of the trust funds commingled was greatly in excess of the total amount of all deposits in banks, plus cash on hand, and it has been impossible to trace such trust funds so commingled.

"The receivers disallowed all claims for preference made by such trust fund claimants and allowed all such claims as common claims.

"Questions of Law.

"(a) Where trust funds have been commingled with other trust funds and with other general funds of the trust company, and where said trust funds cannot be traced into any specific tangible assets, and where the cash on hand and in banks on the date of suspension of business by the trust company is greater in amount than certain single trust funds so commingled but less in amount than other single trust funds or than the

total of trust funds so commingled, can any or all of said trust funds be legally construed to be entitled to a preference over common claims?

"(b) If the answer to question (a) is 'yes,' do such preferred trust claimants share pro rata in the cash on hand and in banks at the time of suspension?

"(c) If the answer to question (b) is 'yes,' should the 'cash on hand and in banks' be construed to include that amount set off by the depositary against the company's debt to it?

"(d) Did the depositary bank have the right to set off against the indebtedness of the company to its funds on deposits consisting of commingled trust funds and general funds?

"(e) If the answer to question (a) is 'yes,' then did the payment of interest by the trust company upon funds in certain trust accounts establish the character of claims to such funds as general claims, there having been no agreement made to the contrary?"

"The Metropolitan Trust Company was a Michigan corporation. It signed a guaranty contained in the bonds involved, designated as series a, b and c as follows: 'And said trust company hereby guarantees the payment of the principal of this bond as and when collected from the respective mortgagors, but in any event within eighteen (18) months after demand by the holder made to the trust company on or subsequent to the due date of the principal of such bond, and the interest accruing thereon semi-annually from the date hereof, in lawful money of the United States of America of or equal to the present standard of weight and fineness, as set forth in this bond and the coupons annexed hereto.'

"The language of the guarantee used in bonds, series d, is: 'Said Metropolitan Trust Company hereby unconditionally guar-

antees the payment of the principal of this bond as and when collected from the respective mortgagors, but in any event within eighteen (18) months after demand by the holder made to the trust company on or subsequent to the due date of the principal of such bond and the interest accruing thereon semi-annually from May 1st, 1928, in lawful money of the United States of America of or equal to the present standard of weight and fineness.'

"Like other corporations, this trust company is a creature of law. It may lawfully exercise no power and authority except that given to it by law. There is nothing in either the charter of the corporation or the statute of its organization which gives it any express power or authority to guarantee the payment of notes, bonds, or other obligations. Its implied powers are limited to those necessary to enable it to exercise the powers delegated to it by its charter and the statute providing for its creation. 2 Fletcher on Corporations, p. 1814. It occupies a fiduciary relation to the beneficiaries of the several trusts lawfully reposed in it who are entitled to its protection. 2 Fletcher on Corporations, p. 1814. It has no right to speculate with the trust funds intrusted to its care.

"This trust company, under the statutes of this state, had no right to imperil the trust funds submitted to its care by becoming surety, 7 C. J. 808; and no right to guarantee the payment of the bonds of others, Federal Land Bank of St. Paul *v.* Crookston Trust Co., 180 Minn. 319, 230 N. W. 797; In re Bankers' Trust Co. (D. C.) 27 F. (2d) 912; Ward *v.* Joslin, 186 U. S. 143, 22 S. Ct. 807, 46 L. Ed. 1093; Fletcher on Corp. Perm. Ed. 721.

"It is claimed that if guaranteeing these bonds was *ultra vires,* the trust company, having obtained the money from their sale, is estopped from questioning the validity of its guaranty; that it cannot profit by its own

wrong; and before repudiating such obligations it must put the bondholders in *statu quo*. It is claimed the receiver stands in the place of the trust company and is bound by these rules. If the receiver should satisfy the trust companies' alleged liability on the guaranties from its assets, there would be nothing left to satisfy its general creditors or its obligations to the beneficiaries of the trusts lawfully reposed in it. If the receiver pays the illegal obligations of the trust company, it cannot pay its legal obligations. Obligations arising from its illegal acts should not be preferred to those arising from its legal acts.

"The trust company not having authority to guarantee the payment of these bonds, such guaranty is not enforceable against the receiver of the trust company. Those dealing with the trust company are presumed to have had notice of its lack of powers to guarantee the payment of the bonds, Farmers' & Mechanics' Bank *v.* Troy City Bank, 1 Doug. 457; Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; and consequently no estoppel arises against the receiver, upon such colorable contracts of guaranty.

"It would be anomalous if the trust company, by violating the law guaranteeing the payment of bonds, engaging in hazardous speculation, with or without compensation, contrary to its charter, in violation of public policy, when such bonds were purchased by those charged with notice of the trust company's lack of power, could, as against the creditors and beneficiaries of the lawful trusts reposed in and accepted by it, divert its funds from lawful corporate purposes to those unlawful and opposed to public policy.

"The doctrine of *ultra vires,* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed upon three distinct grounds: 'The

obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.' McCormick *v.* Market National Bank, 165 U. S. 538, 17 S. Ct. 433, 41 L. Ed. 817.

"A trust company may not lawfully by indirection do what it is forbidden to do by its charter and the law of its creation.

"In Bowers *v.* Lawyers' Mortgage Company, 285 U. S. 183, 52 S. Ct. 350, 352, 76 L. Ed. 690, the business of the mortgage company was carried on as follows: 'Upon receiving an application for a loan it caused an appraisal of the proposed real estate security to be made and procured a title insurance company to survey the property, make a report as to title and insure the same. The borrower, having executed and delivered a bond and mortgage to respondent, received from it the amount specified therein less charges for title insurance, survey, disbursements, and recording tax, and less a lending fee which included the charge for appraisal. Respondent sold the mortgage loans. On the sale of a bond and mortgage as a whole, it delivered an assignable contract called "policy of mortgage guarantee" to the purchaser. On the sale of part of a loan, it issued a participation certificate assignable by indorsement and registration on respondent's books and containing substantially the same provisions as the policy. By every such policy or certificate the purchaser appointed respondent his agent to collect the principal and interest, and the latter agreed to keep the title guaranteed and the premises insured against fire and to require the owner to pay taxes, assessments, water rates, and fire insurance premiums. Respondent guaranteed payment of principal, as and when collected but in any

event within 18 months following written demand made after maturity, and payment of interest regularly at an agreed rate usually one-half of one per cent. less than that specified in the bond. Respondent kept the difference and called it "premium." Respondent also retained the interest accruing between the making of the loans and the sale of the securities. For renewals of loans it charged extension fees.'

"And the court held: 'The Guaranties contained in the policies and participation certificates were in legal effect contracts of insurance.'

"In United States *v.* Home Title Insurance Co., 285 U. S. 191, 52 S. C. T. 319, 321, 76 L. Ed. 695, where a similar case was before the court, it was said: 'The guaranty of payment of the principal and interest of mortgage loans constitutes insurance.'

"A trust company under the laws of this state differs from an insurance company. Each is a creature of statute. One is under the supervision of the banking department; the other under the supervision of the insurance department. We are unable to find the Metropolitan Trust Company had any power or authority, under the law of its creation, to guarantee the payment of bonds and mortgages delivered to the trust company, or any power or authority to guaranty the payment of participation certificates which were substantially similar to those issued by the Lawyers' Mortgage Company involved in Bowers *v.* Lawyers' Mortgage Company, 285 U. S. 183, 52 S. Ct. 350, 76 L. Ed. 690, and United States *v.* Home Title Insurance Co., 285 U. S. 191, 52 S. Ct. 319, 76 L. Ed. 695.

"The receiver of the trust company represents all those legally interested in its assets as creditors. It is the duty of the receiver to administer the estate of such defunct trust company according to law; to protect its legal trusts from claimed liability upon illegal contracts.

"We are of opinion the guaranties in question were *ultra vires,* which defense is available to the receiver of the trust company, and no claimed liability based upon such guaranty may be recognized by, or enforced against, the receiver, under the facts here involved, either absolute or contingent. The trust company had a right to act as trustee in trust mortgages to secure bond issues, to receive money paid by mortgagors, and disburse it to bondholders. It had no right to pay other funds to bondholders, not arising from payments on the mortgages, by reason of its guaranty, to the prejudice of other creditors. No preferences among bondholders secured by any mortgage may obtain. All bondholders are secured ratably without preference. A successor trustee of bonds stands in the same position as the original trustee, and is entitled to collect and enforce the mortgages.

"Trust funds not traceable, not capable of identification, mingled with general assets, lose their identity as such and become general claims. A depositary bank, having no knowledge of the character of funds deposited with it, may set off the credit of the depositing customer against its debt due from it to the depositary bank.

McDonald, *J.* (concurs in result).

Butzel, *J.* (concurs in result).

"The record shows that the trust company engaged actively in a mortgage business, loaning on mortgages, and then selling a participating interest in these securities to the public. It did not sell these mortgages or beneficial interests therein for the purpose of raising necessary funds to conduct a trust business, but sold them outright as a part of a profit making venture by trading in these securities. Its guaranty, made as an inducement to effect such sales, was an exercise of a power extended neither by statute, charter, nor necessary implication. Were this an isolated case where, in order to raise funds

with which to carry on a trust business, a mortgage or participations in it had been sold accompanied by a guaranty, and the latter had been set up as a contingent liability in the company statement, there might be some merit in the assertion that this was merely a method by which the trust company exercised its express power to borrow money and issue notes accompanied by adequate security. The record, however, plainly shows that the trust company went much further, and engaged in the sale of a continuous series of guaranteed mortgage participations as a regular business. It was beyond the power of the trust company and against public policy for an organization of this nature to engage in such a venture, and for this reason I concur in the result.

"Clark, Sharpe, North, Fead and Wiest, *JJ.*, concurred with Butzel, *J.*"

Another case in point is: *Re: Bankers Trust Co.*, 27 F. (2d) 912. In this case the Court held:

"The Bankers' Trust Company acted as a financial agent for numerous banks, under written contracts with them. In order to rediscount the paper of those banks, and to procure original credit for them, it made a practice of guaranteeing, generally by a separate instrument, but sometimes by indorsement of the notes, the paper put out by these banks. In one instance a bank was required to give a bond for the deposit of public money, a fidelity company guaranteeing the deposit for the bank. The Bankers' Trust Company on its part guaranteed the bond company against loss.

The banks becoming insolvent, and the Bankers' Trust Company being in bankruptcy, various claims are sought to be proved against the bankrupt estate on account of such indorsement contracts and guaranties. In no case does it appear that the Bankers' Trust Company was paid anything directly for the use of its name. It

got its compensation only by the contracted salaries paid by the banks which it served.

The only question is whether certain indorsements and written guaranties are binding upon the bankrupt corporation, or are *ultra vires* and void, though the parties holding them have fully performed their obligations in the premises. In no instance did the Bankers' Trust Company receive the consideration which was paid by the holder of the indorsement or guaranty. While the holder paid out money or assumed liability to third parties on the faith thereof, so that there was a sufficient consideration to support the contracts, no direct benefit accrued to the Bankers' Trust Company. Consequently the transactions were accommodation indorsements or suretyships and guaranties for considerations moving to another.

(1) The contention is that such contracts are entirely without the powers of the corporation and not binding on its stockholders or legitimate creditors. The Bankers' Trust Company was organized as a trust company under the laws of the State of Georgia. Code, Sec. 2817, as amended by Acts 1917, p. 56, states under 14 heads the powers of such corporations. Pertinent parts are quoted:

'1. To make contracts. * * *

3. To act as the fiscal or transfer agent. * * *

11. To purchase, invest in and sell, stock, bills of exchange, bonds and mortgages and other securities and when money or securities are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but nothing herein contained shall be construed as giving the right to issue bills to circulate as money.'

"None of the transactions in question were such as are here permitted, but the main transaction in each case was not one of the Bankers' Trust Co. on its own account, but in behalf of someone else; the engage-

ment of the trust company being evidently or expressly collateral and secondary. The power to guarantee is twice given in subsection 13, as to bonds and notes secured by deed to real estate in Georgia, and in subsection 14 as to the validity of real estate titles, on condition in each case that a large guaranty fund be specifically deposited under the direction of the State treasurer.

"2. The naming and limiting of these special cases of guaranty as authorized would in itself indicate a purpose to forbid any other form of pledging the corporation's assets for the benefit of others, even though for a consideration. This is the function of fidelity and guaranty companies, specifically authorized to do such business, and is not considered as among the powers of other corporations. Thus it is generally held that an accommodation indorsement, there being no bona fide holder involved, does not bind an ordinary commercial corporation, though for the benefit of its principal stockholders. Cook *v.* American Tubing Co., 28 R. I. 41, 65 A. 641, and note 9 L. R. A. (N. S.) 193.

"So a contract of guaranty of the debt of another though in expectation of indirect benefits actually realized, and though executed on a part by the holder of the guaranty does not bind the corporation giving it. Western Maryland R. R. Co. *v.* Blue Ridge Hotel Co., 102 Md. 307, 72 A. 351, and note 2 L. R. A. (N. S.) 887; 111 Am. St. Rep. 362. With respect to a loan and trust company similar to this, which had no express power to make guaranties, in the case of Ward *v.* Joslin, 186 U. S. 142, at page 149, 22 S. Ct. 807-809 (46 L. Ed. 1093), it said: 'It must be assumed that the general rule be applicable that such companies have no implied power to lend their credit, or to bind themselves by accommodation indorsements. They must guarantee paper owned by them, or paper which they have negotiated in due course of business, and the proceeds of which they

received, but the power to guarantee the paper of a third party to another is not incidental to powers ordinarily exercised by them. The power of pledging a corporation's assets for another's credit, though for a consideration paid, is so dangerous a one, and requires such organization and officers, that it may well need an express grant of power to embark the capital in it.'

"It is recognized that a corporation may carry on its proper business by means of sub-division or auxiliary corporations or enterprises, and lend its credit to them, just as it might have used its own funds in such business to advance it, but the banks which the Bankers' Trust Co. dealt for were not carrying on its business at all. The Bankers' Trust Co. had stock in some of them. No doubt to protect this ownership, if there were an emergency requiring it, the corporation might have advanced its money or its credit, to relieve the emergency. But these transactions seem all to have been in the ordinary course of business as fiscal agent, representing these banks, and not for the purpose of saving an investment of the Trust Company. No special circumstances are shown which would make the transaction other than what they appear on their face to be.

"There is no question of innocent holder involved. Even as to the accommodation indorsements, it is evident from the fact of the paper that the Bankers' Trust Co. is lending its credit while another gets the consideration of the transaction. Compare Cook *v.* American Tubing Co., *supra;* It is known by the holder to be a contract to misapply the corporation's assets, unless its charter authorizes such power, and since the powers of the trust company are fixed by public law, all are bound to know what they are. Pearce *v.* Railroad Co., 21 How. 441, 16 L. Ed. 184.

"(3) But it is urged that, since the Bankers' Trust Co., by its agreement induced others to assume obligations, or part with money, and since those others have fully performed their agreements the Bankers' Trust Co. is estopped from urging its want of power. The propriety and duty of a corporation to repudiate an *ultra vires* engagement, so long as it is fully executory, has often been stated. So has the reluctance of the courts to entertain the defense after full execution by the other party. But it is believed that, where the contract is wholly without the corporate power, and especially when known so to be by the other party, the contract itself cannot be affected by estoppel. In Louisville, New Albany & Chicago R. R. Co. *v.* Louisville Trust Co., 174 U. S. 532, at page 567, 19 S. Ct. 817-823 (43 L. Ed. 108k), it is said: 'A railroad corporation unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation, and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires,* unlawful and void, and incapable of being made good by ratification or estoppel.' Cases are cited as authority for the statement which involve corporations other than railroads.

"It was said in Ward *v.* Joslin, *supra,* 186 U. S., at page 151 (22 S. Ct. 810), 'The rule in this court is that a contract made by a corporation beyond the scope of its powers expressed or implied, cannot be enforced, or rendered enforceable, by the application of the principle of estoppel.' According to the federal rule, the court will only look to see if the disappointed party is entitled to any relief outside of the contracts, or by an action to recover what the repudiating party received by virtue of the repudiated contract. Central Trans. Co. *v.* Pullman's Co., 139 U. S. 24, 11 S. C. 478; 35 L. Ed. 55, at end of opinion. Pittsburgh Ry. Co. *v.*

Keokuk Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157.

"As to the assets of the Bankers' Trust Co., do not appear to have been in any manner enriched as the direct result of any of the transactions in question, there is no refund due by it, Western Maryland R. R. Co. *v.* Blue Ridge Hotel Co., *supra.*"

In *Flitner-Atwood Co.* v. *Fidelity Trust Co.*, 144 N. E. 218, the Supreme Judicial Court of Massachusetts held that a trust company as mortgagee of a ship had no power to enter into a contract with the mortgagors for their mutual benefit and operation of ship and to supply necessary capital for the undertaking.

In *Nowell* v. *Equitable Trust Co.*, 144 N. E. 749, Chief Justice Rugg, writing the opinion for the Supreme Judicial Court of Massachusetts, held:

"A trust company invites deposits from the general public. It is empowered not only to conduct the general banking and other business already indicated; it also may have a savings department and a trust department wherein large numbers of people may be concerned, with interest differing from those of ordinary commercial depositors. The customers of a trust company in all its departments are obliged in the nature of things to repose a high degree of trust and confidence in the fidelity and sagacity of the managers of such an institution. They must depend to a great extent upon their honesty and good judgment.

The embarrassment, confusion and suffering in business and other financial relations likely to follow in the wake of violations of law or unsound banking methods have been actually illustrated in the recent failures of several trust companies in this commonwealth. The business of banking is of such widespread public importance as to warrant

and receive considerable governmental regulation for the general welfare.

The contract of guaranty upon which this action is founded does not fall within the specific enumeration of powers conferred upon a trust company already summarized. It was not an agreement to pay drafts or bills of exchange drawn on this trust company. It was not an acceptance of such instruments already drawn or to be drawn in the future. It was not the issuance of a letter of credit. The contract here in suit is closely akin to contracts well within the corporate powers of the trust company. It related to payment of drafts arising out of importations of goods and to liabilities primarily undertaken under a letter of credit. The drafts which were the subject of the guaranty were not drawn on the guarantor, but on the plaintiff. The letter of credit was not issued by the defendants but by the plaintiffs. The security of bills of lading and other papers thereof the import was not assured to the defendant but to the plaintiff.

There must be a dividing line between business within and business beyond the corporate powers of a trust company. This contract grew out of a transaction relating to the import of goods. But it cannot by any stretch of definition or description be rightly termed a draft or bill of exchange. A guarantor of the financial obligation incurred by an importer to another banker is different in kind from the business described in the sections delimiting the corporation powers of a trust company. It is not fairly incidental to the power there conferred. All these considerations lead us to the conclusion that this contract of guaranty was *ultra vires* to the trust company. Ward *v.* Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093; Guase *v.* Commercial Trust Co., 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967; Border Natl. Bank *v.* American Natl. Bank (C. C. A.), 282 Fed. 73, 77, certiorari denied. 260 U. S. 708, 43 Sup. Ct. 96, 67 L.

Ed. 471; Commercial Natl. Bank *v.* Price, 82 Fed. 799, 802. 29 C. C. A. 171; Norton *v.* Perry Natl. Bank, 61 N. H. 589, 60 Am. Rep. 334; First Natl. Bank *v.* American Natl. Bank. 173 Mo. 153, 72 S. W. 1059; Hotchkin *v.* Third Natl. Bank of Syracuse, 219 Mass. 234, 106 N. E. 974; Dresser *v.* Traders Natl. Bank, 165 Mass. 120, 42 N. E. 567; Flitner-Atwood Co. *v.* Fidelity Trust Co., 248 Mass.—, 144 N. E. 218."

In *Humboldt Min. Co.* v. *American Mfg. Min. and Milling Co.,* 62 Fed. 356, 10 C. C. A. 415, the Court held a guaranty of performance of another's contract for the erection of a mining plant and accompanying warranties by a company organized to make iron work for mining plants was invalid, though the guarantor, by reason of such guaranty, was enabled to sell the iron work used in the plant.

In *Western Maryland R. Co.* v. *Blue Ridge Hotel Co.,* 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, a guaranty by a railroad company to pay the interest and dividends on the bonds and stock of a hotel company located along the guarantor's line of railway, was held invalid notwithstanding that the business of the hotel would increase the travel on the railroad, and consequently make money for the guarantor.

In *Best Brewing Co.* v. *Kalssen,* 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26, the Supreme Court of Illinois held that the execution of an appeal bond by a brewing company as surety for the benefit of one of its customers was *ultra vires* although done to enable the principal to continue in the business of selling beer, and to make further purchases from the surety. The Court held:

"A corporation can do only those acts which are within the scope of its charter,

> and, if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of a corporation, it is void, and no subsequent act could make it valid, by way of estoppel. It was so held in National Home Building & Loan Ass'n *v.* Home Sav. Bank 181 Ill. 35, 54 N. E. 619; where the decision of this court are reviewed; and we there said (page 44, 181 Ill. and page 621, 54 N. E.): 'If there is no power to make the contract, there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.' ''

In *Logan County Bank* v. *Townsend,* 139 U. S. 67, 73, Mr. Justice Harlan, speaking for the United States Supreme Court, said:

> "It is undoubtedly true * * * that the national banking act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted to it by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

In *First National Bank* v. *National Exchange Bank,* 92 U. S. 122, 123, Chief Justice Waite, in delivering the opinion of the United States Supreme Court, said referring to a bank organized under the National Bank Act:

> "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power."

Again in *California Bank* v. *Kennedy,* 167 U. S. 362, 367, Mr. Justice White said:

> "It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank *v.* Natl. Exchange Bank, 92 U. S. 122, 128."

In *Federal Land Bank of St. Paul* v. *Crookston Trust Co.,* 180 Minnesota 19, 230 N. W. 797, decided May 9, 1930, the Supreme Court of Minnesota held:

> "Defendant is a trust company organized in 1916 and existing under the laws of Minnesota for the sole purpose of doing business at Crookston, Minn., as a trust company * * *. The court found as a fact that by virtue of the laws of this state defendant was without authority to guarantee the note and mortgage and that defendant's efforts so to do were *ultra vires;* that said defendant conducts an extensive trust business, receiving, having and holding in trust for others on the faith and credit of its capital and surplus and on the faith and credit of the law, large deposits of trust funds and trust estates, including a department of savings. * * *
>
> While defendant so acted as plaintiff's agent it negotiated and in form guaranteed loans made by plaintiff aggregating approximately $680,000. It realized therefrom about $30,000 income in the way of authorized commissions. * * *
>
> It is declared law in this state that guaranties of promissory notes by such corporations wherein they have no beneficial interest are *ultra vires.* Farmer's Mechanics' Savings Bank v. Crookston State Bank, 169 Minn. 249, 210 N. W. 998; Farmers & Merchants' State Bank of Lawley *v.* Mellus, 173 Minn. 323, 217 N. W. 381. See also in re Bankers Trust Co. (D. C.), 27 F. (2d) 912; Ward *v.* Joslin, 186 U. S. 143, 22 S. Ct. 807, 46 L. Ed. 1093. This is based upon our

statutes, the authority and power invested in such corporations and upon public policy. It is the intention of the state to control such corporations insofar as reasonably possible, especially for the protection of their depositors and stockholders and generally for the public welfare. The public is vitally concerned. * * *

We are unable to see how this particular guaranty may come within the general authority as a part of the purposes of defendant's creation. We think it does not."

POINT VIII.

The guaranty of payment of principal and interest of mortgage were, in legal effects, contracts of insurance.

We have seen this type of insurance is specifically recognized by our act concerning insurance companies and that a large number of mortgage guarantee companies have been organized under our insurance act and are now functioning in this State under the supervision of the Commissioner of Banking and Insurance.

Furthermore, the Courts in other jurisdictions, when called upon to construe such guarantees have uniformly held that they are in legal effect contracts of insurance.

In *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 183, 52 S. Ct. 350, 76 L. Ed. 690, decided by the Supreme Court of the United States on March 14, 1932, Mr. Justice Butler said:

"Undoubtedly the guaranties contained in the policies and participation certificates were in legal effect contracts of insurance. Tebbets *v.* Mercantile Credit Guarantee Co., 73 Fed. 95, 97; Guarantee Co. *v.* Mechanics' Bank & Trust Co., 80 Fed. 760, 772; State, *ex rel.*, Peach Co. *v.* Bonding & Surety Co., 279 Mo. 535, 536, 213 S. W. 20; Peoples *v.*

Potts, 264 Ill. 522, 527, 106 N. E. 524; Commonwealth *v.* Wetherbee, 105 Was. 140, 160; Shakman *v.* United States Credit System Co., 92 Wis. 366, 374, 66 N. W. 528; Young *v.* American Bonding Co., Pa. 228, p. 373, 380; 70 Atl. 623. These guaranties furnished purchasers additional security and were calculated to make the loans desirable as investments and readily saleable at a profit."

In *United States* v. *Home Title Co.*, 285 U. S. 191, the United States Supreme Court held:

"The guaranty of payment of the principal and interest of mortgage loans constituted insurance. Bowers *v.* Lawyers Mortgage Co., *ante*, p. 182."

In *Young* v. *American Bonding Co.*, 228 Pa. 373, 77 Atl. 623, the Supreme Court of Pennsylvania said:

"In all essential particulars the appellee here is an insurance company, and its obligation in this particular instance was that of an insurer. * * *

"While such corporations may call themselves 'surety companies' their business is in all essential particulars that of insurance."

In *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95, 97, the Circuit Court of Appeals, Second Circuit, held:

"Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers * * *. Their contracts are, in fact, policies of insurance, and should be treated as such."

In *Guarantee Co.* v. *Mechanics' Sav. Bank & Trust Co.*, 80 Fed. 766, 772, the Circuit Court of Appeals, Sixth Circuit, held:

"While, in contracts like this, the more natural attitude of a 'surety' is assumed by

the form, it is, in effect, one of insurance * * *."

The Vice-Chancellor in his opinion cites the case of *McCauley* v. *Ridgewood Trust Co.,* 81 N. J. L. 86, 79 Atl. 327, as being controlling. That was a decision delivered by our Supreme Court in 1911 consisting of Chief Justice Gummere and Justices Trenchard and Minturn, and holds that a trust company created under the act concerning trust companies (P. L. 1899, p. 450) has power to become a guarantor or indemnitor of a bond made by a corporation to it as trustee, but this is as far as the case goes.

It is respectfully urged that there is a vast difference in a corporation doing an act such as was done in the above entitled action, which was only a single instance, from a situation where a trust company goes into the business of guaranteeing the principal and interest of mortgages.

Counsel for the appellants herein has endeavored to find copies of the original briefs used in the argument of *McCauley* v. *Ridgewood Trust Co.,* and has met with no success in finding the brief submitted for the defendant, it appearing that the attorneys involved in this litigation had their papers destroyed in the fire which destroyed the Equitable Building in New York City in 1912. He has, however, located a copy of the brief submitted by the attorneys for the plaintiffs and that brief nowhere called the attention of the court to the existence of Section VIII of Article 1 of 2839, P. L. 1902, page 407, 2 N. J. Compiled Statutes which, as hereinbefore set forth, specifically gives the right to guarantee the payment of principal of mortgages to corporations organized under the Insurance Company Act.

It is respectfully submitted that if the attention of the Supreme Court had been called to the statute concerning Insurance Companies, which is the only statute that gives the right specifically to a corporation, that in all probability the Court would have decided differently. The decision was never appealed so the question is still undetermined by this Court.

The Supreme Court makes no mention of Section VIII of Article 1 of the Insurance Act and in all probability, was ignorant of the same, for it cannot be assumed that it would have otherwise omitted to at least comment upon it.

Moreover when the Court says, "when the express power is given to the trust company 'to purchase, invest in, and sell' bonds, it is manifest that it is appropriate and convenient for it to have power to become a guarantor or indemnitor with respect to bonds in order to carry into effect such expressed power to obtain the best price for the sale of the bonds," the unsoundness of the decision becomes apparent. For example, A dies leaving a last will wherein he appoints the X Trust Company, his executor. Among the so-called assets of the estate are $1,000,000 par value bonds of the South Sea Island Corporation. The bonds have no value whatever. But the Trust Company, "to obtain the best price for the sale of the bonds" as it has the right to do under this case, guarantees the bonds and sells them to the public for $500,000. At maturity the bonds are not paid by the South Sea Island Corporation and the Trust Company is obliged to pay the $1,000,000 back to the holders with a resulting loss of $500,000. Yet this is exactly what that decision would make perfectly proper and legal.

POINT IX.

A corporation organized under one act cannot exercise, without specific authority, the powers conferred upon a corporation organized under a different act.

Chase, in his edition of Blackstone's Commentaries, says (p. 194, Fourth Ed.):

> "Corporations are formed for particular purposes, and cannot exercise other powers than those which are conferred by legislative authority. An insurance company, for instance, cannot act as a banking association."

Conversely, a banking corporation cannot exercise powers conferred by our Legislature only on insurance corporations.

Guaranteeing against loss in the payment of bonds and mortgages is a form of insurance just the same as fire, marine or casualty insurance. Yet no one has ever contended that these are powers properly exercised by trust companies.

POINT X.

As the guaranties of mortgages were issued in violation of both the charter and statutes pertaining to this Trust Company, the holders of such guaranteed mortgages and guaranteed participation certificates cannot claim protection as innocent purchasers.

In *Bailey* v. *Citizens Gas Light Co.*, 27 N. J. Eq. 196, Chancellor Runyon held that where a corporation issued certificates increasing its indebtedness in violation of its charter powers, a holder of such certificates could not claim protection as an innocent purchaser. The Court said:

> "No warrant for this script would have been found in the charter, and the reference

> to the prohibitory limitation contained in the act concerning corporations would have removed all question, and would have been decisive against its validity. Chapter Laws of 1868, p. 398; Revision, title corporation Sec. 3; Green's Brice's Ultra Vires, 147. That the purchaser bought it without inquiry will not protect him in his purchase and bind the company to perform an obligation made without authority and in defiance of law. The Floyd Acceptance, 7 Wall. 667."

POINT XI.

The guaranty of the mortgages by the Middlesex Title Guarantee and Trust Co., even though made upon a valuable consideration, was clearing ultra vires.

Reichert v. *Metropolitan Co.*, 247 N. W. 128, 262 Mich. 123, 7 C. J. 808; *Federal Land Bank* v. *Crookston Trust Co.*, 180 Minn. 319, 230 N. W. 797; *In Re Bankers' Trust Co.*, (D. C.) 27 F. (2d) 912; *Ward* v. *Joslin*, 186 U. S. 143, 22 S. Ct. 807; *Bowers* v. *Lawyers Mtg. Co.*, 285 U. S. 183, 52 S. Ct. 350, 351, 352; 76 L. Ed. 690; *United States* v. *Home Title Ins. Co.*, 285 U. S. 191, 52 S. Ct. 319, 321, 76 L. Ed. 695. *Ward* v. *Joslin*, 186 U. S. 143, 22 S. Ct. 807, 46 L. Ed. 1093, pertained to the validity of the Western Investment Loan and Trust Company's guaranty of the payment of certain notes. The corporation was organized under the laws of the State of Kansas and the guaranty on each note was as follows:

> "For a valuable consideration the Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity."

The Circuit Court and the United States Supreme Court held that the guaranties were *ultra*

vires. Chief Justice Fuller, delivering the opinion of the Supreme Court of the United States held:

> "As before stated, the Circuit Court found that these guaranties were not 'within the reasonable and proper scope of the business, as contemplated by the parties.'
>
> "The preview of the words 'loan and trust' does not appear to have been defined by statute or decision in Kansas, but the declaration alleged that this company was organized for the purpose of transacting a general investment loan and trust business, buying and selling commercial paper, obligations and securities, and it must be assumed that the general rule is applicable that such companies have no implied power to lend their credit or to bind themselves by accommodation endorsements. They may guarantee paper owned by them, or paper which they negotiate in due course of business and the proceeds of which they received, but the naked power to guarantee the paper for one party to another is not incidental to the powers ordinarily exercised by them. The power as exercised here was certainly not 'essential to the transaction of its ordinary affairs,' nor with 'the legitimate objects of its creation.' * * *
>
> "We are of opinion that, upon the facts found, the guaranties were given without authority."

In the above case the guaranty was made for a valuable consideration but, nevertheless, the Court held that the guaranty was *ultra vires.*

See also *Read* v. *Atlantic City,* 49 N. J. L. 558.

Green's Brice's Ultra Vires states the rule to be:

> "A corporation may not become security for the negotiable papers of others, without an express power to do so (p. 256). At page 252. 'It is no part of the ordinary business of commercial and *fortiori,* still less

so of non-commercial corporations, to become security for others. Under ordinary circumstances, without positive authority in this behalf in the constructing instruments, all engagements of this description are *ultra vires,* whether they take the direct form of suretyship, or the indirect forms of joining in accommodation bills, or otherwise becoming liable for the debts of others, * * *"

POINT XII.

Ultra vires acts and contracts of a corporation are not merely voidable but are absolutely void.

7 Ruling Case Law, Sec. 677, states the rule thus:

"An act of a corporation is property said to be *ultra vires* when it is beyond the powers conferred upon the corporation. A corporation is an artificial being, created by the state, for the attainment of certain defined purposes, and therefore vested with certain specific powers, and others fairly and reasonably to be inferred or implied from the express powers and the object of the creation. Acts falling without that boundary are unwarranted—*ultra vires.* If the act sought to be done is foreign to the nature and design of the corporation, it is *ultra vires;* and though the act be calculated to attain the purpose, yet it may be *ultra vires* because of the undue means of accomplishing it. The reasons why a corporation is not liable upon a contract *ultra vires,* are (1) The interest of the public, that the corporation shall not transcend the powers granted; (2) The interest of the stockholders, that capital shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock; (3) The obligation of every one entering into a contract with a corporation to take notice of the legal limit of its powers."

To the same effect are *Schwab* v. *Potter Co.*, 194 N. Y. 409; *Oregon R. R. & Nav. Co.* v. *Oregon R. Co.*, 130 U. S. L.; *Thomas* v. *R. Co.*, 110 U. S. 71.

POINT XIII.

The doctrine of estoppel does not apply to the case sub judice.

7 Ruling Case Law, Sec. 678, states the rule:

> "Thus, where a corporation without power to do so enters into a contract of guaranty or suretyship, the plea of *ultra vires* is a complete defense to its enforcement against the corporation."

The cases in which the doctrine of estoppel is invoked when the defense of *ultra vires* is pleaded are those in which the corporation itself pleads its own illegal acts. Here, however, the Middlesex Title Guarantee and Trust Company is not pleading *ultra vires*. This doctrine is set up by the depositors, as general creditors of the defunct trust company.

While the rule may, in some jurisdictions, be that when the contract has been executed and the corporation has received the benefits of it, the corporation is estopped from questioning its validity, that rule nowhere applies to a creditor pleading that the act was *ultra vires*.

The United States Supreme Court in *Ward* v. *Joslin*, 186 U. S. at page 151 (22 S. Ct. 810) held:

> "The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforceable, by the application of the principle of estoppel."

Read v. *Atlantic City,* 49 N. J. Law 558, decided by the New Jersey Supreme Court in 1887, involved certiorari bringing up proceedings of Atlantic City and a contract between said City and the Atlantic City Water Works Company.

Justice Magie, writing the opinion of the Court says:

> "When the cause was moved, defendants objected to the consideration of the reasons on the ground that the prosecutor's delay in suing out this writ had barred him from relief. They showed by affidavits that the company (which was one of the defendants) had expended large sums of money in the erection of their works and had performed the contract on their part so far as permitted. They moved to dismiss the certiorari as improvidently granted. Counsel was heard on this motion and also on the merits."

The fact, however, that the defendants had performed the contract on their part as far as permitted did not influence the Court for its decision was:

> "The result is that the ordinance and proceeding on the part of the City, were *ultra vires,* and must be set aside."

Reuben A. Reese, Esq., in his works on "Ultra Vires" says:

> "*Sec.* 61. *Performance by innocent party of contract Ultra Vires a corporation.*
>
> "Great stress and no little polemical vaporing has been given to the argument respecting the faithful performance of a given *ultra vires* contract by an innocent party. This sort of sophistry has a pleasing sound to the ear of equity, but is delusive and without merit when urged in support of the enforcement of *ultra vires* contracts of corporations. * * * All persons who deal with a corporation are deemed by the law

to know its powers and the limits imposed upon its acts and undertaking. The act by which a corporation obtains its powers is a public act open to all the world, and misrepresentations by officers or agents of a corporation regarding its powers or capacities can have no proper bearing in arriving at its liability. The charter is of record and open to inspection. There is no reason why a person should place greater trust and confidence in corporations than in individuals; and if he chooses to enter into agreements or business transactions with corporations without investigating as to its powers or liability, and involves himself in loss and hardship, he has no reasonable case for complaint, because he is not deceived. It is his own fault" (Pages 86-87).

Pointing out that there can be no such thing as estoppel to an act of a corporation which is *ultra vires,* the same author continues:

"As was said by the Court in Keen *v.* Coleman, 39 P. St. 299: 'We do not see how there can be an estoppel involved in the very act to which the incapacity relates, that can take away that incapacity. If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd' " (p. 86).

"And at pg. 121, the same author says: '* * * a corporation cannot ratify an act or contract beyond the scope of its chartered powers; for it is a well established principle in the law of corporations that an act or contract *ultra vires* a corporation is void, and cannot be made valid by any subsequent act of the corporation purporting to ratify the same, because there is no residuary power to conform it. What they could not make they cannot ratify. Nor can a void act or contract become valid, merely because it remains unquestioned. A ratification is in law treated as equivalent to a previous

> authority, and it follows that, as a general rule, a person or body of persons, or corporation, not competent to authorize an act, cannot give it validity by ratifying it.' Citing among other cases, National Trust Co. *v.* Miller, 33 N. J. Eq. 155."

Even if the Trust Company had the right to guarantee the payment of mortgages, which it is vigorously contended, it did not possess, nevertheless, it did not have the right to use its depositors' money for the purpose. Even under the Insurance Act, the legislature has seen fit to restrict the guaranty of mortgages to the capital and surplus of the corporation.

N. J. Compiled Stat. Supp. 808, provides as follows:

> "VIII. Against loss or damages on account of encumbrances upon or defects in titles to real property and against loss by reason of the non-payment of principal and interest on bonds and mortgages. A company organized under this act to transact the business authorized by this sub-division shall have the right, in addition to the other powers of investment given by this act, *with its capital and surplus,* to take, buy, sell and deal in first mortgages on real estate and to issue bonds, debentures and certificates against such mortgages; * * *" (P. L. 1912, p. 333, as amended P. L. 1913, p. 171; as amended P. L. 1914, p. 137).

If the legislature has decreed that insurance companies can only do this out of their "capital and surplus" why should this Court decree that this limitation does not also apply to trust companies?

It is, therefore, respectfully submitted that the decree of the Chancellor be reversed and the Commissioner of Banking and Insurance be instructed that the Middlesex Title Guarantee

and Trust Company had no right or authority in law or under its certificate of incorporation to guarantee mortgages or to issue and guarantee mortgage participation certificates.

Respectfully submitted,

RUSSELL FLEMING,
Solicitor for and of Counsel
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constituting the Executive
Committee of the Middlesex
Title Depositors' Association.