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Summons.

The State of New Jersey to: Harry Kridel and Samuel K. Sobel, Executors of the Estate of George Kridel, deceased.

(L.S.) You Are Summoned to answer the annexed complaint of Helen Rogovin in an action at law in the Essex County Circuit Court.

And Take Notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Worrall F. Mountain, Judge of the Essex County Circuit Court, at Newark, this 26th day of March, Nineteen Hundred and Thirty-five.

JOHN R. SCOTT,
Clerk.

Edward R. McGlynn,
Attorney.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law

The plaintiff, Helen Rogovin, residing in the City of Newark, County of Essex and State of New Jersey, complaining against the defendants, says that:

1. The plaintiff is the holder and owner of a certain bond executed by the decedent, George Kridel on or about March 2nd, 1934, a true copy of which is annexed hereto, made a part hereof and designated as Schedule A.

2. On or about October 15th, 1934, the said George Kridel died, and by the terms of his last Will and Testament, the defendants, Harry Kridel and Samuel K. Sobel were named executors thereof.

3. On or about October 27th, 1934, the said last Will and Testament was duly probated in the Essex County Surrogate's Court, and the said Harry Kridel and Samuel K. Sobel duly qualified as executors of the Estate of said George Kridel, and, accordingly, letters testamentary were issued to them by the Surrogate of Essex County, New Jersey.

4. On or about November 16th, 1934, an order was entered in the Essex County Surrogate's Court directing all creditors of the said George Kridel, deceased, to file their verified proof of claims within six months from the date thereof in accordance with the statutes in such cases made and provided.

5. On or about February 9th, 1935, the plaintiff herein, in accordance with the statutes in such cases made and provided, filed with the said executors her claim and demand in writing, specifying the amount claimed, and the particulars of the claim, and verifying the same under oath, whereupon on the said date the said executors disputed the said claim and gave notice in writing to this plaintiff that the said claim was disputed. There is now justly due and owing from the defendants to the plaintiff the sum of Six Thousand Dollars ($6000.00) on account of principal, together with interest thereon from February 1st, 1935, no part of which said sum has been paid.

6. This action is brought within three months from the time of the giving by the executors of the notice disputing the plaintiff's claim as aforesaid.

7. The plaintiff has fully performed all terms, covenants and conditions precedent to the obligation of the defendants to pay the sum hereinabove set forth as due and owing on the said bond.

Wherefore, judgment will be demanded by the plaintiff against the defendants, Harry Kridel and Samuel K. Sobel, Executors of the Estate of George Kridel, in the sum of Six Thousand Dollars ($6000.00), together with interest as aforesaid and costs of suit.

EDWARD R. McGLYNN,
Attorney for Plaintiff.

Schedule A.

Know All Men By These Presents: That I, George Kridel am held and firmly bound unto Helen Rogovin in the penal sum of Fourteen thousand ($14,000) dollars lawful money of the United States of America, to be paid to the said Helen Rogovin her heirs, executors, administrators or assigns: For Which Payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal. Dated the day of March, One Thousand Nine Hundred and Thirty-four.

The Condition of the above obligation is such that if the above bounden George Kridel, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named Helen Rogovin, her heirs, executors, administrators or assigns, the just and full sum of Seven Thousand ($7000) dollars on the 1st day of February which will be in the year One Thousand Nine Hundred and thirty-eight, and the interest thereon, to be computed from February 1, 1934 at and after the rate of six per cent per annum, and to be paid semi-annually as set forth in a mortgage of even date herewith, the principal being payable as follows:

The sum of $1000 on February 1, 1935
The sum of $1000 on February 1, 1936
The sum of $1000 on February 1, 1937
and the balance on February 1, 1938 as aforesaid,

without any fraud or other delay, then the above Obligation to be void, otherwise to remain in full force and virtue.

And It Is Hereby Expressly Agreed, that should any default be made in the payment of the said interest, or installment of principal or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or installment of principal or any part thereof, remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Seven thousand ($7000) dollars with all arrearage of interest thereon, shall, at the option of the said Helen Rogovin or her legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

GEORGE KRIDEL. (L.S.)

Signed, Sealed and Delivered
In the Presence of
Samuel K. Sobel.

Notice to the within named Defendant:

In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defence to this action, you must file an Affidavit of Merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful Service upon a Corporation is deemed personal service for the purpose of this Notice (P. L. 1912, p. 394, Rule 56).

EDWARD R. McGLYNN,
Attorney for Plaintiff.

Affidavit of Merits.

Filed April 4, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

State of New Jersey }
County of Essex } ss.:

Harry Kridel and Samuel K. Sobel, Executors of the Estate of George Kridel, being duly sworn on their respective oaths, say that they are the defendants in the above stated cause, and they believe that they have a just and legal defense to the said action on the merits of the case.

HARRY KRIDEL.
SAMUEL K. SOBEL.

Subscribed and sworn to before me
this 2nd day of April, 1935.
Leo L. Weinberg,
A Master in Chancery
of N. J.

Answer.

Filed April 16, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

The defendants, Harry Kridel and Samuel K. Sobel, executors of the Estate of George Kridel, deceased, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint filed herein, say that:

1. Paragraphs 1, 2, 3, 4 and 6 are admitted.

2. As to Paragraph 5, defendants admit service upon them of plaintiff's purported claim as set forth in Paragraph 5, but deny that the said claim is now due and owing from the defendants to the plaintiff.

3. Defendants have no knowledge or belief as to the allegations set forth in Paragraph 7 of the complaint and therefore leave the plaintiff to her proof.

FIRST SEPARATE DEFENSE.

1. On or about March 2, 1934, George Kridel, now deceased, purchased certain premises in the City of Newark, from Benjamin Rogovin and Helen Rogovin, his wife, Samuel Gurevitz and Dina

Gurevitz, his wife, for the sum of $18,000.00, which premises are more fully described as follows:

> All that lot, 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 Easterly line of So. 11th Street at a point therein distant 328.23 feet Northeasterly measured along said Easterly line of So. 11th Street from its intersection with the Northerly line of Clinton Avenue; thence (1) North 22 degrees 55 minutes East and along easterly line of So. 11th Street 50 feet to a point; thence (2) South 67 degrees 5 minutes East 123.07 feet to a point; thence (3) South 22 degrees 55 minutes West 50 feet to a point; thence (4) North 67 degrees 5 minutes West one hundred and twenty-three feet and seven one-hundredths of a foot to the easterly line of So. 11th Street and the place of Beginning.

2. As part of the purchase price of said premises, the said George Kridel executed a purchase money bond and mortgage in the sum of $7,000.00 to one Helen Rogovin, as the nominee of the sellers, covering the premises above described, which mortgage was dated March 1, 1934, and payable at the rate of $1,000.00 on February 1, 1935, (which sum was paid) the sum of $1,000.00 on February 1, 1936, the sum of $1,000.00 on February 1, 1937, and the balance of said mortgage on the first day of February, 1938, as more fully set forth in said mortgage.

3. Said mortgage is still in full force and ef-

fect, all terms and conditions having been fully complied with by the said George Kridel, and the said Harry Kridel and Samuel K. Sobel, executors as aforesaid.

4. The bond described in the complaint herein was executed by the said George Kridel as further security for the faithful performance of the terms of the mortgage above described.

5. By reason of the terms, the bond held by the plaintiff is not due and payable as set forth in the complaint.

SECOND SEPARATE DEFENSE.

1. These defendants allege Paragraphs 1, 2, 3 and 4 of the first separate defense as though the same were repeated herein at length.

2. This action is within the Statute relating to mortgages, the several supplements and amendments thereto.

3. No foreclosure proceedings have ever been instituted by the plaintiff on the mortgage so held by her.

Defendants reserve the right to move to strike out the complaint herein at any time prior to or at the trial.

SAMUEL K. SOBEL,
Attorney for Defendants.

Notice of Motion.

Filed April 24, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

To the defendants and SAMUEL K. SOBEL, ESQ., their attorney:

Please Take Notice that on Friday, May 10th, 1935, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court House, Newark, New Jersey, I shall apply to the Honorable William A. Smith, or such other Judge as may be hearing motions, for an order striking the answer or parts thereof for the reasons that:

1. As to paragraph 2 of the answer, on the ground that the same is sham and untrue insofar as it denies that the claim is now due and owing from the defendants to the plaintiff, or in the alternative, insofar as it seeks to set forth a conclusion of law, on the ground that the same is frivolous.

2. As to paragraph 3 on the ground that the same is sham and untrue.

3. As to the First Separate Defense on the ground that the same is frivolous and insufficient in law in that by reason of the statute in such

cases made and provided it is not a valid defense in an action upon a claim against the decedent's estate that the same is not by its terms yet due and owing.

4. As to the Second Separate Defense, on the ground that the same is frivolous and insufficient in law, in that the statute requiring a foreclosure of a mortgage before an action for deficiency has no application to proceedings relating to claims against decedent's estate.

And Please Take Notice that I shall rely upon the annexed affidavit and take notice that I shall at the same time and place apply for an order for summary judgment in favor of the plaintiff and against the defendants.

EDWARD R. McGLYNN,
Attorney for Plaintiff.

Affidavit of Helen Rogovin.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

State of New Jersey }
County of Essex } ss.:

Helen Rogovin, of full age, being duly sworn according to law upon her oath deposes and says that:

1. I am the plaintiff in the above entitled matter and I am the holder and owner of a certain bond executed by the decedent George Kridel on or about March 2, 1934, a true copy of which is annexed to the complaint and designated as Schedule "A" and admitted to be true in the answer filed by the defendants.

2. I am informed, and I believe it to be true, and it is admitted in the answer filed by the defendants, that the said George Kridel died on or about October 15, 1934, and by the terms of his last will and testament the defendants Harry Kridel and Samuel K. Sobel were named executors thereof; that on or about October 27, 1934, the said will was duly probated in the Essex County Surrogate's Court and the said Harry Kridel and Samuel K. Sobel duly qualified as executors of the estate of the said George Kridel, and accordingly letters testamentary were issued to them by the Surrogate of Essex County, New Jersey; that on or about November 16, 1934, an order was en-

tered in the Essex County Surrogate's Court directing all creditors of the said George Kridel, deceased, to file their verified proofs of claim within six months from the date thereof in accordance with the statutes in such cases made and provided.

3. On or about February 9, 1935, in accordance with the statutes in such cases made and provided, I filed with the said executors my claim and demand in writing, specifying the amount claimed and the particulars of the claim and verifying the same upon oath, whereupon, on the said date, the said executors disputed my claim and gave notice to me in writing that the said claim was disputed.

4. This action is brought within three months after the time of the giving by the executors of notice disputing my claim as aforesaid.

5. There is now justly due and owing from the defendants to me the sum of $6,000.00 on account of principal, together with interest thereon from February 1, 1935, no part of which has been paid and the whole thereof is now justly due and owing without any set-offs, credits, allowances or deductions whatsoever.

6. I have full performed all terms, covenants and conditions precedent to the obligation of the defendants to pay to me the sums of money hereinabove set forth as due and owing on the said bond.

7. I make this affidavit in support of a motion to strike the answer filed by the defendant and I state that I believe that there is no defense to this action.

HELEN ROGOVIN.

Sworn and subscribed to before me
this 18th day of April, 1935.

Anthony C. Stein,
A Master in Chancery
of N. J.

Notice of Motion.

Filed May 3, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law

To: EDWARD R. MCGLYNN, ESQ.

Please Take Notice that on Friday, May 10, 1935, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Court House in Newark, I will apply to Honorable William A. Smith, Circuit Court Judge, or such Circuit Court Judge as is then sitting to hear motions, for an order striking out the complaint and dismissing the action upon the ground that the complaint discloses no cause of action, in that, by reason of the statutes in such case made and provided the plaintiff may only maintain an action against the defendants after a determination of the sum, if any, due upon the bond after the foreclosure of the accompanying mortgage, and for the further reason that by virtue of the aforesaid statutes and the terms of the bond, no sum is presently due and owing for which the plaintiff may maintain an action.

SAMUEL K. SOBEL,
Attorney for Defendants.

Affidavit of Samuel K. Sobel.

Filed June 20, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

State of New Jersey }
County of Essex } ss.:

Samuel K. Sobel, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the executors of the estate of George Kridel, deceased, and one of the defendants herein. I am a counsellor at law of the State of New Jersey.

2. As a result of my activity as co-executor of the estate of George Kridel, deceased, and from other sources, I have learned that on or about March 2, 1934, George Kridel, now deceased, purchased certain premises in the City of Newark, from Benjamin Rogovin and Helen Rogovin, his wife, Samuel Gurevitz and Dina Gurevitz, his wife, for the sum of $18,000.00.

3. As part of the purchase price of said premises, the said George Kridel executed a purchase money bond and mortgage in the sum of $7,000.00 to one Helen Rogovin, as the nominee of the sellers, covering the premises above mentioned, which

mortgage was dated March 1, 1934, and payable at the rate of $1,000.00 on February 1, 1935, (which sum was paid) the sum of $1,000.00 on February 1, 1936, the sum of $1,000.00 on February 1, 1937, and the balance of said mortgage on the first day of February, 1938, as more fully set forth in said mortgage.

4. Both George Kridel in his lifetime, and the executors thereafter have fully complied with all of the terms and conditions of the bond and mortgage. The mortgage is still in full force and effect and has not matured, and there has been no default of any kind; and the same is true as to the bond.

5. The plaintiff has not prosecuted an action to foreclose the mortgage she holds, nor has there been any foreclosure of a prior mortgage embracing the premises.

6. I believe that there is a good defense to the action.

SAMUEL K. SOBEL.

Sworn to and subscribed before me
this 30th day of April, 1935.
A. Nathan Cohen,
An Attorney at Law
of New Jersey.

Opinion of Essex Circuit Court.

ESSEX CIRCUIT COURT.
Newark, New Jersey

Charles W. Parker
Supreme Court Justice
Worrall F. Mountain
William A. Smith
Newton H. Porter
Joseph L. Smith
Circuit Judges

June 14, 1935.

Re: Essex Circuit Court.

Helen Rogovin v. Harry Kridel and
Samuel Sobel, Executor, etc.

Edward R. McGlynn, Esq.,
Samuel K. Sobel, Esq.

Gentlemen:

The above matter was submitted to me on a motion by the plaintiff to strike out the defendants' answer, and also a motion by the defendants to strike out the complaint.

It is my view that the determination of the defendants' first defense is dispositive of the case. The plaintiff moved to strike that defense on the ground that it is frivolous and insufficient in law.

The defense urged is that the claim of the plaintiff is not due and payable. The defendants move to strike the complaint on the ground that the complaint shows this, and it appears from the examination of the pleadings that the claim is not due and payable.

The defendants have urged that there should be judgment on the pleadings. It seems to me that the determination here is decisive of the whole case, and therefore that the defendants

should have judgment on the pleadings pursuant to Rule 40, and that will be the determination on this motion.

Yours very truly,

WM. L. SMITH.

Order.

Filed June 20, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

This matter having been opened to the Court by Edward R. McGlynn, attorney for the plaintiff, upon a motion to strike out the answer filed by the defendants, and for summary judgment, and a counter-motion to strike out the complaint and for judgment upon the pleadings by Samuel K. Sobel, attorney for the defendants, and the Court having heard and considered the arguments of the plaintiff and the defendants, and being of the opinion that the complaint does not set forth a cause of action, in that it appears that the plaintiff's alleged claim is not due and that the motion

of the defendants to strike out the complaint and enter judgment upon the pleadings should be granted;

It is, on this 19th day of June, 1935, ORDERED, that the complaint be and the same is hereby struck out and judgment entered on the pleadings on the ground above stated in favor of the defendants with costs of suit to be taxed.

WM. A. SMITH,
Judge of the Essex County
Circuit Court.

On Order Striking Out Complaint by Order of the Court.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

Judgment Entered June 20, 1935
Costs $43.35.

SAMUEL K. SOBEL,
Attorney of Defendants.

Judgment on Order Striking Out Complaint by Order of the Court in the above entitled Action was rendered on the Nineteenth day of June, A. D., Nineteen Hundred and Thirty-five in favor of the defendants Harry Kridel and Samuel K. Sobel, Executors of the Estate of George Kridel, deceased and against the plaintiff Helen Rogovin for the sum of Forty-three dollars and thirty-five cents costs of suit.

Judgment Signed June 19, 1935.

Judgment Entered June 20, 1935.

Notice of Appeal and Grounds of Appeal.

Filed July 1, 1935.

ESSEX COUNTY CIRCUIT COURT.

HELEN ROGOVIN, Plaintiff, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants.	Action at Law.

To the defendants and SAMUEL K. SOBEL, ESQ., their attorney:

Please Take Notice that the plaintiff hereby appeals to the New Jersey Court of Errors and Appeals, the last resort in all causes, from the whole of the judgment entered in the above entitled matter in favor of the defendants on the grounds:

1. That the court erred in granting the motion of the defendants to strike the complaint when thereunto moved by attorney for the defendants, whereas the court should have denied the said motion.

2. That the court erred in giving judgment for the defendants against the plaintiff when thereunto moved by attorney for the defendants, whereas the court should have refused to grant the said motion.

3. That the court erred in denying the plaintiff's motion to strike the answer of the defendants when thereunto moved by attorney for the

plaintiff, whereas the court should have granted the said motion.

4. That the court erred in denying the plaintiff's motion to strike the First Separate Defense of the answer filed by the defendants when thereunto moved by attorney for the plaintiff, whereas the court should have granted the said motion.

5. That the court erred in denying the plaintiff's motion to strike the Second Separate Defense of the answer filed by the defendants when thereunto moved by attorney for the plaintiff, whereas the court should have granted the said motion.

6. That the court erred in denying the plaintiff's motion for summary judgment, whereas the court should have granted the said motion.

EDWARD R. McGLYNN,
Attorney for Plaintiff-Appellant.

Service of a copy of the within Notice of Appeal and Grounds of Appeal is hereby acknowledged this 28 day of June, 1935.

SAMUEL K. SOBEL,
Attorney for Defendants.

New Jersey Court of Errors and Appeals

HELEN ROGOVIN, Plaintiff-Appellant, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of George Kridel, deceased, Defendants-Respondents.	On Appeal from Essex County Circuit Court. Sat below: HON. WM. A. SMITH.

BRIEF OF PLAINTIFF-APPELLANT.

(All italics, unless otherwise indicated, are ours.)

Statement of Facts.

Plaintiff appeals from a judgment in favor of the defendant on cross-motions to strike the answer and complaint. The facts are not in dispute.

On March 2nd, 1934, as part of the purchase price of certain premises in the City of Newark, the decedent, George Kridel executed a bond in the principal sum of Seven Thousand Dollars ($7,000.00), and secured it with a second mortgage on the said premises. The plaintiff, who is the mortgagee, was not the grantor, but that circumstance is immaterial. The bond provided for amortization at the rate of $1,000.00 on February 1st, 1935, $1,000.00 on February 1st, 1936, $1,000.00 on February 1st, 1937, and the balance on February 1st, 1938, together with interest at the rate of six per cent., payable semi-annually.

On October 15th, 1934, the said George Kridel died, and thereafter on October 27, 1934, the defendants-executors named in the decedent's Will, qualified. On November 16th, 1934, an order was entered in the Essex County Surrogate's Court directing all creditors to file their verified proofs of claim within six months. On February 9th, 1935, and within the six month period, the plaintiff filed with the executors, in writing, her claim and demand on the bond, specifying the amount claimed and the particulars of the claim, and verifying the same under oath, whereupon the executors notified the plaintiff, in writing, that her claim was disputed. This action was brought within three months from the time of the said notice.

All of the payments required by the terms of the bond and mortgage have been made to date, and there has been no foreclosure of the mortgage. The proof of claim filed with the executors was for the full amount of the bond remaining unpaid, reserving, of course, all claims to the security, and this action is for the same amount.

The answer of the defendant (S. of C., p. 8) sets up two separate defenses, first, that the mortgage by its terms is not yet due, and second, that the plaintiff did not foreclose the mortgage before instituting this action. The plaintiff moved to strike the answer, and the defendants countered with a motion to strike the complaint. The only two issues were the questions of law raised by the two separate defenses. The lower court denied the plaintiff's motion and granted the defendants' motion (S. of C., p. 19), whereupon judgment was entered accordingly (S. of C., p. 21). The lower court based its action solely on the sufficiency of the First Separate Defense, stating in its opinion (S. of C., p. 18, l. 25):

"It is my view that the determination of

> the defendants' first defense is dispositive of the case. The plaintiff moved to strike that defense on the ground that it is frivolous and insufficient in law.
>
> "The defense urged is that the claim of the plaintiff is not due and payable * * *"

and the order of court expressly recites this sole ground for its action (S. C., p. 19, l. 38; p. 20, l. 9). The same two issues argued below are the matters involved in this appeal.

POINT I.

Under the terms of the Orphans' Court Act, a claim not yet due at the time of the decedent's death is nevertheless a provable debt.

Section 69 of the Orphans' Court Act (3 Comp. Stat. 3834), provides as follows:

> "Debts and demands liquidated, not due and payable, but which are payable in the future, may be presented for allowance; a reasonable rebate of interest being made when interest is not accruing on the same; and if any such debt or demand be disputed, and action brought therefor, *the plaintiff shall not fail in such action on account of such debt and demand being payable in the future,* if the same be otherwise a legal debt or demand."

Under the plain terms of this section, the claim of the plaintiff, although payable in the future, became provable. The obvious purpose of the statute is to mature all claims, so that there may be an immediate liquidation of the estate. This statute was enforced in accordance with its plain meaning in the case of *Ray Estate Corporation*

v. *Steelman,* 90 N. J. L. 184 (E. & A. 1916). The action was against an ancillary administrator to recover rents, taxes and water rates due under a lease. The rent involved fell due on May 1st, 1913, November 1st, 1913 and May 1st, 1914. The defense was an order barring creditors, apparently dated May 20th, 1913, although there is also a suggestion in the case that the date of the order was February 20th, 1914. Whichever date is correct, the case nevertheless involved the question of whether it was necessary to prove a claim, maturing by its terms, after the order barring creditors. Mr. Justice SWAYZE said at page 185:

> "* * * The same course would clearly have been open as to the rent due November 1st, 1913, if the answer had set up what seems from the colloquy at the trial to have been the fact that the decree was not entered until February 20th, 1914. Notwithstanding this blunder, we think the defense was open as to the rent due November 1st, 1913, and May 1st, 1914. Both were liquidated demands which might be presented for allowance under section 69 of the Orphans' Court act. *Comp. Stat.,* p. 3834."

In *Feick* v. *Hill Bread Co.,* 99 Atl. 851 (Chan. 1917), Vice Chancellor FOSTER said at page 851:

> "It was under section 69, 3 Comp. St. p. 3834, and Section 101, 3 Comp. St. p. 3850, which permits claims to be filed against an estate for debts due and payable in the future, upon a rebate of interest being made, that the bank and company filed their respective claims against the estate * * * *"

This case was affirmed in 89 N. J. E. 189 (E. & A. 1918).

In *Hackensack Trust Company* v. *Van Den Berg*, 92 N. J. L. 412 (E. & A. 1918), where the question involved was whether the decree barring creditors was applicable to a tort claim, this Court speaking through Mr. Justice PARKER said at page 413:

> " * * * * The object of the procedure laid down in sections 67 to 70, and others germane to them, is, in the language of our cases, *to secure the speedy settlement of decedents' estates* and to enable the personal representative to determine whether the estate is to be settled as a solvent or insolvent estate, and whether real estate must be resorted to for payment of debts. Emson v. Allen, 62 N. J. L. 491, 493; Newbold v. Fenimore, 53 Id. 307 (at p. 309). It is obvious that an executor may be obliged to wait for the statute of limitation to operate before settling the estate, or to resort to tedious and expensive Chancery litigation, if a tort claim is exempt from an 'order to limit creditors'. So, in this respect, the object of the act would be defeated if it is not applicable to a claim in tort. When we turn to the statute itself we find it contains ample indicia of an intent to include all claims enforceable by suit terminating in a money judgment. In section 67 the 'creditors' are to be ordered to bring in their 'debts, demands and claims against the estate'. Section 68 speaks of 'debts and claims;' 'claims and demands;' they are to specify the amount claimed and the particulars of the 'claim;' and the phrase 'claim or demand' or 'claim and demand' is used six times thereafter in the same section. *Section 69 permits debts and demands liquidated, but not due, to be presented subject to discount*; the plain implication is that unliquidated debts and demands are cognizable. Throughout section 70 the word 'creditor' is linked up with the phrase 'debt, demand or claim.' In section

> 71 we find the statute using the word 'claimant' as well as 'creditor'."

In *Narozniak* v. *Perdek,* 10 N. J. Misc. 1000 (Sup. Ct. 1932), the same result was reached. In that case, an employee of the decedent sustained an injury within the purview of section two of the Workmen's Compensation Act. The insurance carrier of the employer made regular payments until about a year after the employer's death, when the carrier became insolvent. Proceedings were thereupon instituted in the Compensation Bureau to recover from the estate of the employer. The defense was failure to file a claim prior to the order barring creditors. The case therefore involved the question of the provableness of an obligation which was payable after the death of the obligor. The Court said at page 1002:

> " * * * Legally they are in default for not having presented their claim in due season, and are barred, except as against a surplus remaining after settlement (Orphans' Court Act, Comp. Stat. p. 3836, §72), or unless some estate not accounted for is discovered. *Ibid.* p. 3834, §69."

This rule was applied to the identical fact situation here involved in the case of *Hess* v. *Bugbee,* 13 N. J. Misc. 358 (1935). A bond and mortgage executed by the decedent, by their terms, became due after the order barring creditors. No claim was filed with the administrator. The mortgage was foreclosed, and a deficiency resulting, an action was brought to recover the same. Judge Oliphant held at page 360:

> "2. The question here presented is—does the failure to file a claim with the executor of an estate on a bond *not due and payable* until after the time fixed in the

order of the surrogate for the presentation of claims in the order barring creditors, prevent a recovery on said bond in a suit against the executor? The sixty-ninth section of the Orphans' Court Act provides 'debts and demands liquidated, not due and payable, but which are payable in the future, may be presented for allowance; a reasonable rebate of interest being made when interest is not accruing on the same; and if any such debt or demand be disputed, and action be brought therefor, the plaintiff shall not fail in such action on account of such debt and demand being payable in the future, if the same be otherwise a legal debt or demand.' The bond in question was for a liquidated amount, not due and payable at the time limited as set forth in the order barring creditors. It was not a contingent but an absolute liability of the plaintiffs. The bond could have been sued upon without first foreclosing the mortgage. The cases to which the court has been referred by counsel for the plaintiffs are not in point. They relate to cases where a contingent liability existed. Where the courts use the words 'contingent liability' they refer to the contingency of the obligation of payment, not the contingency of the amount of the claim or payment. The fact that a claim such as here existed must be presented to the executor is supported by numerous cases in this state, among which are Ray Estate Corp. v. Steelman, Admr., 90 N. J. L. 184; 100 Atl. Rep. 209; Smith v. Crater, 43 N. J. Eq. 636; 12 Atl. Rep. 530; Weatherby v. Sparks, 63 N. J. L. 445; 43 Atl. Rep. 683; Voorhees' Case, 57 N. J. Eq. 291; 42 Atl. Rep. 567; Smith v. Wilson, 79 N. J. Eq. 310; 81 Atl. Rep. 851; Cranmer v. Cole, 11 N. J. Mis. R. 578; 167 Atl. Rep. 744; Hackensack Trust Co. v. Van Den Berg, 92 N. J. L. 412; 105 Atl. Rep. 719."

The statute in question is similar to statutes relating to administration of other estates and rests on the same policy favoring an immediate winding up of such estates. For example, the Corporation Act, Section 86 (2 Comp. Stat. p. 1652) likewise provides with respect to estates of insolvent corporation as follows:

> "* * * and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same * * *"

This Court held in construing this section in the case of *Newman* v. *Hatfield Wire & Cable Co.*, 113 N. J. L. 484 (E. & A. 1934) as follows at page 489:

> "* * * Not only does out act respecting insolvent corporations say that set-off is allowable where the dealings are mutual but, like the Bankrupt act, in section 86, it declares that 'the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same.' *For the purpose of the winding up proceedings this section matures the debt at the time of the receiver's appointment. As soon as he is appointed claims become provable* * *"

It is, therefore, respectfully submitted that the lower court erred in holding that this action should fail because of the fact that the claim was not yet due, and that for the same reason the lower court erred in denying the plaintiff's motion to strike the First Separate Defense.

POINT II.

The statute requiring that all proceedings to collect a debt represented by a bond and mortgage shall be first to foreclose the mortgage, does not apply to claims filed against a decedent's estate or actions instiuted thereon.

We now turn to the question of the sufficiency of the Second Separate Defense. As already pointed out, the lower court did not pass upon this question, resting its conclusion entirely on the disposition of the first issue discussed above.

The following statutes are pertinent and are listed in the order of their enactment:

Orphans Court Act, Section 71 (3 Comp. Stat. 3835):

> "If any executor or administrator to whom any such claim is presented dispute the same, or any part thereof, and shall give notice in writing to the creditor, claimant, his attorney or agent, that said claim, or any part thereof, is disputed, such creditor shall bring suit therefor in three months from the time of giving such notice; and in any suit not commenced within said time, said decree shall bar any recovery of the account or part so disputed, as if said debt or claim had not been presented within the time so limited by said court."

Orphans' Court Act, Sections 87 and 88 (3 Comp. Stat. 3843):

> Sec. 87: "Whenever any mortgagee or holder of any mortgage upon the real estate of any testator or intestate *shall file a claim upon the debt* secured by said mortgage with the executor or administrator of said

testator or intestate, and it shall appear to the Orphans' Court to be necessary to sell the lands and premises incumbered by said mortgage, for the payment of the debts of said testator or intestate, the said court shall have power to order the said lands and premises sold free and clear of the incumbrance of said mortgage; provided, the said court shall, at the time of making the order to sell, also order that the moneys arising from such sale be first applied to the payment of the said mortgage debt, and the balance, after paying the same, to be assets in the hands of said executor or administrator."

Sec. 88: "Where the proceeds of said sale shall be insufficient to pay the said mortgage debt in full, the said mortgagee or holder of mortgage shall be entitled to be paid out of the other assets in the hands of said executor or administrator the balance only of his claim pro rata with the other creditors."

Sections 87 and 88, which were originally enacted as Laws of 1881, page 141, Chapter 125, were approved on March 18th, 1881, and by their terms took effect immediately.

Section 48 of the Mortgage Act (3 Comp. Stat. 3421):

"That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the

> date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit."

This provision, which is quoted for the time being without the recent amendments although reference will be made to the same later on, was passed on March 23rd, 1881 (Laws 1881, page 184, Chapter 147) and provides that it should take effect immediately. It will be noticed that Section 48 of the Mortgage Act was accordingly passed five days after the passage of Sections 87 and 88 of the Orphans Court Act. Section 48 contains no express repealer.

All of the provisions of the Orphans Court Act quoted above were re-enacted in the Revision of 1898. We recognize the rule that so far as inconsistencies in statutes are concerned, a revision relates to the date of original enactment, but mention the fact of the revision insofar as it may indicate legislative intention that none of the sections listed above are in fact repugnant to each other. We also refer to the familiar rule that implied repealers are not favored by the law and every effort is made to reconcile enactments. This is particularly true where two statutes in question were both enacted at the same session of the Legislature. Thus, in 59 *Corpus Juris,* at page 928, it is stated that:

> "The principle that a repeal by implication is not favored by the law is especially applicable as between two statutes passed at the same session of the legislature * * *"

The following principle may also be pertinent (59 *Corpus Juris* 1055):

> "Where statutes passed at the same session are necessarily inconsistent, a statute

> which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature * * *''

We also point out, for whatever it may be worth, that Section 87 of the Orphans Court Act was amended by Laws 1900, page 308, although the amendment itself is not material to the issue in this case.

The contention of the defendants below (we presume that it will be repeated here) is that the cases interpreting these several statutes establish two rules: (a) That although a proof of claim may be filed, no suit can be brought upon the bond if the proof of claim is disputed; and (b) that the proof of claim in any event is limited to such deficiency as may remain after a foreclosure. With this contention in mind, we turn to an analysis of all of the cases on the subject.

In the case of *Crater* v. *Smith*, 42 N. J. E. 348 (Prerog. Ct. 1886), the situation was as follows: An order was entered limiting creditors, and pursuant to the same, the holder of a bond dated April 11th, 1882 (which is after the enactment of the section of the Mortgage Act referred to above) presented his claim for the principal and interest due upon the bond. This claim was allowed by the administrators. It appeared that subsequent to the order barring creditors, the holder of the bond foreclosed the mortgage. On exceptions to the administrator's account, it was argued that since the holder of the bond had not instituted a deficiency action within six months after the foreclosure, as required by section 48 of the Mortgage Act, the debt was barred, and, accordingly the administrator was in error in allowing the claim.

The Ordinary, in discussing the effect of the Mortgage Act, says at page 351:

> "* * * *The case is not within the act.* The act is in derogation of the common law, and unless it, in terms or by necessary or fair and reasonable implication, takes away from the appellant his remedy for the recovery of the money remaining due to him upon the bond, his rights with respect to that money are such as they would have been had the act not been passed * * *"

It is, therefore, clear that in the opinion of the Ordinary, the holder of a bond in our situation is entitled to file his proof of claim for the full amount of the debt, for such, of course, was unquestionably the practice at common law.

This case was carried to the Court of Errors and Appeals, which affirmed the decision of the Ordinary in 43 N. J. E. 636 (E. & A. 1887). The defendants in the instant case rely upon some of the language of the opinion of the Court of Errors and Appeals in that case as supporting their contention. The language in question is the following (we are numbering the sentences for convenience in reference) at page 639:

> "(1) The act of 1881 prohibits suit upon the bond until sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar. (2) If not presented within the time so limited, it cannot be presented at all. (3) The object of said act is to compel the mortgagee to look primarily to the mortgaged premises for payment, and to limit the time for suing upon the bond for deficiency to six months from the date of sale. (4) *It would be a perversion of the law to so construe it, that, in case of the death of the obligor be-*

> *fore the foreclosure sale, his personal liability on the bond could not be resorted to.* (5) There is nothing in the language of the act which indicates an intention to deprive the bond holder of his right of action under any circumstances, provided he sues within the limited time. (6) No summons was issued in this case within the prescribed six months, hence the question arises whether the claim is lost where the statutory proceedings to declare the estate insolvent have been initiated before the expiration of the period of limitation."

It will be observed, of course, that there is not the faintest suggestion in this language that the proof of claim when filed is limited merely to such deficiency as may thereafter accrue, nor do we see anything in this language which supports the notion that when the proof of claim is disputed by an executor, no action may be instituted upon the bond. The contention of the defendants in this regard rests upon the first three sentences of the quotation, read independently of the remainder of the paragraph. It is apparent that the Court's opinion cannot be interpreted piecemeal. Sentence No. 3, if taken as the ultimate conclusion of the Court on the problem, of course, would mean that no such suit could be instituted. A fair reading of the paragraph indicates that sentence No. 3 is merely introductory to sentence No. 4, and that sentence No. 4, together with sentence No. 2 re-state the proposition of the Ordinary, namely, that the act does not apply to the situation where the obligor dies before there has been a foreclosure. Indeed, the contention of the defendants that a claim may be filed but that no suit can be brought upon it, would present an anomalous situation. If the creditor may not sue to test the validity of the administrator's denial

of his claim, it means that the creditor is wholly at the mercy of the personal representative. If the claim is allowed, he will be paid, but if the administrator disputes it, then if the defendants' contention is correct, the creditor cannot litigate the validity of his claim in the manner provided by the statute, by a suit within three months. It is inconceivable that the Legislature or the Court could have so intended. We, therefore, submit that the holding of the Court of Errors and Appeals in the case of *Smith* vs. *Crater,* was flatly to the effect that upon the death of the obligor, the holder of the bond is entitled to prove for the full amount of his claim, and that the situation is outside of the purview of the Mortgage Act.

The next pertinent decision is *in re Voorhees' case,* 57 N. J. E. 291 (Chan. 1899). In that case, the decedent left personal property and several tracts of land. Upon three of these tracts were mortgages securing bonds of the decedent. The mortgagees, without foreclosing, proved the full amount of these mortgage debts against the estate. The administrators thereupon by court order sold the mortgaged premises and out of the proceeds paid the mortgagees. Exceptions were taken to the allowance of these payments. With respect to the proof of claim, Vice Ordinary Reed said at page 292:

> "* * * The mortgagees proved the amount of these mortgage debts as claims against the estate of Hendrick Voorhees. *Smith* v. *Crater,* 16 Stew. Eq. 636 * * *"

This language, it seems to us, indicates that, in the opinion of Vice Ordinary Reed the case of *Smith* v. *Crater* justified the very practice pursued by the mortgagees in the case before him. The Vice Ordinary then went on to consider

whether the Mortgage Act, quoted above, repealed Sections 87 and 88 of the Orphans Court Act, which contemplates proof of the full debt, and sale of the mortgaged premises where necessary. As already indicated above, the Mortgage Act was passed five days (the Vice Ordinary refers to this period of time as four days) after the passage of the provisions of the Orphans Court Act in question. Vice Ordinary Reed held at page 293:

> "It is not contended, nor I think could be contended with success, that this act repealed the act passed four days earlier. There is no express repealer, nor is there such repugnancy between the operation of the two acts as would effect an implied repealer * * *"

The Vice Ordinary then went on to hold that the order for sale in the Orphans Court, although somewhat ambiguous, was an order for the sale free of the mortgage as required by the Orphans Court Act and not merely a sale of the equity as contended by the exceptant, and accordingly affirmed the approval of the account.

The next pertinent authorities are a pair of cases, *Weatherby* v. *Weatherby's Executors,* 63 N. J. L. 445 (Sup. Ct. 1899), and *Ware* v. *Weatherby,* 45 Atl. 914 (Sup. Ct. 1900). In the first of the two cases, the situation was as follows: The plaintiff sued on an overdue bond secured by a mortgage. The defense was that there had been no foreclosure. The plaintiff replied that he had presented his verified claim to the executor, who thereupon disputed the claim. A motion to strike the replication was certified to the Supreme Court for its advisory opinion. The Court, in discussing the Mortgage Act and provision of the Orphans

Court Act requiring suit within three months after the disputing of the claim, said at page 447:

> "* * * The two statutes do not conflict in their provisions. The supposed difficulty in their joint application, in some cases, inheres in extrinsic conditons. If a creditor of a decedent, holding a bond secured by mortgage, should promptly serve his claim on the bond and receive notice that it was disputed, it might easily be that, before he could reach a sale on foreclosure, three months would have expired; but such a predicament was purely for legislative consideration. All we can do is to determine the legislative intent.
>
> "We must assume harmonious intent in the body of our statute law and construe separate enactments accordingly. With those now involved it is possible to do this and avoid a dilemma that would otherwise be presented. It will be observed that in the requirement of the statute—that 'proceedings to *collect*' shall be, first, to foreclose the mortgage—there is no express prohibition of a previous suit on the bond. Inferred prohibition should go only as far as necessary. A suit against the *obligor* has been held not maintainable. *Hellyer* v. *Baldwin,* 24 Vroom 141; *Holmes* v. *Seashore Electric Railway Co.,* 28 Id. 16. It was proper to so hold, for such a suit is a step in a proceeding to collect. *A suit against the legal representatives of a deceased obligor, brought by legal necessity on notice from his legal representatives, stands on a different footing.* True, in *Smith* v. *Crater,* 16 Stew. Eq. 636, 639, it seems to have been assumed that the inferred prohibition extends to such a case, but the statement to that effect was *obiter* and not required by the decision. The present phase of the case was not in contemplation. The decision itself is express authority for the right, notwithstanding the stat-

ute, to serve on the representatives of a deceased obligor a verified claim on a bond secured by mortgage not yet foreclosed, and is therefore in harmony with the view about to be expressed. If a claim so served be disputed by notice in writing, the right to bring suit on it follows as a necessary incident. Such a suit is not a proceeding to *collect,* but only to *ascertain* the debt. The judgment will not be a lien on either goods or lands of the decedent. If execution is possible, that, of course, will be stayed by the statute, but no other restraint is required by either the spirit or letter of the law. No preference over such creditors will be gained by the mortgagee if such judgment be permitted, for, on a decree of insolvency, the proceedings have relation back to the original order of limitation. *Wemple* v. *Von Arx,* 17 Vroom 531. The representatives of the estate are in no worse plight under judgment than under the verified claim. If the mortgagee will not foreclose, their remedy is to secure sale free from the mortgage. *Gen. Stat.,* p. 2401, § 198, now *Pamph. L.* 1898, p. 715, § 87.

"There is nothing novel in thus limiting the prohibition of the statute in question. Its scope was considered by Chief Justice Beasley in *Mershon* v. *Castree,* 28 Vroom 484. That learned judge said that the act, being in derogation of the common law force inherent in a bond and mortgage, must be strictly construed, and he upheld ejectment for the mortgaged lands before foreclosure because ejectment is not a 'proceeding to collect the debt.' He pointed out that the hardship the statute was intended to alleviate was the seizure and sale of other property of the mortgagor by virtue of a judgment on the bond before resorting to that which had been mortgaged, and he declared, as the result of his reflection, that 'no purpose is observed in it to abridge the

right of the mortgagee beyond that measure.' "

It will be noticed that the Supreme Court does say that the opinion in *Smith* v. *Crater* seems to have assumed that there was an inferred prohibition against a suit on the bond. Certainly there is no express statement to that effect in that case, and if the inference is possible at all, it can hardly be regarded as a deliberate dictum. It is at best a mere possible interpretation arising from a possible ambiguity in wording. As already pointed out, to allow a proof of claim for a mortgage debt, but at the same time to deny the right to litigate a disputing of that claim, would present an impossible anomaly. At any rate, the Supreme Court, in a decision which has never been questioned, flatly holds that suit for the full amount may be maintained. It is noteworthy that Chief Justice MAGIE, who was one of the four justices who decided *Weatherby* v. *Weatherby's Executors,* was also a member of the Court of Errors and Appeals at the time of the decision of *Smith* v. *Crater.*

In the companion case of *Ware* v. *Weatherby,* the plaintiff sued on a bond secured by a mortgage. The defendant pleaded that the claim had been presented to the executor, that the same had been disputed, but that the plaintiff had failed to sue within three months, and that a decree had been entered barring creditors. The plaintiff replied that within three months of the notice, he started his foreclosure suit, and that this suit was for the resulting deficiency. The Supreme Court held that the reply was insufficient. After referring to its decision in *Weatherby* v. *Weatherby's Executors,* the Court said at page 915:

"* * * The question now presented is governed by the decision in that case; for if,

> as then held, the holder of the bond could bring his action at law thereon against the executors, notwithstanding the provisions of the act of March 12, 1880, as amended by the act of March 23, 1881 (2 Gen. St. pp. 2111, 2112), the limitation of such an action imposed by section 71 of the revised orphans' court act of 1898 (Laws 1898, p. 740) justifies the interposition of the decree barring creditors as furnishing a complete bar to recovery thereon. The replication demurred to does not remove the bar by asserting the filing of the bill to foreclose the mortgage within three months from notice. That proceeding was not a suit for the claim of plaintiff within section 71 of the orphans' court act, for by the express provisions of the acts of 1880 and 1881 no decree for deficiency could have been made therein against defendants * * *"

Three of the four justices who decided *Ware* v. *Weatherby,* namely, Chief Justice MAGIE, Mr. Justice DEPUE and Mr. Justice VAN SYCKEL, sat on the Court of Errors and Appeals when *Smith* v. *Crater* was decided, and in fact, Mr. Justice VAN SYCKEL wrote the opinion in *Smith* v. *Crater.* We thus find that within a few years after the decision of *Smith* v. *Crater,* six justices of the Supreme Court, three of whom had decided the earlier case, interpreted that case to hold that the owner of a bond is entitled to file his proof of claim for the full amount of the bond, and that upon the disputing of the same, the proper course is a suit on the bond for the full amount of the claim. This has uniformly been assumed to be the law.

Thus, in *Reinhardt* v. *Inter-State Telephone Co.,* 71 N. J. E. 70 (Chan. 1906), Vice Chancellor PITNEY expresses the holding of *Smith* v. *Crater* in the following language at page 74:

> "It seems to me the position that he is

> not a creditor is hardly arguable, and the case before cited of *Smith* v. *Crater,* 42 N. J. Eq. (15 Stew.) 348, and 43 N. J. Eq. (16 Stew.) 636, holds that he is a creditor. There a party held a bond and mortgage against a decedent whose estate was insolvent, and before foreclosing his mortgage he presented a sworn claim to the administrator, which was stricken out by the orphans court on the strength of this statute, but was reinstated and held to be valid by both the Chancellor in the Prerogative Court and the Court of Errors and Appeals on appeal therefrom."

In *Callan* v. *Bodine,* 81 N. J. L. 240 (Sup. Ct. 1911), Mr. Justice REED said at page 243:

> "An action on a bond without first foreclosing an accompanying mortgage can be brought where the bond has been presented to a legal representative of a deceased obligor, this representative having served notice disputing the claim. *Weatherby* v. *Weatherby's Executor's,* 34 Vroom 445."

In *Cranmer* v. *Cole,* 11 N. J. Misc. 578 (Cir. Ct. 1933) Judge JAYNE had before him the question whether the holder of a bond and mortgage who failed to file his verified claim prior to the order barring creditors could subsequently, after foreclosure, sue the executor. In concluding that such failure barred the action, Judge JAYNE held at page 581:

> "* * * Where the decedent was the obligor of the bond which he executed and delivered in his lifetime, together with an accompanying mortgage, the owner of the bond and mortgage, after the death of the obligor, may file a claim for the amount due upon the bond with the representative of the decedent's estate before the foreclosure of the mortgage. *Smith* v. *Crater,* 43 N. J. Eq.

> 636; *Weatherby* v. *Sparks,* 43 Atl. Rep. 683; *Voorhees Case,* 57 N. J. Eq. 291; *Smith* v. *Smith,* 79 Id. 310. The holder of such a bond and mortgage of the decedent is a creditor who, at least, has a claim and demand against the decedent's estate comprehended by the pertinent provision of the Orphans Court act. 3 Comp. Stat., p. 3834."

In *Abramson* v. *Heyman,* 12 N. J. Misc. 273 (1934), a motion was made to strike a complaint in an action on a bond secured by a mortgage where the executor of the obligor had disputed a proof of claim for the same. The ground of the motion was that the plaintiff had failed to foreclose the mortgage. Judge Brown, after first holding that the defense should have been pleaded, nevertheless deliberately determines the issue in the following language at page 274:

> "* * * Under the authority of *Weatherby* v. *Weatherby's Ex'rs.,* 63 N. J. L. 445; 43 Atl. Rep. 683, it was decided that if, under order to limit creditors, a verified claim on the bond of a deceased obligor is presented to his legal representatives and they serve notice disputing the same, a suit may be brought on the bond, without first foreclosing an accompanying mortgage, notwithstanding the statutory requirement that in all cases where a bond and mortgage shall be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage, and after sale, then to proceed on the bond for deficiency. It appears by the complaint that the plaintiff has presented his verified claim to the executors of the obligor and that they have disputed the claim and refused to pay. In the Weatherby case the motion to strike out was denied and that will be the order in the case *sub judice.*"

The latest case considering this problem is the case of *Hess* v. *Bugbee,* 13 N. J. Misc. 358 (1935), which has already been referred to under Point I. In that case, as already pointed out, the bond, precisely as in the instant case, was not yet due at the time of the obligor's death and at the time of the order barring creditors. The court nevertheless held that the claim should have been presented, and the failure to do so barred the action.

We thus find a long line of unequivocal decisions supporting the claim of the plaintiff. The only decision which lends any support to the position taken by the defendant in this case is *Smith* v. *Wilson,* 79 N. J. E. 310 (Chan. 1911). The question before Vice Chancellor Stevenson was whether the Mortgage Act, referred to above, wiped out the doctrine of exoneration. Holding that it did, the Vice Chancellor as one of the steps in the reasoning leading to that conclusion, said at page 321:

> "(5) Assuming *arguendo* that the enforcement of the mortgage debt against the defendant has not been barred, it is important to see precisely what the presentation under oath to an executor or administrator of a claim on a bond and mortgage like this amounts to. The matter I think is made plain by the case of *Crater* v. *Smith,* 42 N. J. Eq. (15 Stew.) 348, and the same case on appeal, 43 N. J. Eq. (16 Stew.) 636.
>
> "The practice of presenting under oath the whole mortgage debt as due on the bond is sustained by this case, but what the claim amounts to is not a claim for the whole debt, but merely a claim for the payment of any deficiency which may thereafter be declared due to the claimant after his primary security (the land) has been exhausted. Mr. Justice Van Syckel (43 N. J. Eq. (16 Stew.) 639), speaking for the entire Court of Errors and Appeals, discusses the effect of the

> act of March 12th, 1880, as amended in 1881, upon 'bonds and mortgages given for the same indebtedness' by a decedent whose estate was before the court, and he says (at p. 639): 'The act of 1881 prohibits suit upon the bond until sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar. If not presented within the time so limited, it cannot be presented at all. The object of said act is to compel the mortgagee to look primarily to the mortgage premises for payment, and to limit the time for suing for deficiency to six months from the date of sale.' "

It will be noticed that the Vice Chancellor quotes only the first three sentences of the paragraph of the opinion of the Court of Errors and Appeals in *Smith* v. *Crater,* which is set forth hereinabove, and we urge again that the full meaning of the court in that case can be obtained only by the consideration of the whole quotation, and that the last sentence quoted by Vice Chancellor Stevenson, rather than being the conclusion of the Court in *Smith* v. *Crater* was merely introductory to the fourth sentence, and that the fourth sentence of the quotation in effect, holds that the Mortgage Act has no application to proceedings relating to decedents' estates.

At any rate, the decision of Vice Chancellor Stevenson was completely overruled by the case of *Hill* v. *Hill,* 93 N. J. Eq. 567 (Chan. 1922), affirmed, 95 N. J. Eq. 233 (E. & A. 1923), the Court holding that the Mortgage Act did not abolish the right of an heir to have the mortgage paid out of the estate. In thus overruling *Smith* v. *Wilson,* it would seem necessarily to follow that this Court overruled the reasoning whereby the Vice Chan-

cellor reached his conclusion. It will be noticed that this Court in *Hill* v. *Hill,* distinctly holds that the Mortgage Act relates merely to the procedure or remedy and does not affect the question of the substantive liability upon the bond, and in quoting, at page 239, the *full* paragraph of the case of *Smith* v. *Crater,* referred to above, it seems to us to have expressly disagreed with the Vice Chancellor in his interpretation of the meaning of that case. It is, of course, further significant that Vice Chancellor Stevenson in his opinion made no reference to *Weatherby* v. *Weatherby's Executors, Ware* v. *Weatherby,* and *in re Voorhees' case,* or section 87 of the Orphans' Court Act, which clearly contemplates proof of claim for the full amount of the bond, and payment of the same, and perhaps these authorities were not called to the Vice Chancellor's attention. At any rate, under all these circumstances, the language of *Smith* v. *Wilson* cannot be regarded as authoritative.

To avoid the necessity of a reply brief, we will anticipate two contentions urged by the defendants below. The defendants suggest that even assuming that the plaintiff is correct in her version of law, the amendment of section 48 of the Mortgage Act in 1933 had the effect of inaugurating a different rule. This amendment (p. 1, p. 172) does not alter the body of the section quoted above but adds a proviso as follows:

> "Provided, however, *that no action shall be instituted* against any party answerable on the bond unless such party is joined in the proceedings to foreclose the mortgage * * *"

The argument is that, assuming the correctness of the earlier decisions that a suit on the bond after

a dispute by the executors is not a proceeding to collect the debt but merely a proceeding to ascertain the debt, still the wording of the proviso added by the Laws of 1933, which uses the expression "*no action* shall be instituted", is so broad as to prohibit even a suit to ascertain the debt. We think the answers to this contention are the following:

(a) The proviso clearly applies only to cases in which a foreclosure must be had before a claim can be made on the bond, and, accordingly if, as already held, our situation is outside of section 48 of the Mortgage Act, it must also of necessity be outside of the effect of the amendment of that section.

(b) If the Legislature intended to make any such change by the use of that language, it surely would have amended the earlier language of the same paragraph, which, as already pointed out, still reads as it did in 1881: "All proceedings to collect said debt", and would have substituted therefor the words which the defendants claim effected the change.

(c) If the Legislature intended to alter a rule which has been established for so long a period of time and to repeal Section 87 of the Orphans' Court Act, it would have done so expressly and not by mere inference.

(d) It should not be presumed that the Legislature intended to create the anomaly referred to, namely, that a claim must be presented to the personal representative, and yet that no suit could be brought to test the validity of the disallowance as provided in Section 71 of the Orphans' Court Act.

(e) A suit brought after a claim is disputed

by a personal representative and brought pursuant to the statutory mandate, is not, strictly speaking, an independent action at all but is merely ancillary to the administration proceedings. In other words, the statute has merely set up machinery, in the nature of a reference from the Orphans' Court to the law courts, whereby the validity of a claim may be determined, but such proceedings are essentially only part of the administration of the estate. Thus, in discussing the nature of such suits, the Supreme Court, in *Weatherby* v. *Weatherby's Executors,* said at page 448:

> " * * * If a claim so served be disputed by notice in writing, the right to bring suit on it follows as a necessary incident. Such a suit is not a proceeding to *collect,* but only to *ascertain* the debt. The judgment will not be a lien on either goods or lands of the decedent. If execution is possible, that, of course, will be stayed by the statute, but no other restraint is required by either the spirit or letter of the law. No preference over other creditors will be gained by the mortgagee if such judgment be permitted, for, on a decree of insolvency, the proceedings have relation back to the original order of limitation. Wemple v. Von Arx, 17 Vroom 531. The representatives of the estate are in no worse plight under judgment than under the verified claim. If the mortgagee will not foreclose, their remedy is to secure sale free from the mortgage. Gen. Stat., p. 2401, §198, now Pamph. L. 1898, p. 715, §87."

It was also urged below by the defendants that the law has been changed by reason of the enactment of Chapter 164 of the Laws of 1924 (p. 375), entitled "An Act Respecting Devises and Descent of Lands Which Are Subject to Mortgages", which reads as follows:

> "1. Whenever any real estate which is

> subject to a mortgage shall descend to an heir or pass to a devisee, *such heir or devisee shall not be entitled* to have such mortgage discharged out of the personal estate or any other real estate of the ancestor or testator, but such real estate so received by him shall be primarily liable for the mortgage debt, unless there be a direction expressed or implied in the will of such testator that such mortgage be otherwise paid."

It is argued that the abolition of the doctrine of exoneration necessarily abolishes the claim of the mortgagee against the personal property of the estate, and that if the executors are compelled to meet the personal demand they will be violating the provisions of this Act. It is doubtful that the title of the act, if this change were contemplated by the Legislature, meets with the constitutional requirements, but it is nevertheless clear that no such effect can be given to the statute, because:

(a) the rights of creditors are always superior to the rights of the heirs or next of kin, and the regulation of the rights of the latter *inter sese* cannot embarrass the prior rights of a creditor;

(b) the statute says that "such heir or devisee shall not be entitled", and nowhere limits the right of a mortgagee;

(c) the payment of the mortgage debt will not result in exoneration, because, clearly the personal representative will be subrogated to the position of the mortgagee, for the purpose of preserving the rights of the beneficiaries. As a matter of fact, the conduct of the defendants in this case is at variance with this contention. The executors have made payments since the death of the decedent, and presumably, they intend to continue

such payments, but only at the dates mentioned in the bond. If such payments be wrongful, then they would be subject to surcharge.

Nor is there anything in the plaintiff's position which works a hardship upon the defendants. The maturing of the plaintiff's claim, by virtue of Section 69 of the Orphans' Court Act, is to the interest of the estate, since it will permit an early distribution rather than tying up the estate during the life of the bond. Dispensing with the requirement of foreclosure is likewise without hardship, because under Section 87 of the Orphans' Court Act, the executors can, if need be, have the sale in the Orphans' Court proceedings, and it is difficult to understand how a sale in one court can be more beneficial to the estate than a sale in another. Moreover, if the position of the defendants were correct, a mortgagee could tie up the administration of an estate indefinitely by delaying the foreclosure of the mortgage, for the question of the deficiency would still be open, whereas under Section 87 of the Orphans' Court Act, the liquidation of the estate is left entirely within the control of the personal representative.

The only practical effect of the plaintiff's position in this case is that the plaintiff will be paid in full, and there is nothing unconscionable about that. The vice at which section 48 of the Mortgage Act was aimed was not the collection of the mortgage debt as such, but rather the oppressive proceedings to collect the debt and to foreclose the mortgage at one and the same time. See *Hill* v. *Hill,* 93 N. J. E. 567, at page 574. No such hardship inheres in this situation.

It is, therefore, respectfully submitted that the claim of the plaintiff, although not yet due at the

decedent's death, was immediately provable, that that claim is provable for the full amount of the mortgage debt without the necessity of foreclosure, and that the lower court erred in denying the plaintiff's motion to strike the answer, in granting the defendants' motion to strike the complaint, and in ordering judgment for the defendants.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

HELEN ROGOVIN, Plaintiff-Appellant, vs. HARRY KRIDEL and SAMUEL K. SOBEL, Executors of the Estate of GEORGE KRIDEL, deceased, Defendants-Respondents.	Action at Law On Appeal from Essex County Circuit Court.

BRIEF OF DEFENDANTS-RESPONDENTS.

Statement.

This was a suit instituted by the plaintiff-appellant for the sum of Six thousand dollars and interest, upon a certain bond more fully set forth as Schedule A of the complaint on page four of the State of the Case. Defendant-Respondents refused to pay on the ground that said sum was not due and payable for the reasons set forth in their answer contained on pages 8, 9 and 10 of the State of the Case. Thereafter plaintiff-appellant moved to strike the answer and the defendant-respondents moved to dismiss the complaint, with the result that the order on pages 19 and 20 of the State of the Case, was made. The plaintiff-appellant appeals therefrom.

In order to dispose of the question presented in this case, it is necessary to reconcile the provisions of the Mortgage Act relating to proceedings to collect a debt represented by a bond and mortgage, and the provisions of the Orphans

Court Act, requiring the institution of a suit within three months after the rejection of a creditor's claim by an executor. The creditor's claim in this suit, represented a demand for a balance due on a bond, secured by a mortgage, both of which by their terms, became due in 1938. On the one hand, we have a statute which prevents an action on the bond until after the foreclosure of the mortgage; on the other, there is the need for the institution of a suit within three months after the rejection of a claim on the bond.

A reconciliation has been accomplished by the courts. It has not, however, been accomplished in the manner contended for by the plaintiff-appellant (hereinafter referred to as the plaintiff). Looking only to the plaintiff's claims, the question arises: have the courts adopted a construction which will allow an action on a bond which is not due or in default, and will not be due until 1938, so that the bondholder contrary to the terms of his contract, may get his money in 1935 or 1936? Have our courts held that there is one contract if the obligor lives and another substituted for it, if he dies? We contend that the authorities which this court should accept, permit the plaintiff to file a claim with the executor, but not to institute such a suit as this complaint presents. We will demonstrate that if the claim is rejected, the creditor has in the mortgage act a legal excuse for not instituting suit within three months. He need only foreclose his mortgage when it is due, sue within three months for any deficiency, and he may then collect from the estate the amount of the deficiency, upon the claim which he originally filed. To establish this proposition, we will make three points:

POINT ONE.

The plaintiff's authorities are in conflict with an authoritative doctrine of the Court of Errors and Appeals which does not permit an action of this nature, much less a summary judgment.

In *Smith* v. *Crater*, 42 N. J. Eq. 636, the Court of Errors and Appeals said of the mortgage act:

> "The Act of 1881 prohibits suit upon the bond until sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar. If not presented within the time so limited, it cannot be presented at all. The object of said act is to compel the mortgagee to look primarily to the mortgaged premises for payment and to limit the time for suing upon the bond for deficiency to six months from the date of sale."

This excerpt indicates that the most that the bondholder can do is to file a claim. The 1881 act does not prohibit the filing of the claim, but it does prohibit an action on the bond until foreclosure and sale. Hence, the court declared that the claim might be filed, but went no further.

Now in *Weatherby* v. *Weatherby's Executor*, 63 N. J. L. 445, the Supreme Court said that in the *Smith* case the Court of Errors and Appeals "seems to have assumed" that an action could not be brought against the executors, and proceeded to declare that the statement to that effect was *obiter* and not required. The Supreme Court then stated a contrary rule and indicated that an action might be brought, judgment entered, but that no execution would be permitted thereon.

The quoted excerpt from the *Smith* opinion indicates that the Court stated a rule derived from the purpose of the statute. The purpose is the same whether the court had before it the same question as is here involved or a different one. Certainly, the Court of Errors and Appeals was competent to discover the real object of the mortgage act. Since that object was to require the mortgagee to look primarily to the mortgaged premises for payment, the language of the Court of Errors and Appeals applies to every case where a bond and mortgage are given for the same debt. It is evident that if this statement of the Court of Errors and Appeals is dicta, it is the result of consideration by the court and not merely a casual comment. The language of Justice Cardozo in *Hawks* v. *Hamill,* 288 U. S. 52, 53 Sup. Rep. 240, is applicable:

> "At least it is considered dictum, and not comment merely obiter. It has capacity though it be less than a decision, to tilt the balanced mind toward submission and agreement."

The *Smith* decision has been treated as authoritative and not as dicta in an opinion by Vice Chancellor Stevenson, rendered subsequent to the *Weatherby* case, in *Smith* v. *Wilson,* 79 N. J. Eq. 310. He said:

> "The practice of presenting under oath, the whole mortgage debt as due on the bond, is sustained by this court, but what the claim amounts to is not a claim for the whole debt, but merely a claim for the payment of any deficiency which may thereafter be declared due to the claimant after the primary security (the land) has been exhausted. Mr. Justice Van Syckel (43 N. J. Eq., 16 Stew. 639), speaking for the entire

> Court of Errors and Appeals, discussed the effect of the act of March 12, 1880, as amended in 1881, upon bonds and mortgages given for the same indebtedness by a decedent whose estate was before the court and he says, (then follows the excerpt already quoted herein in the Smith case).

It is evident that the learned Vice Chancellor had in mind the *Weatherby* case for he subsequently said:

> "In the light of this *authoritative* exposition of the relation of the mortgage debt in this case, to the land covered by the mortgage and the personal estate of the mortgagor," etc. (Italics ours.)

The Vice Chancellor reconciled the two statutes here involved in the manner contended for by the defendants. The claim may be filed, but it is merely a claim *for the amount of the deficiency which may thereafter be established after foreclosure.* This necessarily means that no action can be brought on the bond until that time and hence on the claim which is based only on the bond. There is therefore an adequate excuse for failing to sue on the claim within three months—an excuse residing in a statutory prohibition. And certainly a summary judgment may not be recovered on such undetermined rights.

Smith v. *Wilson* declared in addition that the mortgage act abolished the right of a devisee to exoneration. This phase of the case was overruled in *Hill* v. *Hill,* 93 N. J. Eq. 567, a decision by Vice Chancellor Lewis, concurred in by Chancellor Walker. The *Hill* case was affirmed by the Court of Errors and Appeals in 95 N. J. Eq. 233. But the reasoning of Vice Chancellor Stevenson on the independent matter for which the opinion

is cited here was not disturbed. In affirming the *Hill* case, the Court of Errors and Appeals said:

> "The act did not relieve the obligor of the obligation assumed by him in making the bond. It merely provided that before action could be taken on the bond the obligee should have realized upon the real surety given to secure the bond. In this connection, the language of this court in the case of *Smith* v. *Crater,* 43 N. J. Eq. 636 is quite significant."

The Court later quoted the excerpt from *Smith* v. *Crater* which has been set forth hereinabove. The opinion therefore clearly recognizes *Smith* v. *Crater* as being sound and as stating the true rule on this subject. The court felt that the mortgage act was procedural and did not abolish the fundamental doctrine of exoneration.

There are further reasons for accepting the doctrine of *Smith* v. *Crater.* In *Holmes* v. *Sea Shore Electric Ry. Co.,* 57 N. J. L. 16, Justice Van Syckel said for the Supreme Court, referred to the mortgage act:

> "The statute is comprehensive—it in terms applies to all cases. It is imperative that all proceedings to collect the debt shall be first, to foreclose the mortgage securing it, and the further provision that it shall be lawful to proceed on the bond for the deficiency after sale of the mortgaged premises, by clear implication excludes the right to sue upon the bond before foreclosure."

Since the statute is comprehensive and in terms applies to all cases, it necessarily applies to such a case as this. This reasoning is fortified by the consideration that so far as compliance with its terms is concerned, the statute does not relate merely to procedure, but penetrates to the very

matter of the remedy which the bondholder may pursue. The Court of Errors and Appeals indicated that this was so in *Penn. Co. for Insurance, etc.* v. *Marcus,* 89 N. J. L. 633, where it is said:

> "Thus it appears that the Act of 1881 is not one of procedure but one that related to the obligee's remedy."

The court proceeded to point out that the 1907 statute relating to the filing of a *lis pendens* before bringing an action for a deficiency dealt with procedure merely and not remedy. This is significant because recent decisions have indicated how essential it is that the provisions of the 1907 act be complied with before an action on the bond is warranted. *Workingmen's B and L Ass'n* v. *Hunger,* 12 N. J. Mis. 810; *So. Broad B & L Ass'n* v. *Brunetto,* 112 N. J. L. 79. It would seem to follow that a like view must be taken of an act relating to the very remedy of the obligee. In *Hill* v. *Hill,* supra, the act was deemed procedural in the broad sense, so far as it might affect substantive legal principles. But when we are concerned with compliance with the act, it is observable that it relates to the remedy. It was upon the theory that the act related to the matter of remedy that it was held unconstitutional as to mortgages made prior to its enactment. It must be taken therefore, that as to the matter of compliance with its terms, the statute relates to remedy and not procedure.

Further support for the doctrine of *Smith* v. *Crater,* is found in the statement of Justice Lloyd in *Deal Park Co.* v. *Bannard,* 2 Mis. 194:

> "Foreclosure is made a condition precedent to the right to proceed on the bond."

Still further support is found in *Voorhees'*

Case, 57 N. J. Eq. 291, where REED, *V. O.* said of the mortgage act:

> "The effect of this legislation is to make the real estate primarily liable for the mortgage debt, and only the deficit remaining after the sale of the mortgaged premises is a claim against the personalty."

Such being the purpose of the act, to permit the bondholder to sue as this plaintiff sues, would thwart the legislative intent. If a judgment may be recovered upon the bond and presented to the executor, the latter is obliged to pay it out of personal property in the first instance. Nevertheless, the bondholder could recover a judgment, if the plaintiff is correct, and upon which she would have a right to payment out of the personal assets of the estate. Such frustration of the purpose of the statute is accomplished by the Supreme Court's opinion in the *Weatherby* case, but is avoided in the authoritative opinion of the Court of Errors and Appeals in *Smith* v. *Crater.* The only way to accomplish the purpose of the legislature is to preclude such suits as this. If they may be maintained then the obligee may secure satisfaction in the manner contrary to what the legislature intended. The mischief sought to be suppressed will be continued.

All that may be offered in support of the *Weatherby* case, are the following decisions in the Miscellaneous Reports which are entirely distinguishable from the present controversy. In *Cramner* v. *Cole,* 11 Misc. 578 (JAYNE, *C. C. J.*) the fact was that no claim was filed until after the foreclosure and the amount of the deficiency was determined. The court did not say that *an action* could be brought prior to foreclosure. It declared merely that a claim could be filed prior to that

event. This is consistent with the defendants' contention here, although the *Weatherby* case is cited by the court. In *Abramson* v. *Heyman,* 12 Misc. 273 (BROWN, *C. C. J.*), the matter came before the court on a motion to strike the complaint. The court properly found this *procedure* to be erroneous, following *Callan* v. *Bodine,* 81 N. J. L. 240. Hence it was not necessary for the court to go into the merits as it did, and apparently follow the *Weatherby* case. This truly was nothing but dicta—not considered dicta, but something entirely unnecessary to the decision that the motion to strike the complaint was not the proper procedure. In the case of *Hess* v. *Bugbee,* 178 Atl. 276, the Supreme Court said:

> "The question here presented is—does the failure to file a claim with the executor of an estate on a bond not due and payable until after the time fixed in the order of the surrogate for the presentation of claims in the order barring creditors, prevent a recovery on said bond in a suit against the executor? The sixty-ninth section of the Orphans' Court Act provides—"debts and demands liquidated, not due and payable, but which are payable in the future, may be presented for allowance; a reasonable rebate of interest being made when interest is not accruing on the same; and if any such debt or demand be disputed, and action brought therefor, the plaintiff shall not fail in such action on account of such debt and demand being payable in the future, if the same be otherwise a legal debt or demand." The bond in question was for a liquidated amount, not due and payable at the time limited as set forth in the order barring creditors. It was not a contingent but an absolute liability of the plaintiffs. The bond could have been sued upon without first foreclosing the mortgage."

It would seem that the court here recognizes the right to sue upon the bond without first foreclosing the mortgage. This was nothing but dicta and entirely unnecessary to the decision in that case, since the mortgage had become due in that case, foreclosed, and the amount of the deficiency determined so that the liability of the executors was fixed. The question as to whether or not a suit could have been brought if there had been no default in the terms of the mortgage and the same was still in full force and effect, was not passed upon by the Supreme Court in the *Hess* case, *supra.* The only question necessary to a decision in the *Hess* case was whether *after* a foreclosure proceeding resulting in a deficiency, a suit could be maintained against the executors of the estate for that deficiency when no claim had been filed with the executors within the necessary three months. This is quite in accordance with the decisions cited in support of the defendants' contention.

On the contrary, we have the decisions of *Smith* v. *Crater,* and *Smith* v. *Wilson,* supported by numerous authorities which indicate that the purpose of the act and the construction it has received are in agreement with the doctrine of *Smith* v. *Crater.*

POINT TWO.

Accepting the plaintiff's authorities as binding, they do not apply to the instant case.

It is to be observed that in the *Weatherby* case, as well as in *Cranmer* v. *Cole, Abramson* v. *Heyman* and *Hess* v. *Bugbee,* the mortgage was due when the claim was filed with the representative of the deceased. That is *not* the fact in the present case. Here the mortgage will not become due until 1938 and it is not in default. The present case is distinguishable in principle and not merely upon external differences.

The outstanding distinguishing feature is this: where the mortgage is due the mortgagor can foreclose, and in a short time determine the deficiency, if any; where the mortgage is not due and will not become due for a number of years, no foreclosure is possible, with a consequent dilemma to the estate. The executor must either pay the bondholder out of the personal assets or must hold up distribution of the estate for perhaps an unreasonable time, until the mortgage is foreclosed and the matter of deficiency determined. In either event he is obliged to act contrary to the interests of some persons. If he pays the mortgage debt out of the personalty, he violates the purpose of the statute and the rights of those who are interested in the personal estate. If he holds up distribution for a number of years, such action will violate the rights of other persons beneficially interested and entitled to distribution.

Another important distinction is found in the fact that where the holder of a bond and mortgage which are due seeks to recover a sum on the

bond without foreclosing the mortgage, after filing a claim with the executor, the mortgagee secures nothing more than he could have obtained prior to the act of 1881. Before that statute he could have sued on his bond without foreclosure of the mortgage. On the other hand, the holder of a bond and mortgage which are not due and who seeks to recover a judgment on the bond before foreclosure and after filing a claim with an executor, asks for something which he could not have secured prior to the act of 1881. The bond and mortgage not being due he could not have brought suit. Thus there is indicated the fact that in the one case the obligee seeks to enforce a right which he had prior to the statute, and on the other hand he seeks something to which he was not entitled prior to the mortgage act.

These are distinctions which go to the foundation of the matter and therefore indicate the inapplicability of the *Weatherby* decision. *The plaintiff has not cited a single case where that rule was followed in connection with a bond and mortgage which were not due when the claim was filed with the executor.*

POINT THREE.

The effect of recent legislation is to remove the reasoning on which the plaintiff's authorities are based and to prevent the institution of such an action as the present one.

The *Weatherby* decision rests upon the fact that in the 1881 act it is provided that "all proceedings to collect said debt shall be", etc. The court reasoned that such language did not prohibit the institution of a suit on a claim because such a suit was not a proceeding to *collect the debt,* but merely to ascertain the amount of the claim. We must assume therefore, that if the statute contained language to the effect that "no action shall be instituted against the obligor" that the substantial reason for the court's decision would be removed. Now, in 1933 (P. L. page 172) the legislature amended the mortgage act, retaining the language in the earlier part of the act that "all proceedings to collect said debt shall be", etc., but setting up a proviso which reads: "provided, however, that no action shall be instituted against any party answerable on the bond unless such party is joined in the proceedings to foreclose the said mortgage; * * *".

In 1935 (an act adopted on March 11, 1935, Senate Committee Substitute for Assembly #98), by reason of the fact that a portion of the 1933 act was declared unconstitutional, the legislature reenacted the same with some changes, including a preamble reciting the existence of a serious public emergency threatening the welfare, comfort and safety of the people, and reciting the necessity for legislative intervention. This last enactment contains the same proviso, and also contains

a provision declaring that the obligor may dispute the amount of a deficiency and introduce testimony of the fair market value of the mortgaged premises at the time of the foreclosure sale.

It would seem that the 1933 act, which *antedates the mortgage in the present case,* applies here as far as the proviso above mentioned is concerned. The severable nature of the various portions of the act is evident from the recent decision of *Union County* v. *Weltchek,* 12 N. J. Misc. 847. The fact that the provisions of the 1933 act for the introduction of testimony as to the fair value of the premises was held unconstitutional does not affect the proviso here in question. Moreover, the declaration of unconstitutionality applies only to bond and mortgages which antedate the 1933 statute, and not to those executed subsequently, as *the present bond and mortgage. Vanderbilt* v. *Brunton,* 111 N. J. L. 596.

The constitutionality of the 1935 act as to previously executed bonds and mortgages as emergency legislation which is to expire July 1, 1938 is evident from *Vanderbilt* v. *Brunton, supra,* and *Home B. & L. Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 Sup. Rep. 231.

Now, the provision contained in each of these acts of 1933 and 1935 is clearly framed in terms of the *bringing of an action* against any party answerable on the bond. It declares that no action shall be instituted. There is no room for construction here. The legislative intent is clearly manifested. The defendants are parties "answerable on the bond." The true meaning of the words of this proviso is that no action shall be brought until there is a foreclosure, and obviously the action must be for the amount of the deficiency. An action for the full amount of the debt

before foreclosure seems to be expressly prohibited. And the word "action" is used, thus embracing all kinds of actions.

That the proviso must be given the effect here contended for is evident from numerous decisions. In *Gerstung* v. *Sauer,* 82 N. J. L. 68, the Supreme Court said:

> "If the two provisions cannot thus be reconciled, the proviso takes precedence and controls the enactment as expressing the later intent of the legislature." (citing cases).

The proviso under consideration here expresses the later intent of the legislature because this provision appeared for the first time in 1932, whereas the parts of the 1933 and 1935 acts which preceded this proviso are taken from the 1881 act.

Furthermore, the proviso is in express and specific terms, whereas the earlier portions of such act are couched in general terms. The proviso says that no action shall be instituted. The earlier portions of these acts speak broadly of proceedings to collect the debt. In this situation the rule stated by the Supreme Court in *State* v. *Trenton,* 38 N. J. L. 64 is applicable:

> "The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms."

Moreover, the 1935 act contains an additional indication that no action of any nature shall be instituted on the bond until after foreclosure. It provides a means of setting up against any deficiency the fair market value of the mortgaged premises if the foreclosure sale did not produce the fair market value. In other words, it ex-

presses a purpose to have the mortgagee exhaust to the fullest possible extent his security before he can proceed on the bond. This purpose is designed to offset a serious public emergency threatening the comfort and safety of the people and the economic condition of the State. It seems to be the *policy* of the legislature, for the benefit not only of individuals but for the entire commonwealth, that no proceedings be brought on the bond until the real estate is made to satisfy the obligation as far as possible. In *Neu* v. *Rogge,* 88 N. J. L. 335, Justice KALISCH pointed out that not only does a defendant suffer a wrong, but the public also when a judgment is entered contrary to the express mandate of the legislature. This may be properly applied to these 1933 and 1935 enactments. The effect of the 1933 and 1935 statutes is to make the complaint demurrable for failure to disclose that a foreclosure has taken place. The doctrine of *Callan* v. *Bodine, supra,* does not apply, for that rule was promulgated when these acts were not in force and the legislation applicable did not contain a declaration that *no action should be instituted against any party answerable on the bond,* unless he was made a defendant in proceedings to foreclose the mortgage. Having in mind that these recent statutes are designed as an important part of the State's policy, we submit that the complaint must set forth, and it must appear that the mortgage is either due, in default and been foreclosed. The right to bring an action depends upon whether that has been done. The legislature has not left the matter to the parties themselves, but has regulated it for the interest of the whole commonwealth.

The disposition of the motion in the manner contended for by the defendants in the court below, is decisive of the entire case. This being so, the court's ruling on pages 19 and 20 as contained in the State of the Case, is in accordance with the case of *Commonwealth Investment Co.* v. *Guarantee Trust Co.,* 176 Atl. 189, wherein the Court of Errors and Appeals indicates:

> "A ruling of a trial court upon the pleadings may be decisive of the whole case, in which event judgment for the successful party should be given."

This ruling was based upon Supreme Court Rule 40.

It is therefore respectfully submitted that the action of the Court below was proper and that the appeal should be dismissed with costs to the defendants-respondents.

Respectfully submitted,

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