INDEX

COMPLAINT.

(Filed)

Essex County Circuit Court

THE ALERT BUILDING & LOAN ASSOCIATION OF THE CITY OF NEWARK, a corporation, *Plaintiff,* *vs.* WILLIAM S. BECHTOLD, and GEORGE SCHUMACHER, *Defendants.*	*Action At Law.* *Complaint.*

Plaintiff, The Alert Building & Loan Association of the City of Newark, a body corporate, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, says:

1. On October 9, 1930 William S. Bechtold, George Schumacher and Frank D. Moore executed a certain bond bearing said date to said The Alert Building & Loan Association of the City of Newark, a corporation, in the penal sum of $22,000.00 conditioned to pay $11,000.00 with interest at six per centum per annum. Said obligors under the terms of said bond are jointly and severally liable.

2. On said last mentioned date William S. Bechtold and Henrietta Bechtold, his wife, George Schumacher and Sarah Schumacher, his wife, and Frank D. Moore and Esther Moore, his wife, executed a certain mortgage bearing the same date to the said plaintiff, on certain lands and premises whereof the said defendants,

William S. Bechtold, George Schumacher and Frank D. Moore were seized in fee, situate in the City of Newark, Essex County, New Jersey, and more particularly described as follows:

BEGINNING in the westerly line of South Tenth Street at a point therein distant one hundred feet northerly from Belgium Street; thence running westerly parallel with Belgium Street ninety-one feet and fifty-four one-hundredths of a foot; thence northerly fifty feet; thence running in an easterly direction and parallel with the first course, ninety-one feet and sixty-one one-hundreths of a foot; and thence running southerly along the westerly line of South Tenth Street fifty feet to the point and place of BEGINNING.

Being known and designated as street numbers 529-531 South Tenth Street, Newark, New Jersey. The above description being drawn from and in accordance with a survey made by John B. Acocella, surveyor, November, 1926.

Being the same premises conveyed to said William S. Bechtold, George Schumacher and Frank D. Moore, by two certain deeds, each dated December 1, 1926 and recorded in the Essex County Register's Office in Books R-75 of Deeds for Essex County on page 120 and in Book S-75 of Deeds for said County on page 189.

3. On September 29, 1936 a final decree for the sale of stock certificate No. 25594 for fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey as also a sale of the said lands and premises in the foreclosure of the said mortgage, was made in the Court of Chancery of New Jersey in a suit brought by the said The Alert Building & Loan Association of the City of Newark, a corporation, against William S. Bechtold, Henrietta Bechtold,

his wife, George Schumacher and Sarah Schumacher, his wife, and others, and said decree adjudged that there was due upon said bond and mortgage the sum of Ten Thousand five hundred eighty-five dollars and seventy-one cents ($10,585.71) and interest thereon, and directed that a writ of fieri facias be issued to the Sheriff of the County of Essex for the sale of the said certificate No. 25594 for fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey, and of said mortgaged premises, to make the said sum, with lawful interest thereon from September 18, 1936, and complainant's costs in that suit, which were thereupon taxed at the sum of $349.53.

4. The Sheriff, by virtue of said writ of execution, sold said premises on December 29, 1936, and also sold said certificate No. 25594 for fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey. Said Sheriff made his report of sale, whereupon the defendant William S. Bechtold filed objections to the confirmation of said sale. Subsequently, and on or about March 23, 1937 said defendant, William S. Bechtold withdrew his objections to confirmation and consented to the entry of an order confirming said sale. The order confirming said sale was entered in the Court of Chancery in said foreclosure proceedings on or about March 25, 1937 and within three months of the commencement of this action. Said mortgaged premises were sold to complainant for the sum of $100.00 and said certificate No. 25594 was sold to complainant for $100.00, it being the highest bidder at said sale.

5. The Sheriff's lawful fees and disbursements upon said execution amounted to $81.76

which were thereupon paid by the said The Alert Building & Loan Association of the City of Newark, a corporation, to said Sheriff, all of which appears upon said writ of execution which was duly returned to the court.

6. After crediting, upon said decree and execution, the amount of the proceeds of said sale, there remained due to the said plaintiff upon the same, a deficiency in the amount of $10,953.05.

7. Said sum of $10,953.05 has not been paid nor has any part thereof been paid.

8. On April 21, 1937 and within three months after the entry of the order confirming Sheriff's sale and prior to the institution of this action and the entry of judgment hereunder, plaintiff filed in the Office of the Register of Deeds and Mortgages in and for the County of Essex, being the county in which said mortgaged premises are situate, a written notice of this proposed action, setting forth the Court in which it was proposed to bring said action, the name of the party to said bond and action, the book and pages of the record of the said mortgage, together with a description of the mortgaged premises according to the statute in such case made and provided, a copy of which notice is annexed hereto and made a part hereof.

9. Plaintiff's action against said defendants was commenced within three months from the date of the entry of the order confirming sale of the mortgaged premises.

Plaintiff demands the sum of $10,953.05 with interest thereon.

SAMUEL ROESSLER,
Attorney for Plaintiff.

Notice.

Notice.

To Whom it May Concern:

Notice is hereby given, pursuant to the provisions of the statute in such case made and provided of a proposed suit to be instituted in the Essex County Circuit Court, by The Alert Building and Loan Association of the City of Newark, a corporation, against William S. Bechtold and George Schumacher, which suit will be entitled as above and that the general object of said suit is to recover a judgment in said suit on the bond given by the above named defendants, bearing date the ninth day of October, 1930 and secured by a certain mortgage bearing even date with said bond. Said mortgage is in the principal sum of $11,000 and embraces the following described lands and premises, viz:

All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

Beginning in the westerly line of South Tenth Street at a point therein distant one hundred feet northerly from Belgium Street; thence running westerly parallel with Belgium Street ninety-one feet and fifty-four one-hundredths of a foot; thence northerly fifty feet; thence running in an easterly direction and parallel with the first course, ninety-one feet and sixty-one one-hundredths of a foot; and thence running southerly along the westerly line of South Tenth Street fifty feet to the point and place of Beginning.

Being known and designated as street number 529-531 South Tenth Street, Newark, New Jersey. The above description being drawn from and in accordance with a survey

Notice.

made by John B. Acocella, surveyor, November 1926.

Being the same premises conveyed to said William S. Bechtold, George Schumacher and Frank D. Moore by two certain deeds, each dated December 1, 1926 and recorded in the Essex County Register's Office in Books R-75 of Deeds for Essex County on page 120 and in Book S-75 of Deeds for said County on page 189.

Said mortgage was recorded in the Essex County Register's Office on October 10, 1930 in Book L-70 of Mortgages for said County, pages 413-416.

SAMUEL ROESSLER,
Attorney for Plaintiff.

ANSWER.

(Filed)

The defendant, William S. Bechtold, of the Township of South Orange, answering the complaint of the plaintiff herein, says:

1. He denies paragraphs 1, 4, 6 and 8.
2. He admits paragraphs 2, 3, 5, 7 and 9.

FIRST DEFENSE.

This defendant disputes the amount of the deficiency alleged to be due to the plaintiff in the complaint herein and demands that the Court sit, with or without a jury, and determine the amount of said deficiency after hearing testimony of the fair market value of the mortgaged premises at the time of the sale under the foreclosure proceedings mentioned and described in the complaint, and that the Court, after determining the fair market value of the mortgaged premises, deduct said amount from the debt alleged to be due, all in accordance with the provisions of an act entitled, "A Supplement to An Act Entitled, 'An Act Concerning Proceedings on Bonds and Mortgages given for the same in indebtedness and the foreclosure and sale of mortgaged premises thereunder' Approved March 12, 1880," approved March 22, 1935, and being known as Chapter 88, P. L. 1935.

Dated: April 30, 1937.

LIONEL P. KRISTELLER,
Attorney for the Defendant,
William S. Bechtold.

An Answer was filed on behalf of appellant George Schumacher by his attorney Saul J. Zucker, identical in form with the foregoing answer filed by appellant William S. Bechtold.

Notice of Motion.

NOTICE OF MOTION FOR ORDER TO STRIKE OUT ANSWERS AND FOR SUMMARY JUDGMENT.

(Filed May 14, 1937.)

To: Lionel P. Kristeller, attorney for the defendant, William S. Bechtold, and
Saul J. Zucker, attorney for the defendant, George Schumacher.

SIRS:

PLEASE TAKE NOTICE that I shall apply to the Essex County Circuit Court at the Court House in Newark, on Friday, the fourteenth day of May, 1937, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order to strike out the answers filed by the defendants, William S. Bechtold and George Schumacher in the above stated cause, and for summary judgment, on the grounds that the allegations contained in the same are untrue in fact, and sham, and on the further ground that said answers do not constitute a legal defense to the plaintiff's cause of action.

TAKE FURTHER NOTICE that in support of the application by the plaintiff for the striking of said answers and the entry of summary judgment, I shall present the affidavits of Samuel Schechner and Samuel Roessler, hereto attached.

SAMUEL ROESSLER,
Attorney for Plaintiff.

Affidavit of Samuel Schechner.

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

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

1. I am the President of The Alert Building & Loan Association of the City of Newark, a corporation, the plaintiff in the above entitled suit.

2. The said association was the holder of a certain bond bearing date October 9, 1930 in the penal sum of $22,000.00 conditioned for the payment of $11,000 together with interest at six per centum in the manner therein provided. Said bond was made and executed by the defendants, William S. Bechtold and George Schumacher, together with one Frank D. Moore.

3. To secure the payment of the said bond the above named obligors executed and delivered to the plaintiff a mortgage bearing even date therewith, in the same amount, embracing land and premises then owned by the said obligors and known and designated as 529-531 South 10th street, Newark, N. J.; and as further security for the repayment of the said sum of $11,000.00 together with interest the defendant, William S. Bechtold assigned to the said association certificate No. 25594 for fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey.

4. Default having occurred in the terms of the aforementioned bond and mortgage, the said association passed a resolution for the foreclosure

of said mortgage, and thereafter, on or about the 21st day of July, 1936 a bill of complaint was filed in the Office of the Clerk of the Court of Chancery of New Jersey for the foreclosure of the aforementioned mortgage and for the sale of the said shares of stock so pledged as aforesaid.

5. Due proceedings having been had in said foreclosure proceedings, a writ of execution was duly issued out of said court, directed to the Sheriff of the County of Essex who, after having duly advertised the same, conducted a sale at the Court House in the City of Newark on December 29, 1936, and the plaintiff herein became the purchaser, and thereafter the said Sheriff did execute and deliver to the plaintiff his deed bearing date March 25, 1937 and which was duly recorded in the Essex County Register's Office on April 15, 1937 in Book A-92 of Deeds for said County, pages 107-110.

6. In and by the terms of the final decree entered in said foreclosure proceedings there was found to be due to the plaintiff the sum of Ten thousand five hundred eighty-five dollars and seventy-one cents ($10,585.71) together with interest from September 18, 1936 and the taxed costs in said foreclosure proceedings amounting to the sum of $349.53, and after crediting the said defendants upon said decree and execution with the amount of the proceeds of said sale, there remained due to the said plaintiff a deficiency in the amount of Ten thousand nine hundred fifty-three dollars and five cents ($10,953.05). I further say that no part of said sum has been paid.

SAMUEL SCHECHNER.

Affidavit of Samuel Roessler.

Subscribed and sworn to before me
this 5 day of May, 1937.

SHERMAN SCHECHNER,
A Notary Public for N. J.

Affidavit of Samuel Roessler.

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

SAMUEL ROESSLER, being duly sworn according to law upon his oath deposes and says:

1. I am the attorney for The Alert Building & Loan Association of the City of Newark, a corporation, the plaintiff in the above entitled suit. On its behalf, and pursuant to a resolution which was duly passed by the Board of Directors of said association, I did, on or about the 21st day of July, 1936 cause to be filed in the Office of the Clerk of the Court of Chancery, a bill of complaint for the foreclosure of the bond and mortgage held by said association, made and executed by the defendants, William S. Bechtold and George Schumacher and one Frank D. Moore, in the principal sum of $11,000.00; as also for the sale of certificate No. 25594 for fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey, which certificate had been pledged at the time of the granting of the loan made by said association to said defendants.

2. The defendants having been duly served in said foreclosure proceedings and having failed to file an answer or other pleading, a decree pro confesso was duly entered therein and thereafter,

after the filing of the Master's Inspection Report, a final decree was duly entered in said proceedings wherein and whereby it was adjudged that there was due to the complainant for principal and interest on its said bond and mortgage the sum of Ten thousand five hundred eighty-five dollars and seventy-one cents ($10,585.71) together with interest from September 18, 1936.

3. On October 6, 1936 a writ of fieri facias was issued out of said court in said proceedings directed to the Sheriff of the County of Essex commanding him to make sale of said mortgaged premises and of said certificate of stock. The Sheriff of said County, after having duly advertised the same, conducted a sale at the Court House in the City of Newark on December 29, 1937, and the plaintiff being the highest bidder became the purchaser.

4. On December 31, 1936 the defendant, William S. Bechtold filed objections to the confirmation of said sale and thereafter, upon notice of a motion to dismiss said objections, the said defendant, William S. Bechtold withdrew the same in open court and thereupon, on March 23rd, 1937 an order was entered dismissing said objections.

5. The Sheriff of Essex County has since executed and delivered to the complainant, his deed, which deed was recorded on April 15, 1937 in Book A-92 of Deeds for said County, pages 107-110.

6. I further say that on April 21, 1937 and within three months after the entry of the order confirming Sheriff's sale and prior to the institution of this action, I caused to be filed in the Office of the Register of Deeds and Mortgages in

and for the County of Essex, being the County in which said mortgaged premises are situate, a written notice of this action, setting forth the court in which it was proposed to bring said action, the names of the parties to said bond and action, the book and pages of the record of the said mortgage, together with a description of the mortgaged premises, according to the statute in such case made and provided.

SAMUEL ROESSLER.

Subscribed and sworn to before me
this 5th day of May, 1937.

RALPH KAPLAN,
An Attorney at Law of N. J.

Affidavit of Oscar H. Merz.

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

OSCAR H. MERZ, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am the Secretary of The Alert Building & Loan Association of the City of Newark, a corporation of New Jersey, the complainant in the above entitled cause. As such Secretary I have charge of the books of account of said association and I am familiar with the account of the defendants with said association in relation to the mortgage loan which is the subject matter of this suit. At the time of the institution of this suit, the defendants, William S. Bechtold and George Schumacher, the owners of the mort-

gaged premises, had defaulted in the monthly payments of dues and interest on the mortgage held by the complainant, for upwards of three months. Because of such default, the complainant elected that the entire principal sum with interest, be due and by resolution directed the institution of these proceedings.

2. The complainant, The Alert Building & Loan Association of the City of Newark, is the holder of a certain bond bearing date October 9, 1930, made and executed by William S. Bechtold, George Schumacher and Frank D. Moore to the complainant in the penal sum of $22,000.00, besides interest at six per centum per annum. Said bond was given to secure the sum of $11,000.00 loaned by said complainant, and was made payable in installments of One Dollar per month on each of the fifty-five shares of the capital stock of the said corporation owned by said defendants, and payable during the continuance of complainant as such association or until the fifty-five shares owned by the said defendants in the said association and assigned as collateral security for the payment of said money, should have matured, together with all fines, premiums and advancements, or other payments or charges. (Solicitor for the complainant offers said bond in evidence and it is marked Exhibit C. 1 for the complainant.)

3. The complainant is also the holder of a certain mortgage which was given to secure said bond and which bears even date therewith, made and executed by the defendants, William S. Bechtold and Henrietta Bechtold, his wife, George Schumacher and Sarah Schumacher, his wife, and Frank D. Moore and Esther Moore, his wife, to complainant to secure the principal

sum of $11,000.00 besides interest at six per centum per annum, payable monthly and embracing the lands and premises described in the bill of complaint herein. Under the terms of said mortgage, the said defendants, for themselves, their heirs, executors, administrators or assigns, agreed to pay the said sum of $11,000.00 in the manner hereinabove recited, and as specially provided for in and by the terms of said bond and mortgage. Said mortgage, after having been duly acknowledged according to law, was recorded in the Essex County Register's Office on October 10, 1930 in Book L-70 of Mortgages for said County, pages 413-416, as appears from the endorsement thereon. (Solicitor for the complainant offers said mortgage in evidence, and it is marked Exhibit C. 2 for the complainant.)

4. As additional collateral security for said mortgage loan, the defendant, William S. Bechtold, assigned to the complainant fifty shares of the capital stock of Firemen's Insurance Company of Newark, New Jersey, owned by him, evidenced by Certificate No. 25594, dated October 9, 1928, which said certificate and assignment are in the possession of complainant and still held by it as collateral security, and a sale thereof is prayed for in and by the bill of complaint herein. (Solicitor for the complainant offers said certificate in evidence, and it is marked Exhibit C. 3 for the complainant.)

5. There is due to the complainant, The Alert Building and Loan Association of the City of Newark, for principal and interest on said bond and mortgage, together with advancement made for taxes and insurance premiums and disbursements made since November, 1933, at which time the complainant entered into the possession of

said mortgaged premises, the sum of Ten Thousand five hundred eighty-five dollars and seventy-one cents ($10,585.71), as shown in and by the statement prepared by me and attached hereto. Said sum of $10,585.71 is the balance due after crediting the defendants with the rents collected since November, 1933, amounting to $2,486.44, all of which also appears in the statement so prepared by me and attached hereto.

6. The aforementioned statement, showing the amount due the complainant, referred to in the preceding paragraph, contains all of the items of charge and credit relating to the ownership by the complainant of the aforementioned bond and mortgage as said items appear on the books of the association under my charge and supervision. The defendants have been credited in full with all of the rents of the mortgaged premises collected by the complainants as mortgagee in possession since November, 1933, on which last mentioned date it entered into possession of said mortgaged premises because of default on the part of the mortgagors, and there is also a charge against the said mortgagors and defendants herein, of the disbursements made during the course of management of said premises since November, 1933, amounting to $823.06 as appears from said statement.

Among the items charged against the defendants, and forming part of the mortgage debt, are the following viz: $37.35 being the balance due for 1931 taxes advanced August 7, 1933; $184.35 advanced by complainant on June 10, 1936 for 1934 taxes; $257.65 advanced by complainant on June, 10 1936 for 1935 taxes; $121.56 advanced by

complainant on June 10, 1936, for 1936 taxes, and the following items representing advancements actually made by complainant for fire insurance premiums: October 28, 1933, $64.00; December 27, 1933, $15.00; December 29, 1934, $4.39; April 28, 1935, $22.50; Auril 20, 1936, $21.13. On August 21, 1935 complainant paid the sum of $14.70 for the dispossession of a tenant, as appears from the said statement. The item of $808.36 under the head "Operating Expenses," is supported by the detailed statement of disbursements for repairs, water charges, etc., as itemized on said statement.

7. I further say that the amount due to the complainant as set forth in the statement attached hereto, is the sum of $10,585.71, no part of which said sum has been repaid to the complainant. The defendants are not entitled to any other credits than appear upon said statement.

8. I further say that I am familiar with the mortgaged premises. They consist of a lot fifty feet in width by ninety-one feet and sixty-one one-hundredths of a foot deep upon which land there are erected two two-family frame dwelling houses. Said buildings cover substantially the entire width of said lot. Said land and premises are not susceptible of division without destroying the value of said mortgaged premises. In my opinion, said premises should be sold as a whole and not in parcels.

O. H. MERZ.

Subscribed and sworn to before me
this day of September, 1936.

.....

Decision.

DECISION.

(Filed June 21, 1937.)

On motion to strike out answer.

Samuel Roessler for the plaintiffs.

Saul J. Zucker for the defendants.

WILLIAM A. SMITH, *Circuit Court Judge.*

A motion was submitted to me in the above matter to strike out the answer filed by the defendants and for a summary judgment. The suit is to recover a deficiency on a bond after the sale of the mortgaged premises which secured the bond. The only question to consider on the motion is whether or not the defendant may plead as a defense the right given under Chap. 88, P. L. 1935, p. 260, to have a jury determine what the fair market value of the mortgaged premises was at the time of the Sheriff's sale and deduct that amount from the amount of the deficiency, instead of permitting recovery of the deficiency as determined by the foreclosure decree with credit of the amount received as the Sheriff's sale.

The question of the constitutionality of this Act has already been passed upon in the Supreme Court; *Fidelity Union Trust* vs. *Bryant,* 183 Atl. Rep. 825; *Sayre* vs. *Duffy,* 179 Atl. Rep. 459. I agree with the conclusions reached in these two cases that the Act is unconstitutional as to obligations existing when it was passed, specifically because it violates Article 4, Section 7, paragraph 3 of our Constitution, in that it deprives the plaintiff of a remedy for enforcing his contract which existed when the contract was made.

When the contract was made, the remedy in so far as protecting the obligor on the bond from being obligated to become liable for unwarranted

deficiency was to oppose the confirmation of the Sheriff's sale; before the 1935 Act was passed the holder of the bond had the benefit of the determination as to the amount due fixed by the Court of Chancery in the foreclosure suit and that determination was final and res judicata in the suit on the bond. *Usbe Building & Loan* vs. *Ocean Pier, etc.,* 112 N. J. Eq. 50. The 1935 Act gives an additional remedy to the obligor on the bond, namely the setting up as a defense in the suit for deficiency the fact that the fair market value of the mortgaged premises was not realized at the Sheriff's sale and the obtaining of the credit of the fair market value of the premises in the suit for deficiency.

The setting up of this defense in the deficiency suit certainly deprives the holder of the bond of his remedy theretofore existing from having the determination of the amount due in the foreclosure suit conclusive.

Before the statute was passed, the amount bid at the Sheriff's sale in the foreclosure suit determined the amount that must be deducted from the decree and, when the sale was confirmed, the amount of the deficiency was fixed. The amount that must be credited against the decree is made conclusive by the sale and confirmation and cannot be questioned in the deficiency suit. The realization on the sale of the best price then obtainable determined that the holder of the bond has exhausted his security and he may then look to the obligor on the bond for the deficiency so fixed.

Now, under the 1935 Act, the holder of the bond, notwithstanding the security has been sold in the foreclosure proceedings, is required in a deficiency suit to meet the issue permitted to be

raised by the 1935 statute, in addition to having had to satisfy the Chancellor that he had obtained the best price obtainable for the security. A new rule of damage is, therefore, set up by the statute, the new rule being that the obligor on the bond may set off the fair market value of the security, notwithstanding the security may not bring that on a sale, and the holder of the bond is deprived of the conclusiveness of a sale in the foreclosure suit establishing the credit to be given for the collateral. This conclusive determination made by the sale and confirmation was what the holder of the bond had before the passage of the 1935 statute. It seems to me that, if we give effect to the 1935 Act, he is deprived of a remedy for enforcing his contract that he had before the passage of the act.

Counsel now asks the Court, on the strength of the determination had in the United States Supreme Court in the case of *Richmond Mortgage & Loan Corporation* vs. *Wachovia Bank & Trust Company,* 57 Sup. Ct. 338 (235 Advance Opinions, p. 361), decided February 1, 1937, on appeal from a decision of the Supreme Court of North Carolina reported in 185 Southeastern 82; 210 N. C. 29, to declare the Act of 1935 valid as to obligations existing at the time of its passage.

I do not think the determination of that case or the reasoning therein contained calls upon this Court to change the previous determinations on the question of the constitutionality of the 1935 Act here under consideration in so far as obligations incurred previous to its passage.

The North Carolina Act provides that, when the holder of an obligation secured by real estate or personal property causes a sale of the prop-

erty by a trustee holding title to the collateral and becomes the purchaser at the sale for a sum less than the amount of the debt and afterwards brings an action for the deficiency, the defendant in such an action may show by way of defense or set off that the property sold by the trustee was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property and thus defeat the claim in whole or in part. As I understand it, when loans of money are to be secured by real estate, it is usual in North Carolina to evidence the same by notes and a conveyance of the real estate to a trustee with power of sale. The realizing upon collateral may also be had in North Carolina through foreclosure in the Court of Chancery and I believe that a deficiency judgment may be obtained in that action. The North Carolina statute under consideration in the Supreme Court case cited did not, by its terms, interfere with or affect the rights of the parties where foreclosure was had in the Court of Chancery.

In considering this matter, we must remember that the Supreme Court was considering Article One, Section 10 of the Federal Constitution prohibiting the passage of statutes impairing the obligation of contracts. In the case here presented we are considering our own Constitution, which provides that a party to a contract may not be deprived of a remedy for enforcing it which existed when the contract was made.

The North Carolina statute only applies where the holder of the obligation becomes the purchaser at the trustee's sale and it will therefore be seen that the contractual rights are not disturbed. If the holder of the bond wants to take

title to the security on sale from the trustee, then the fair market value must be credited against the debt and not the amount which he may bid if the trustee sells. But if the holder of the bond wants to fix his deficiency at a sale, he may foreclose and, I assume, by satisfying the Chancellor that the best price has been obtained, he may let the property be sold either to himself or to some third party and he may hold the obligor for the deficiency between the amount of the debt and the price realized at the foreclosure sale.

The 1935 Act now under consideration permits the defendant to credit the fair market value in the deficiency suit, notwithstanding the sale has been made to a third party. Clearly under such circumstances the holder of the bond is unconstitutionally deprived of the difference between the sale price and the fair market value, if the latter is greater, because after having credited the price received at the sale, he must in the deficiency suit go further, if it is established it is not at least the fair market value, and credit the fair market value in lieu of the amount realized at the sale. Chapter 88, P. L. 1935 as applied to contracts made before it took effect is unconstitutional because it deprives the holder of a bond secured by a mortgage of a remedy for enforcing his bond which existed when the bond was made.

The motion to strike out the answer and for summary judgment will be granted.

ORDER FOR SUMMARY JUDGMENT.

(Filed June 22, 1937.)

It appearing by affidavit filed in the above cause that the defense made by the answers filed by the defendants William S. Bechtold and George Schumacher is sham, and that the separate defense of the answer is frivolous and does not constitute a legal defense to the plaintiff's cause of action, and the said defendants, William S. Bechtold and George Schumacher, after due notice, having failed to show such facts as entitled them to defend:

It is, on this 22nd day of June, 1937 ORDERED that the defense of said defendants, William S. Bechtold and George Schumacher be struck out and that final judgment be entered in favor of the plaintiff for the sum of ten thousand nine hundred fifty-three dollars and five cents ($10,953.05) and costs.

WILLIAM A. SMITH,
Circuit Court Judge.

On Motion of:

SAMUEL ROESSLER,
Attorney for Plaintiff.

Notice of Appeal.

NOTICE OF APPEAL.

(Filed August 15, 1937.)

To:
Samuel Roessler, Esq.,
Attorney of Plaintiff,
60 Park Place,
Newark, N. J.

SIR:

The defendants, William S. Bechtold, and George Schumacher, hereby appeal to the New Jersey Court of Errors and Appeals, the Court of last resort in all causes, from a judgment entered herein on June 22, 1937, for $10,953.05 damages, and costs.

Dated: August 14, 1937.

Yours, etc.,

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys of Defendants, William S. Bechtold and George Schumacher.

Judgment.

JUDGMENT.

Entered June 22, 1937.

ESSEX COUNTY CIRCUIT COURT.

72625 THE ALERT BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, a corporation, *Plaintiff,* *vs.* WILLIAM S. BECHTOLD, and GEORGE SCHUMACHER, *Defendants.*	*Action at Law.* *Summary Judgment.* *On Order Striking Out Defense By Order of the Court.*

June 22, 1937.

Damage	$10,953.05
Costs	67.80
Total	$11,020.85

Judge William A. Smith.

Samuel Roessler, attorney of plaintiff.

Summary Judgment On Order Striking Out Defense by Order of the Court in the above entitled action was rendered on the Twenty-second day of June A. D. Nineteen Hundred and Thirty-seven in favor of the plaintiff, The Alert Building and Loan Association of the City of Newark, a corporation and against the defendants William S. Bechtold and George Schumacher for the sum of Ten Thousand Nine Hundred Fifty-three Dollars and Five Cents ($10,953.05), dam-

Judgment.

age and Sixty-seven Dollars and Eighty Cents, costs of suit.

Judgment signed and entered June 22, 1937.

CHARLES W. PARKER,

J.

Book 127, page 354, Circuit Court Judgments.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THE ALERT BUILDING & LOAN ASSOCIATION OF THE CITY OF NEWARK, a corporation, *Plaintiff-Respondent,* *and* WILLIAM S. BECHTOLD, *et al.*, *Defendants-Appellants.*	*On Appeal from Circuit Court.* *Grounds of Appeal.*

Defendants-appellants hereby specify the grounds upon which they will rely for a reversal of the judgment entered in the Essex County Circuit Court June 22, 1937, for $10,953.05 and costs:

1. The Court below erred in striking the answers filed by the defendants and ordering summary judgment to be entered, since said answers legally and properly put in issue the fair market value of the real estate securing the bond upon which the complaint was filed, under and pursuant to the terms and provisions of Chapter 88, P. L. 1935.

2. The action of the Court below in striking the answers filed by appellants, and the refusal of the Court to grant and permit appellants the benefit of Chapter 88, P. L. 1935, was repugnant to, and in violation of, Section 1 of the 14th Amendment to the Constitution of the United

States, in that said action denied to appellants the equal protection of the laws.

3. The action of the Court below in striking the answers filed by appellants, and the refusal of the Court to grant and permit appellants the benefit of Chapter 88, P. L. 1935, was repugnant to, and in violation of, the Fifth Amendment to the Constitution of the United States, in that the action of the Court below amounted to a deprivation of appellants' property without due process of law.

4. The Court below erred in determining that Chapter 88, P. L. 1935, insofar as said Statute affected bonds and mortgages executed prior to the effective date of said Statute, was violative of Article 4, Section 7, paragraph 3 of the New Jersey Constitution, and Article 1, Section 10 of the Constitution of the United States, since said Statute does not impair the obligation of contract, nor does it deprive the holder of a contractual right or a remedy for enforcing said contract which existed when the contract was made, without providing a legal substitute therefor.

Dated: September 21, 1937.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Attorneys for Defendants-Appellants, William S. Bechtold and George Schumacher.

To be argued by
Mr. Saul J. Zucker.

New Jersey Court of Errors and Appeals

THE ALERT BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, a corporation,
Plaintiff-Respondent,

vs.

WILLIAM S. BECHTOLD, *et al.*,
Defendants-Appellants.

Action at Law.
On Appeal from Circuit Court.

BRIEF ON BEHALF OF APPELLANTS.

(Italics ours except where otherwise noted.)

Statement.

This is an appeal from a judgment (S. C. 25) entered in the Essex County Circuit Court on June 22, 1937, pursuant to an order which struck out the answers of appellants William S. Bechtold and George Schumacher, as sham and frivolous, and ordered final judgment to be entered in favor of respondent for the sum of $10,953.05 and costs (S. C. 23).

The issue on this appeal is a narrow one—the constitutionality of Chapter 88, P. L. 1935, with respect to bonds and mortgages executed and delivered prior to the effective date of the Statute. In other words, is a defendant in a deficiency suit after foreclosure of a mortgage, entitled to have the "fair value" of the premises determined *at law*, notwithstanding the bond and mortgage antedated the effective date of the "Fair Value Statute" (Ch. 88, P. L. 1935)?

Facts.

On October 9, 1930 William S. Bechtold, George Schumacher and Frank D. Moore executed a certain bond bearing said date to the Alert Building and Loan Association of the City of Newark, in the penal sum of $22,000 conditioned to pay $11,000 with interest at six per centum per annum (S. C. 1, l. 25). On the same date, the aforementioned parties and their wives executed a mortgage to respondent building and loan association, on certain lands and premises whereof the parties were seized in fee (S. C. 1, l. 35).

On September 29, 1936 a final decree of foreclosure and for the sale of the said lands and premises described in the said mortgage was made in the Court of Chancery in a foreclosure suit brought by respondent Alert Building and Loan Association against William Bechtold *et al.*, and said decree adjudged that there was due upon said bond and mortgage the sum of $10,585.71, and directed that a writ of *fieri facias* issue to the Sheriff of the County of Essex for the sale of said lands and premises. Respondent bought in the property at the Sheriff's sale for $100 (S. C. 3, l. 35).

On April 21, 1937, respondent instituted the present suit at law in the Essex County Circuit Court against William S. Bechtold and George Schumacher as obligors on the aforementioned bond. The sum demanded is $10,953.05, the deficiency alleged to be due to the building and loan association after buying in the foreclosed property for the sum of $100 (S. C. 4, l. 9).

Appellants in their answers disputed the amount of the deficiency alleged to be due to respondent in the complaint, and requested that the Circuit Court determine the amount of said deficiency

after hearing testimony of the fair market value of the mortgaged premises at the time of the sale under the foreclosure proceedings mentioned in the complaint; and that the court, after determining the fair market value of said mortgaged premises, deduct said amount from the debt alleged to be due, all in accordance with the provisions of an act entitled, "A Supplement to An Act Entitled, 'An Act Concerning Proceedings on Bonds and Mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder,' approved March 12, 1880," approved March 22, 1935, and being known as Chapter 88, P. L. 1935 (S. C. 7).

Upon application of respondent to strike the answers, the Circuit Court Judge held the aforementioned Act to be unconstitutional as applied to contracts made before its effective date (S. C. 18-22), and on June 22, 1937, entered an order striking appellants' defense as sham and frivolous, and ordering the entry of final judgment in favor of respondent for the sum of $10,953.05 (S. C. 23). The judgment was entered in the Essex County Circuit Court on June 22, 1937 (S. C. 25-26).

Appellants have appealed to this Court (S. C. 24) on the ground that the Circuit Court erred in deciding that Chapter 88, P. L. 1935, insofar as said statute affected bonds and mortgages executed prior to the effective date of said act, was violative of Art 4, Sect. 7, par. 3 of the New Jersey Constitution, and of Art. 1, Sect. 10 of the U. S. Constitution (S. C. 27-28). Appellants also contend that the action of the court below denied the equal protection of the laws to them in violation of Sect. 1 of the 14th Amendment to the Constitution of the United States, and also amounted to a deprivation of their property without due process of law in violation of the fifth amendment to the Constitution of the United States (S. C. 27-28).

LAW.

Chapter 88, P. L. 1935, as applied to the facts in the case at bar is entirely constitutional, in that it violates neither the New Jersey nor the United States Constitutions, and therefore should govern the procedure instituted in the Court below by the respondent in its suit for a deficiency judgment.

A.

The defects in Chapter 82, P. L. 1933, as pointed out by this Court in *Vanderbilt* v. *Brunton Co.*, 111 N. J. L. 596, have been cured by the present statute.

This appeal presents the question of the constitutionality of Chapter 88, P. L. 1935, for the first time to the Court of Errors and Appeals. This statute modified the provisions relating to the collection of a debt secured by a bond and mortgage, as enacted by the legislature in Chapter 82, P. L. 1933. This court in *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596, declared the 1933 Act unconstitutional with respect to bonds executed before said Statute took effect. It was decided in that case that such an application of the Statute would be an impairment of a pre-existing contract right and thus violative of Art. 1, Sect. 10 of the Federal Constitution and Art. 4, Sect. 7, par. 3 of the New Jersey State Constitution.

Counsel in the *Vanderbilt* case had argued that the Act could be sustained as a valid exercise of the police power of the State of New Jersey. This court took judicial notice of the great financial emergency menacing so many of the residents of New Jersey, which had caused the legislature to enact the 1933 statute to protect mortgagors from

oppressive suits during these troubled times. But the court held that the Act was defectively drawn in that it contained no provisions stating the existence of an emergency nor limiting the duration of the statute for the period of the emergency. *Since these important provisions had been omitted, the 1933 Act was not a proper exercise of the state's police power and therefore could not be sustained on that ground.*

To cure these defects, the Legislature enacted the Statute, the constitutionality of which is now under consideration in the case at bar,—Chapter 88, P. L. 1935. *In its preamble the Act expressly states the existence of the emergency, and limits the duration of the statute until July 1, 1938.* Thus, the shortcomings of the 1933 Act, as indicated by this court in *Vanderbilt* v. *Brunton Piano Co., supra,* have been overcome and corcorrected.

It is submitted, therefore, that the 1935 Act should be sustained as a valid exercise of the police power of the state in the promotion of the common good.

B.

The facts of *Vanderbilt* v. *Brunton Piano Co.* clearly distinguish it from the case at bar.

An important factor in the decision in the *Vanderbilt* case was that the 1933 Act was enacted, not merely after the making of the bond in suit, but subsequent to the conclusion of the Chancery proceedings to foreclose, and *subsequent also to the institution of the very action on the bond.*

In the words of the Court:

> "The mortgagee instituted such an action on the bond, *and then, and not until then, came the 1933 amendment.*"

Such facts clearly present a more forceful argument for refusing to recognize the protective and beneficial features of the Act than where, as in the case at bar, the suit on the bond for the deficiency was instituted almost two years *after* the 1935 Act took effect. Indeed, it is strongly urged that the holding in *Vanderbilt* v. *Brunton Piano Co.* can be sustained entirely on this ground, and the balance of the opinion may be considered as mere dicta. In any event, this may properly be considered as another element distinguishing the *Vanderbilt* case from the present suit before the Court.

C.

A recent decision of this Court, *Bucsi* v. *Longworth Building and Loan Co.*, holds squarely that legislation of the type now before this Court should be sustained as a valid exercise of the police power of the State.

In *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120, a case decided by this court in October 1937, Chapter 102, P. L. 1932 was upheld even as to contracts entered into before the enactment of the statute. In that case, Mrs. Bucsi had subscribed for stock in the building and loan association in 1919. She had given written notice of her intention to withdraw from the association in 1931 and then had started the present suit in 1934 to recover the withdrawal value of ten installment shares of stock held in the association, as was permitted under Chapter 65, P. L. 1925, the statute in effect at the time she gave notice of her withdrawal. Between the date of the notice and the commencement of the suit, Chapter 102, P. L. 1932 was enacted. This statute radically changed the rights and privileges of withdrawing shareholders, in that it restricted the amounts that could be withdrawn, in some in-

stances even denying payment of any withdrawals. Indeed, it expressly denied the right of the withdrawing shareholder to sue and recover the withdrawal value of his shares if the funds in the association had been applied as directed in the said Act.

Plaintiff there, strongly contended that the 1932 Act was unconstitutional as affecting her withdrawal rights vested under P. L. 1925, Chapter 65, and invoked the same constitutional arguments as has the respondent in the case at bar.

Although the statute in the Bucsi case made no reference to any emergency, nor was its duration limited, this court sustained its constitutionality as a valid exercise of the police power of the state.

The court clearly held that neither Art. I., Sect. 10 of the U. S. Constitution nor Art. IV., Sect. 7, par. 3 of the N. J. Constitution can hamper the State in legislating under its reserved power to protect the vital interests of all its people, saying at page 123:

> "It is well settled, however, that the constitutional interdiction against statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into may thereby be effected."

And at page 130:

> *"Assuming that the appellant has a vested right of contract, the obligations on contract must yield to a proper exercise of the police power of the state and vested rights cannot inhibit the proper exercise of the power."*

And at page 131:

> "The constitutional prohibition against the impairment of the obligation of contracts does

> not make it impossible for the state, in the exercise of its essential reserved power, to protect the vital interests of all its people. The exercise of that reserved power has been repeatedly sustained against a literalism of the contract clause which would make it destructive of the public interest by depriving the state of its prerogative of self-protection."

This court in the *Bucsi* case took judicial notice of the fact that a large number of New Jersey residents are members of building and loan associations, that these associations invest heavily in first mortgages on real estate located in New Jersey, that the associations have foreclosed thousands of these mortgages and bought in the property at the public sale, and that the value of these mortgages runs into hundreds of millions of dollars. The court also judicially noticed the enactment by the Congress of the United States of the Home Owners Loan Act on June 13th, 1933, chapter 64, article 1, 48 Stat. 128, tit. 12, par. 1463, U. S. C. A. and that it is also common knowledge that thousands of mortgagors who were in default to the associations availed themselves of the benefit of this statute.

The court also very clearly pointed out that the legislatures of 1903 and 1925 could not foresee the subsequent economic collapse of the country, and consequently it was the duty of later legislatures to amend the early statutes to conform with present day business conditions:

> "When the legislature in 1903 gave to withdrawing shareholders the unqualified privilege of suit it did not foresee the economic collapse through which this country has labored for the last eight years, with the consequent credit stringency, loss of employment, and collapse of price levels. It is unnecessary to cite official statistics to establish what is common knowledge throughout the

length and breadth of the land. West Coast Hotel Co. *v.* Parrish, U. S. ; 8 L. Ed. 455, 463. In the face of this financial stringency the number of withdrawals filed by shareholders of associations accelerated at a very rapid rate. It cannot be assumed that they were an exception to what was generally happening in all saving institutions'' (pp. 127-8) * * *.

''The legislatures of 1903 and 1925 were neither omniscient or prescient and events proved to the legislature of 1932 that the unfettered privilege of suit granted to withdrawing members compelled these associations to accede to the prior demands of those who made an early request for withdrawals which would completely undo the major purposes for which they were created. The 1932 legislature faced the unenviable choice of permitting conditions to continue as they were with the inevitable result being the actual insolvency of most, if not all, of the associations, or it could regulate the rights of a withdrawing shareholder in a manner consonant with mutuality. It chose the latter and enacted the statute in question'' (pp. 128-9).

From the above language it is clear that this court in the *Bucsi* case recognized that the current economic depression has resulted in innumerable mortgage foreclosures in this state, and that the value of real estate has greatly depreciated. Therefore, the statute respecting building and loan associations was upheld under the police power of the state to protect these associations from the effects of this decline in value of real estate.

What better analogy could there be to the situation in the case at bar? Just as the legislatures of 1903 and 1925 could not foresee the future, neither could the legislature of 1880, which first enacted the statute regulating the procedure to be followed on mortgage foreclosures, foretell that

economic conditions in 1933 and 1935 would require a change in the remedy of the foreclosing party. The 1935 statute was passed to protect the great number of mortgagors and bondsmen in New Jersey from being held liable for huge deficiencies on their mortgages and bonds, which had been collateral for real estate worth many times its present value at the time of the execution of the bonds and mortgages. In short, the legislature in 1932 protected the building and loan associations from the effects of the depression, and in 1935 it went to the rescue of the mortgagors and bondsmen who also were menaced by the unforeseen economic decline.

This court, having upheld the statute protecting building and loan associations, should certainly sustain the Act safeguarding the interests of the mortgagors and their sureties.

In the *Bucsi* case, it was intimated that the subject matter of the contract in *Vanderbilt* v. *Brunton* was not *per se* affected with a public interest, but that "the statute, there in question, had effect only upon the interests of the respective contracting parties since the contracts affected thereby were of themselves only capable of a legal or economic force which was coterminous with the limits of the contract."

The statute in the *Vanderbilt* case, as in the case now before this court, endeavored to protect the interests of mortgagors and their sureties from the abnormal disruption in economic and financial processes and from the abnormal deflation of real property values. This court, in the *Bucsi* case, stated that the contracts between the mortgagees and the mortgagors and their sureties as set forth in the *Vanderbilt* case, had no relation to the public interest. Appellants urge that this statement is not entirely accurate or consistent with the general views of this court as ex-

pressed in other language in the *Bucsi* case at pages 129, 130:

> "The value of real property and real estate mortgages was largely gone for the time being and liquidation could only be had on ruinous terms, but these values were susceptible of ultimate return. The result would be chaos and even under orderly liquidation of this vast amount of assets the ultimate return of these values would be indefinitely postponed if not irreparably impaired. *The state has an important interest in the maintenance of real estate values because these values form the major base upon which its tax structure and its various political subdivisions rests. The stability of the tax base over a term of years is vitally important to the state.*"

It is clear then, that the factual background of legislation of the kind considered in both the *Bucsi* case and in the case at bar, is fraught with a *high degree of public interest.*

Moreover, the court in the *Vanderbilt* case in holding that the police power of the state could not be invoked since the statute was not expressly founded upon an emergency basis, indicated indirectly that the situation involved was affected with a public interest. In that case, the power of the legislature to deal with the matter at hand was not questioned if a proper basis was laid, but only the particular defects in the act to carry out the will of the people:

> "We may take judicial notice of the financial emergency that now presses upon so many people in so much of the world, but we may not read into the statute a limited duration that is neither expressed nor implied therein, nor do we subscribe to the intimation that an emergency automatically lifts all constitutional restraints. The statute does not grant a stay or a delay, and therefore does

not deal with the question of moratorium. The subject matter of the point under discussion does not save the statute from the fault laid against it."

It is apparent, therefore, that the very features which induced the criticism by this court of the 1933 Statute—both in the *Vanderbilt* and *Bucsi* cases—have been cured by the preamble and body of the 1935 Statute.

D.

The views of the Supreme Court of the United States should serve as a guide to our courts in making decisions in analagous situations.

A recent case in the U. S. Supreme Court, *Richmond Mortgage and Loan Co.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, 81 Law Ed. 552 (1937), indicates clearly that the highest court in the land strongly favors legislation to protect the interests of the mortgagor and his surety. That case sustained a North Carolina statute very similar in purpose and form to the act now before this court. The Supreme Court held that the passage of a North Carolina statute subsequent to the execution and delivery of the mortgage which was later foreclosed did *not* impair the mortgagee's right of contract. It merely afforded a modified remedy for enforcing the same.

The only respect in which the North Carolina statute differs from the New Jersey statute is that it specifically states that the right to contest the deficiency *at law* does not exist where the purchaser at the foreclosure sale is one other than the mortgagee, payee or holder of the obligation—although it expressly applies where such a party takes title either directly or *indirectly.* The New Jersey statute is silent in that respect, but the

rationale of the United States Supreme Court opinion does not depend upon that fact. It should make no difference by whom the property is purchased at foreclosure sale. *The purpose of the Statute is to prevent the mortgagee from being unjustly enriched at the mortgagor's expense.* Consequently, whether the mortgagee purchased the property at the foreclosure sale, or permitted it to be bought in by a third party at a ridiculously low figure, only to subsequently sue the mortgagor for the remaining deficiency, the resulting detrimental effect upon the mortgagor would be the same, if the mortgagee could collect the fictitious deficiency thus obtained.

As was said by Justice Roberts in the *Richmond* case:

> "The loan rendered the appellees debtors to the appellant. For that debt the borrower pledged real estate as security. The contract contemplated that the lender should make itself whole, if necessary, out of the security, but not that it should be enriched at the expense of the borrower or realize more than would repay the loan with interest. The state provided remedies whereby the security could be made available for solution of the debt."

Appellants concede that in North Carolina the usual method of foreclosure by bill in chancery still exists, but maintain that the North Carolina statute by modifying the method of foreclosure under a power of sale, has clearly impaired the *complete remedy formerly enjoyed by the mortgagee.* Before the act, the mortgagee had two courses of procedure on foreclosure. *After the act, one of these methods had been changed.* Clearly some of the mortgagee's former remedies have been removed and modified. Yet the Supreme Court decided that the statute did not violate any constitutional privileges of the mortgagee.

It is urged that this Court recognize this decision of the United States Supreme Court as indicative of that court's views on legislation similar to that now before this court, and conform its decision thereto. Just as the decision of the Supreme Court, upholding the constitutionality of the "Fair Trade" Acts of California and Illinois induced this Court to uphold the constitutionality of the "Fair Trade" Act of this State, so this Court should now recognize the constitutionality of Chapter 88 of the Laws of 1935. The highest court of the land has *impliedly* recognized its constitutionality in the case herein cited.

E.

The only cases holding Chapter 88, P. L. 1935, unconstitutional as applied to mortgage bonds executed before the effective date of the statute, are two lower court decisions which may be distinguished or overruled by this Court.

Appellants are aware that Ch. 88, P. L. 1935 has been held unconstitutional, as applied to mortgage bonds executed before its enactment, in two cases, *Sayre* v. *Duffy,* 13 N. J. Misc. 458, and *Fidelity Union Trust Co.* v. *Bryant,* 14 N. J. Misc. 243. Not only are these decisions lower court opinions, and therefore not binding on this court, but there are features in each case distinguishing it from the one at bar.

In the *Sayre* case, the judge decided that the inclusion of the provision in the 1935 statute limiting the duration of the statute until July 1, 1938 did not cure the defect in the 1933 Act as pointed out by the court in *Vanderbilt* v. *Brunton Piano Co., supra.* The judge held that the effect of the 1935 statute is not to postpone or delay the remedy until July 1, 1938, but to abrogate the right

of the mortgagee to a deficiency suit up to that time. In substance, the argument of the court in the *Sayre* case is to the effect that an emergency statute is a valid exercise of the police power of the state only where it provides for merely a moratorium or stay of the rights involved.

It seems apparent that the police power of the state was never intended to be restricted solely to legislation of a moratorium type. The state uses this inherent reserved power to protect the welfare of its people. Many statutes have been sustained by the courts as proper exercises of the police power even though many contract rights were completely swept away while the acts were in effect.

The importance of the Sayre case is minimized by the fact that the action was commenced on March 14, 1935, while the statute only went into effect on March 22, 1935. Thus that situation presented an exact parallel to the facts in the *Vanderbilt* case, *supra,* where as stressed earlier, suit was instituted before the 1933 statute became effective. Therefore, both the *Sayre* and *Vanderbilt* cases may be distinguished from the case now before this court on these grounds.

Fidelity Trust Co. v. *Bryant* is the only other reported case holding the 1935 act unconstitutional as applied to mortgage bonds executed before its enactment. The opinion of the court is based upon *Sayre* v. *Duffy* and *Vanderbilt* v. *Brunton Piano Co.,* both of which cases are distinguishable from the case at bar as appellants have already indicated.

It is submitted that the doctrine of the *Fidelity* case, *supra,* a lower court decision, be overruled by this court in view of the opinion of this court in *Bucsi* v. *Longworth Building and Loan Association.*

It should be noted that the court in the *Fidelity* case, relying upon *Sayre* v. *Duffy,* based its holding that the effect of the 1935 Act will be to change *completely* the nature of the mortgagee's right to a deficiency suit until July 1, 1938, upon the provision in the Statute requiring the mortgagee to bring his action for the deficiency within three months from the date of the sale of the mortgaged premises.

It is interesting to observe that Chapter 170, P. L. 1880, as amended by Chapter 147, P. L. 1881, required that the obligee institute his suit on the bond within *six months* after the date of the sale of the mortgaged premises. The constitutionality of these statutes has never been doubted. The 1933 and 1935 Acts changed the six months' period to a limitation of three months. It is apparent that this modification can in no way destroy the validity of the prior statutes. *Such a change is deemed one of procedure only, and although it may affect pre-existing contractual or remedial rights, this fact will not be sufficient to hold the Act unconstitutional. Wooton* v. *Pollock,* 116 N. J. E. 490.

This court in *Lapp* v. *Belvedere,* 116 N. J. L. 563, in holding that a provision copied into the very statute under consideration in this case precluding action against obligors on a mortgage bond not joined in the foreclosure proceedings was constitutional, is not in violation of either Art. 1, Sec. 10 of the Federal Constitution, or Art. 4, Sec. 7, par. 3 of the State Constitution, *even as to contracts entered into before the enactment of the Statute,* quoted the following excerpt from *Bronson* v. *Kinzie,* 42 U. S. 311:

> "* * * Undoubtedly, a state may regulate at pleasure the modes of proceedings in its Courts in relation to past contracts, as well as future. It may, for example, shorten the

> period of time, within which claims shall be barred by the Statute of Limitations. * * * Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own view of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

From this reasoning it should be apparent that the three months' limitation in the 1935 Act did not have the effect of unconstitutionally impairing respondent's pre-existing contractual or remedial rights. Regulations concerning periods of time within which suit must be brought have always been deemed wholly procedural and perfectly valid in this effect on pre-existing rights. The mere fact that the 1935 Statute also provided for the defense of fair market value of the mortgaged premises should in no way affect this long established principle in the law.

Wooton v. *Pollock,* 116 N. J. E. 490 (reversed on other grounds by the Court of Errors and Appeals, 119 N. J. E. 128), is a *direct* holding on the point that a legislative enactment changing the period within which the mortgagee must bring suit upon a deficiency, from six months to three months, is constitutional, even as affecting pre-existing contractual rights.

The Court based its decision upon the ground that such a modification of the law was directed at the remedy and procedure, and, therefore, within the power of the State to revise at will.

Sooy, Vice-Chancellor, quoting from *Terry* v. *Anderson,* 95 U. S. 628, at 632:

> "* * * The parties to a contract have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain."

Both the *Fidelity* and *Sayre* cases, *supra,* were decided prior to the decisions of this court in *Lapp* v. *Belvedere* and *Wooton* v. *Pollock, supra.* It is submitted that the reasoning of the two lower Courts is overruled by the later Court of Appeals cases, and therefore, nothing remains to substantiate the holdings of *Sayre* v. *Duffy* and *Fidelity Union Trust Co.* v. *Bryant, supra.*

Lapp v. *Belvedere, supra,* also destroys an argument made by respondent in the Court below that conceding Chapter 88, P. L. 1935 does not impair the right of contract as safeguarded by Art. 1, Sect. 10 of the United States Constitution, it does deprive an obligor of a remedy he formerly had for enforcing a contract, contrary to Article 4, Sect. 7, par. 3 of the New Jersey State Constitution. The *Lapp* case, *supra,* indicates clearly that there is, in practical application, very little difference between the scope of the impairment of contract clause in Art. 1, Sect. 10 of the Federal Constitution, and the deprivation of a remedy clause in the New Jersey Constitution:

> "There is, as regards this provision, little or no practical difference between the obligation of a contract, and the remedy for its enforcement. If, through the deprivation of a remedy in existence when the contract was made, the efficacy of the means provided for the enforcement of a contract is lessened, the substance and obligation of the contract are impaired. But where a remedy of substantially like character remains, or a substitute means of enforcement of the same species are given, there is no impairment of the substance of the right. There is, in that situation, no lessening of the force, efficiency, or value of the obligation."

Appellants strongly urge that Chapter 88, P. L. 1935 is procedural in character, and merely adopts a different method of computing the amount of the debt due upon the breach of the condition of the mortgage bond. The mortgagee is not deprived of his cause of action. He is still entitled to the full amount of his debt, being able to recover both the land and a deficiency. The only effect of the act is to restrict the mortgagee's deficiency judgment by deducting the fair market value of the premises from the amount of the debt. This insures complete reimbursement to the mortgagee, but does prevent him from being unjustly enriched at the expense of the mortgagor. The statute enables the mortgagee to regain the mortgaged property at its fair market value, and to obtain a deficiency judgment for the balance owed to him on the debt. Clearly, he is deserving of nothing more.

CONCLUSION.

For all the reasons herein stated, appellants urge that Chapter 88, P. L. 1935, should be deemed constitutional as applied to the facts in the case at bar, and that the judgment of the Circuit Court of June 22, 1937, should be in all respects reversed, and that the case be remanded to the lower court for proceedings in accordance with the statute.

Respectfully submitted,

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Attorneys for and of Counsel with Defendants-Appellants, William S. Bechtold and George Schumacher.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton St., Newark, N. J., U. S. A.
(4665)

Mr. Samuel Rodler

New Jersey Court of Errors and Appeals

The Alert Building and Loan Association of the City of Newark, a corporation, Plaintiff-Respondent, *vs.* William S. Bechtold, *et al.*, Defendants-Appellants.	Action at Law. On Appeal from Circuit Court.

BRIEF ON BEHALF OF APPELLEE.

Statement.

This brief is filed by the appellee in answer to the one filed on behalf of the appellant. We first wish to emphasize that the question involved in this case is not a matter of procedure, but one of the substantive rights of the appellee, namely, the right to recover a deficiency on a bond without giving credit for the fair market value of the property. Any references made in the appellant's brief, with respect to the constitutionality of the act in question, with reference to its procedural provisions, are beside the point and will not be discussed.

ARGUMENT.

Chapter 88 Public Laws of 1935 is unconstitutional as to the present appellee:

The first contention made by the appellant is that this Court, in *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596, held the 1933 amendment to the mortgage act to be unconstitutional, but indi-

cated that a similar statute, enacted under the police power would be constitutional, and that Chapter 88 Laws of 1935, which is a supplement to the mortgage act, is constitutional because the defects indicated in the prior statute were cured. In that case this Court said (at page 603):

> "We may take judicial notice of the financial emergency that now presses upon so many people in so much of the world, but we may not read into the statute a limited duration that is neither expressed nor implied therein nor do we subscribe to the intimation that an emergency automatically lifts all constitutional restraints. The statute does not grant a stay or a delay and therefore does not deal with the question of a moratorium. The subject-matter of the point under discussion does not save the statute from the fault laid against it."

Assuming that this Court would hold constitutional a statute of a limited duration, during a financial emergency, the statute in question does not comply with those requirements. This statute does not grant a stay or delay, and therefore does not deal with the question of a moratorium. The statute may, in effect, be for a limited period of time, but it does not delay or stay actions. It permits them but to a limited extent, which is unconstitutional.

The appellant contends that there is a limitation in the statute in question, which contention is not well founded. The limitation is contained in a preamble, which also states that an emergency exists. The preamble is no part of the act. The act itself, except that it provides for suits to be instituted within three months after confirmation of sale, rather than three months after the date of sale, is exactly like the 1933 statute, word for word. The 1933 statute is part of our organic law, and extends to an indefinite period in

the future, and is set forth in the new revision under subject 2:65-2, etc. If the 1935 statute is held to be constitutional, because it only exists until July 1, 1938, the court will, in effect, be holding the 1933 statute constitutional, because the statutes are exactly the same, and will thus be overriding its own opinion in *Vanderbilt* v. *Brunton Piano Co., supra.*

The recitals in the preamble can have no effect upon the validity of the statute. The only purpose for which recitals are ever referred to by the Court is for the purpose of resolving a doubt by reason of an ambiguity in the enacting part of the statute. Where such a doubt exists, the preamble or title can be looked to for the purpose of endeavoring to ascertain the intention of the legislature. But that is the only purpose for which preamble or title can be used. Where the statute is clear and definite and where no ambiguity exists, the court cannot and should not look to a preamble to sustain the validity of the statute.

In *Brown* vs. *Erie Railroad Co.,* 87 N. J. L. 487 (at page 490) this Court said:

> "It seems to be established that in cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals for the purpose of ascertaining the legislative intent. But where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals. The enacting clause of a statute may be extended by the preamble, but cannot be restrained by it. *36 Cyc. 1132; Den* v. *Urison,* 2 N. J. L. *212, 224; *James* v. *Dubois,* 16 Id. 285; *Quackenbush* v. *State,* 57 Id. 18, 21."

In *Den* v. *Urison,* 2 N. J. L. *212, 224, the Supreme Court said:

> "It appears to me, to be a settled principle of law, that the preamble cannot control the

> enacting part of the statute, in cases where the enacting part is expressed in clear, unambiguous terms; but in case any doubt arises on the enacting part, the preamble may be resorted to, to explain it, and show the intention of the lawmaker. The enacting part of this statute is clear and explicit; there is no ambiguity on the face of it. Shall we then go out of the enacting part, which is clear and intelligible, and resort to the preamble, to create an ambiguity, and then have recourse to the same preamble to explain this ambiguity? It appears to me, that this would be carrying the office of the preamble beyond anything heretofore contemplated, by giving it a paramount authority to the enacting part of the statute itself."

In the case at bar the enacting part of the statute is unambiguous. It is clear and explicit. The preamble should have no effect upon it.

In *James* v. *Dubois,* 16 N. J. L. 285 (at page 294) the Supreme Court said:

> "When a statute is in itself ambiguous and difficult of interpretation, the preamble may be restorted to; but not to create a doubt and uncertainty, which otherwise does not exist".

It is apparent that the 1935 statute is a specious and unsuccessful attempt on the part of the legislature to make valid, by a preamble which is no part of the act, the very thing that this court said was unconstitutional.

The next point made by the appellants is that this case is distinguishable from the *Vanderbilt* vs. *Brunton Piano Co.* case because this was instituted after the statute took effect, whereas the suit in the Vanderbilt case was instituted prior to the effective date of the statute considered in that case. In both cases, however, the bond and mortgage in question were executed and delivered prior to the enactment of either statute. The time

of the institution of the suit on the bond did not have any effect in the decision of this court in the Vanderbilt case, as appears from the case itself.

In the case of *Vandervilt* vs. *Brunton Piano Co.*, 111 N. J. L. 596, (at page 597) this court said:

> "Mr. Justice Parker, sitting below, struck the answer for the reason that the amendatory statute was unconstitutional in so far as it related to the right to enforce mortgage contracts made and delivered prior to the enactment. Defendants appeal and present the constitutional question as the single issue.
>
> It was the right of the mortgagee, the order in Chancery confirming sale having been duly made and still subsisting, to recover the deficiency in an action upon the bond. That was his right, arising from his contract, under the 1880 statute (as amended Pamph. L. 1881, ch. 147, p. 184) *supra,* which provided that a creditor holding a bond and mortgage, given for the same debt, must in proceeding to collect first foreclose the mortgage, but that if, at the foreclosure sale, the premises should not sell for a sum sufficient to satisfy the debt, interest and costs, it would then be lawful to proceed on the bond, for the deficiency. The deficiency was the amount by which the debt, as adjudged by the Court of Chancery in the foreclosure decree, exceeded the proceeds from the sale conducted by that court. *Murray* v. *Pearce,* 95 N. J. L. 104. The 1880 statute was effective when the contract was made, and that statute therefore entered into the contract without need for express stipulation to that effect. *Bronson* v. *Kinzie,* 1 How. 311; 11 L. Ed. 143. The mortgagee instituted such an action on the bond and then, and not until then, came the 1933 amendment. That amendment provides that the obligor may, by his answer in an action on the bond for the deficiency, dispute the amount of the deficiency and—not in the forum which conducted the sale, but in the action at law on the bond—raise an issue on the "fair market value of the mortgaged premises at the time

> of the sale under the foreclosure proceedings", whereupon the court which is trying the action on the bond, sitting with or without a jury, shall assess the "fair market value" and determine the deficiency by deducting that value from the debt. There can be no doubt that the amendment substitutes the "fair market value" determined in the subsequent action on the bond in place of the proceeds of the sale in foreclosure as the credit to be allowed the debtor in reduction of the debt. It is apparent that when an obligee on a bond has, as an incident to his contract, the right to recover a liquidated sum, first by receiving the proceeds from the sale of the pledged property and supplementarily by a personal action, and a statute is thereafter passed, the direct effect of which is to provide an opportunity to the debtor for reducing the sum recoverable, his contract is impaired. It might well happen in a given case that under the questioned statute the entire right sued upon the law action would dissolve."

The only issue decided by this court in the Vanderbilt case, therefore, was the constitutional issue on the question of crediting the fair market value. The date when the suit was instituted was not a factor in its determination, and *Vanderbilt* v. *Brunton Piano Co.* should not be dismissed for that reason. The reference to the time of the institution of the action was merely incidental.

The next point made by the appellant is that the opinion of this court in *Bucsi* vs. *Longworth Building and Loan Association,* 119 N. J. L. 120, should influence this court to overrule its opinion in *Vanderbilt* v. *Brunton,* but this court in *Bucsi* vs. *Longworth Building and Loan Association* specifically said:

> "Nothing that has been said here should conflict with the holdings in *Vanderbilt* v. *Brunton Piano Co.,* 111 N. J. L. 596, 169 A.

> 177, 89 A. L. R. 1080, and *Home Building & Loan Ass'n.* vs. *Blaisdell, supra.* The subject matter of the contracts in those cases was not *per se* affected with a public interest. The statutes there in question had effect only upon the interests of the respective contracting parties since the contracts affected thereby were of themselves only capable of a legal or economic force which was coterminous with the limits of the contract".

It is apparent that the situations in the Bucsi case and the case at bar are entirely dissimilar. This case deals solely with the interests of a party endeavoring to recover on a contract, the effect of the enforcement of which would not extend to any other person not a party to the contract. However, in the Bucsi case, the effect of the enforcement of the contract there would be to the detriment of the thousands of shareholders and investors in building and loan associations, and to the associations themselves as expressed in the opinion. We do not think any further comment is necessary, since the Vanderbilt and Bucsi cases were both decided by this court, and we feel that the court had in mind all the ramifications arising from those cases when it particularly exempted the Vanderbilt case from the holding in the Bucsi case.

The next and last point made by the appellant is that this court should follow the decision of the United States Supreme Court in *Richmond Mortgage and Loan Corp.* vs. *Wachovia Bank and Trust Co.*, 81 Law Ed. 361. In this contention the appellant also argues the statute to be constitutional because it is procedural. There are some sections of the act which are procedural, but we are not here concerned with those sections. We do not desire to burden the court with a discussion of those points, and we will confine ourselves to the validity of that part of the statute which deals with fair market value.

The case of *Richmond Mortgage & Loan Corp.* vs. *Wachovia Bank and Trust Company* is not a precedent in favor of the appellants for two reasons:

First, because the statutes involved are materially different, and secondly, because the constitutional question involved is materially different.

That case dealt with the validity of a statute of North Carolina claimed to impair the obligation of a contract contrary to Article 1, Section 10 of the Federal Constitution. The case shows that there existed in North Carolina two methods of foreclosure and of obtaining deficiency judgments. One was by the classical method of foreclosure in the Court of Chancery. The other was by a power of sale contained in the mortgage or deed of trust and exercised by the mortgagee or trustee. The statute in that case dealt only with a situation where the mortgagee or trustee foreclosed by exercising the power of sale. The proviso of the North Carolina statute expressly said that the section of the act "shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgments sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed."

In the instant case the act in question applies to foreclosure sales made pursuant to an order or decree of court and to a judgment sought to be obtained upon such an order.

The United States Supreme Court in the *Richmond* case said:

> "* * * The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away. Home Bldg. & L. Asso. *v.* Blaisdell, 290 U. S. 398, 434, 78 L. ed. 413, 426, 54 S. Ct. 231, 88 A. L. R. 1481, and cases cited, note 13."

The Supreme Court distinctly held that another equally effective remedy for the enforcement of the obligation remained. It used the following language:

> "* * * By the old and well known remedy of foreclosure a mortgage was so limited because of the chancellor's control of the proceeding. That proceeding, as has been said, has always been available to the mortgagee in North Carolina. Granting that by the alternative remedy of trustee's sale the mortgagee might perchance obtain something more, or might obtain only that which was his due somewhat more expeditiously, than he could in chancery, it remains that the procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee. If, therefore, the legislature of the State had elected altogether to abolish the remedy by trustee's sale we could not say that it had not left the mortgagee an adeqaute remedy for the enforcement of his contract. But the legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract."

The statute in the instant case does not leave remaining an equally effective remedy for the enforcement of the contract. This is the holding in *Vanderbilt* v. *Brunton Piano Co.*, 169 Atl. 177, 111 N. J. L. 596, (Ct. of E. & A.). In that case the court had under consideration an amendment to the act passed in 1933, which amendment is, so far as the present issue is concerned, the same as the 1935 amendment. See *Sayre* v. *Duffy*, 179 Atl. 459, 13 N. J. Misc. 458.

The Court of Errors and Appeals in *Vanderbilt* v. *Brunton Piano Co., supra,* discussed in detail the question whether or not an equally effective remedy exists in this State. It compared the rights and liabilities under the statute with the rights and liabilities afforded by the Court of Chancery under its equitable powers, and came to the conclusion that the Court of Chancery did not afford a remedy equally effective with that given by the statute.

This is also the holding of the Supreme Court in *Fidelity Union Trust Company* v. *Bryant,* 183 Atl. 825, 14 N. J. Misc. 243. In that case Justice Bodine said:

> " * * * The statute does not afford a period of temporary relief from the enforcement of contractual obligations, but it changes and alters the nature of the relief which existed as a means of enforcing contractual obligations. The obligee is deprived of his right to liquidate the same, and is forced to accept a right of action to determine the amount which he may recover. He does not have the six months after sale, which he formerly had, to enforce a right to recover a liquidated amount, but his right to bring an action to prove his loss is limited to the period of three months from the date of the confirmation of the foreclosure sale and exists only against those persons who were made parties to the foreclosure proceedings."

The opinion of the United States Supreme Court in the *Richmond* case expressly said:

> "The statute has no application if the purchaser at the trustee's sale be other than the mortgagee."

The instant statute applies whether the sale be to the mortgagee or to a third party. See *Vanderbilt* v. *Brunton Piano Co., supra.* In the latter case the Court said:

> "* * * We are considering the statute. It is unimportant that the foreclosure sale in the case at bar was to the mortgagee himself. The statute applies, without distinction, whether the sale be to the mortgagee or to a third party, and the statute is incapable of dissection so that it may be held to apply in the one instance and not in the other. There is no legal obligation upon a mortgagee either to bid up, or to bid in, the property at the foreclosure sale, and the impairment of his contract is the more obvious when the property is struck off to a third person at a figure less than that subsequently fixed in the action on the bond as the 'fair market value.' In such a posture the mortgagee has no further recourse to the property itself; the property is gone with no right of redemption in him. * * *"

On this same subject the *Richmond* case holds as follows:

> "* * * The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. * * *"

The practical effect of the North Carolina statute is to leave a mortgagee in such a position that he can collect the full amount of the indebtedness due him. The practical effect of the New Jersey statute is to leave the mortgagee, in many instances, in a situation where he can never recover the full amount due on the obligation.

The instant case is further distinguishable from the *Richmond* case in that a different constitutional issue is presented. In the *Richmond* case the constitutional provision claimed to have been

violated was Article 1, Section 10 of the Federal Constitution, which is as follows:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts * * *"

In the instant case the question is whether or not the New Jersey Constitution has been violated. Article 4, Section 7, paragraph 3 of our Constitution provides:

> "The legislature shall not pass any * * * law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

This raises a much narrower question than that presented in the *Richmond* case. That case holds that the remedy can be impaired because there was in that case no constitutional prohibition against impairing the remedy. But there is such a prohibition in this matter.

In *Vanderbilt* v. *Brunton Piano Co., supra,* the Court said, continuing from last quotation:

> "* * * He is compelled to forfeit a part of the debt which his contract, valid and enforceable when made, gave him; at least his remedy for enforcing the contract has been taken away. On the first assumption, his contract is impaired. On the second, he is deprived of a remedy. The law that accomplishes the former of these results is in conflict with both the Federal and the State Constitutions, and one that accomplishes the latter is in conflict with the State Constitution. In truth, the taking away of the remedy in the supposed instance is inseparably combined with an equivalent to the taking away of the right itself. * * *"

Under the Federal Constitution, as is said in the *Richmond* case, there can be an impairment

of the remedy, but under the New Jersey Constitution no such impairment is valid. It was just because of the situation that a remedy could lawfully be impaired under the Federal Constitution, that the particular provision in the New Jersey Constitution was inserted.

In *Rader* v. *Southeasterly Road District of Township of Union,* 36 N. J. L. 273, the Supreme Court said:

> "In construing that clause of the constitution of the United States, which prohibits the states from enacting any law impairing the obligation of contracts, the courts made a distinction between the obligation of a contract and the remedy upon it. Whilst the former was under the protection of the constitutional prohibition, it was considered that the remedies for enforcing existing contracts were under the control of the state legislatures, and might be modified and changed in their nature and extent, provided a substantive remedy be left. 2 *Story on Const.,* Sec. 1385; *Cooley on Const. Lim.* 287. * * *
>
> * * * * *
>
> "Indeed, as was said by Mr. Justice Swain, in *Von Hoffman* v. *City of Quincy,* 'No attempt has been made to fix, definitely, the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; every case must be determined upon its own circumstances.' The decisions on this subject, while they uniformly recognize the existence of this distinction, are not harmonious in the application of it. In many instances, embarrassment, if not injustice to creditors, in the collection of debts, arose from laws, modifying and taking away remedies which existed when the contract was entered into, which also gave rise to much litigation to determine whether particular laws enacted for that purpose were within legislative powers.

"This vexed question was before the Supreme Court of the United States, in *Bronson* v. *Kinzie,* 1 *How.* 311, and *McCrackin* v. *Hayward,* 2 Ib. 608. Chief Justice Taney, in pronouncing judgment in the former case, declared that whatever belonged merely to the remedy, might be altered according to the will of the state, in relation to past contracts, as well as future, provided the alteration did not impair the obligation of the contract; and that, although the new remedy might be less convenient than the old one, and in some degree render the recovery of debts more tardy and difficult, it would not follow therefrom that the law was unconstitutional. Among the illustrations of the power of legislatures over the remedy on existing contracts used by the Chief Justice, was the exemption of certain property of the debtor from process of execution.

"*Bronson* v. *Kinzie* was decided in January, 1843, and *McCracken* v. *Hayward* in January, 1844. In June, 1844, the convention which framed our present constitution, assembled. In the third paragraph of Sec. 7, Art. IV., of that instrument, it was declared that, 'the legislature shall not pass any bill of attainder, *ex post facto law,* or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.' The latter clause of this paragraph was not in the section originally reported, but was added by amendment, advocated by Messrs. Ryerson, Vroom and Green, and adopted by the decisive vote of 36 to 9. Afterwards, a motion was made to strike it out, which, after discussion, was lost without a division.

"This provision is peculiar to the constitution of this state and is regarded as having an important effect in restriction of the power of the legislature over remedies. *Sedg. on Stat. and Const. Law* 617, n. 656. * * *"

* * * * *

> "It is clear that any legislation, the effect of which is to deprive the party of the power to resort to the person or any property, which, as the law stood when the contract was made, might have been taken or applied in satisfaction of his demand, is within the constitutional prohibition. The evil at which this peculiar provision was mainly directed, was the construction put upon the provision of the constitution of the United States relative to the obligations of contracts, admitting the power of the states to pass laws abolishing imprisonment for debt, and exempting property from execution, and make such laws applicable to existing contracts, whereby the value of contracts in the ability to enforce performance was in many instances seriously impaired."

The 1935 amendment was passed apparently to avoid the effect of the decision in *Vanderbilt* v. *Brunton Piano Company, supra,* and by adding a preamble declaring an emergency to exist, and in an apparent endeavor to enact a moratorium law. But this subterfuge is of no avail. In *Fidelity Union Trust Company* v. *Bryant, supra,* the Court said:

> "Because the Legislature declares an emergency gives them no power to deprive for all time a party of an existing remedy for enforcing a contractual obligation. This was made perfectly clear in Vanderbilt *v.* Brunton Piano Co., 111 N. J. Law, 596, 169 A. 177, 89 A. L. R. 1080."

In *Sayre* v. *Duffy, supra,* the Court said:

> "The effect of the present statute, however, is not to postpone or delay the remedy until July 1, 1938, but to abrogate completely the right of the mortgagee to a deficiency suit up to that time. In other words, while the life of the statute is limited, its effect during its existence and when applied is permanent and complete, and not merely dilatory, so that the

> criticism made in the Vanderbilt Case, *supra,* still applies in that its 'purview is absolute, final, and permanent. It extends to all classes of property—homes, business properties, speculative ventures, everything.'
>
> "While a financial or economic emergency may justify a temporary relief from enforcement of a contract by delaying its enforcement, it does not justify the permanent destruction or cancellation of contractual obligations. In the words of Justice Case, in the Vanderbilt Case, *supra:* 'The statute does not grant a stay or a delay, and therefore does not deal with the question of a moratorium.' "

In *Sayre* v. *Duffy* the Court discusses the case of *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A. L. R. 1481, and *Louisville Joint Stock Land Bank* v. *William W. Radford, Sr.,* 55 S. Ct. 854, 869, 79 L. Ed. ——, and came to the conclusion that the 1935 statute was neither temporary nor conditional, but was in fact permanent and conclusive and therefore was not a moratorium act or the exercise of the police power.

This Court has passed upon the constitutionality of this statute in effect by passing upon the constitutionality of the 1933 Act. The opinion in the *Richmond* case is not contrary to the opinion in *Vanderbilt* v. *Brunton Piano.* In fact, when studied carefully, the opinion of the U. S. Supreme Court lends support to the findings of the New Jersey Court of Errors and Appeals.

It is therefore respectfully urged that this Court hold the statute in question to be unconstitutional and affirm the ruling of the Court below.

Respectfully submitted,

Samuel Roessler,
Attorney and of Counsel for Appellee.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.
(21333)