New Jersey Court of Errors and Appeals

IDA ROCKER, *Plaintiff-Appellant,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant-Appellee.*	*Action at Law.* *Appeal from New Jersey Supreme Court.* *On Motion to Dismiss Appeal.*

STATE OF CASE

HAROLD SIMANDL,
Attorney for Defendant-Appellee.
For the Motion to Dismiss Appeal.

JOHN J. STAMLER,
Attorney for Plaintiff-Appellant.
Contra-Motion to Dismiss Appeal.

Stipulation.

New Jersey Court of Errors and Appeals

IDA ROCKER, *Plaintiff-Appellee,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant-Appellant.*	*Action at Law.* *On Cross Appeal.* *Stipulation.*

It is hereby stipulated between John J. Stamler, attorney for the plaintiff-appellee, and Harold Simandl, attorney for the defendant-appellant, that the State of the Case prepared by the plaintiff-appellee, on the appeal from the judgment in this matter, shall also serve as the State of the Case on the cross-appeal of the defendant-appellant, and also on the motion to dismiss the appeal.

Dated September 18, 1935.

JOHN J. STAMLER,
Attorney for Plaintiff-Appellee.

HAROLD SIMANDL,
Attorney for Defendant-Appellant.

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Summons.

THE STATE OF NEW JERSEY TO CARDINAL BUILDING AND LOAN ASSOCIATION OF
(L. S.) NEWARK: YOU ARE SUMMONED to answer the annexed complaint of Ida Rocker, in an action at law, in the New Jersey Supreme Court, and

TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in said suit and judgment may be entered against you.

WITNESS, THOMAS J. BROGAN, Chief Justice of our New Jersey Supreme Court, at Trenton, this 10th day of September, Nineteen hundred and thirty-four.

FRED L. BLOODGOOD,
Clerk.

JOHN J. STAMLER,
Attorney.

TO THE WITHIN NAMED DEFENDANT:

TAKE NOTICE, that if the within Summons and Complaint be served upon you personally, and you intend to make a defense to this action, then you must file an Affidavit of Merits within ten days of such service hereof upon you, and you must file an answer within twenty days after the date of such service, and that in default thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this rule. (Rule 56, Chapter 231, P. L. 1912, p. 377.)

JOHN J. STAMLER,
Attorney for Plaintiff.

Complaint.

New Jersey Supreme Court

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, Ida Rocker, residing in the City of Elizabeth, in the County of Union and State of New Jersey, complains:

FIRST COUNT.

1. That the Cardinal Building and Loan Association of the City of Newark, is a corporation duly organized under an Act "An Act Concerning Building Loan Associations of the State of New Jersey" and that its original name was the Powerful Building and Loan Association of Newark, N. J., and by due and appropriate proceedings the said Powerful Building and Loan Association of Newark caused its name to be changed to the Cardinal Building and Loan Association of the City of Newark.

2. That on July 10, 1928, and at the time of the grievances herein complained, the said defendant was subject to all of the provisions contained in Chapter 65 of the Laws of 1925, being an act "An Act Concerning Building and Loan Associations (Revision of 1925 at page 189)."

3. That Section 73, subdivision 4, of the aforesaid act reads as follows:

> "Paid up. Paid up shares shall be shares the maturity value of which shall be paid in advance."

4. That Section 74 of the aforesaid Act applicable to paid up shares reads, in part, as follows:

> "No agreement or understanding shall be made or entered into whereby the time for surrendering paid-up shares to such association and withdrawing the value thereof shall be postponed, and paid-up shares shall only be surrendered and withdrawn on the same terms and under the same conditions as provided in the constitution for the surrender and withdrawal of installment shares; provided, that agreements may be entered into by and between any such association and any of its members holding paid-up shares, as the constitution shall provide, whereby said members waive participation in the general profits of such association in consideration of a fixed profit on the paid-up shares; provided, further, that no member shall hold paid-up shares in any such association of a value in excess of two per centum of the liability of such association for dues on installment shares, and in no case shall a member hold paid-up shares in any such association of a value in excess of twenty-five thousand dollars."

5. That Section 49 of the Act reads as follows:

> "ARTICLE III. RELATING TO ALL BUILDING AND LOAN ASSOCIATIONS.
>
> 1. Withdrawal of shares.
>
> 49. How withdrawn.
>
> The shares of every such association of this State or doing business therein, may be withdrawn by the holder at any time, by

giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

6. That Section 52 of said Act reads as follows:

"52. PAYMENT OF WITHDRAWALS. Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

7. That in pursuance of the statutory provisions aforesaid, the said defendant by due and

proper proceedings adopted a resolution whereby it agreed to sell to the public paid up shares of stock, the maturing value of which shall be paid in advance at the rate of $200.00 per share and it further agreed that it will pay an annual profit of 6% per annum and also guaranteed such interest on said stock in lieu of all other profits, payable semi-annually from the date of the issue of such stock; and it further resolved and agreed that such prepaid or paid up stockholders shall have a right to withdraw said funds, together with the guaranteed profits to the date of redemption upon 30 days' written notice, and that said association would pay to the holder, after said 30 days' written notice, the aforesaid principal sum represented by said prepaid or paid-up shares of stock, together with the guaranteed profit thereon to the date of withdrawal.

8. That the plaintiff, relying upon the said statutory provisions and the resolutions adopted by the said defendant association as aforesaid, and believing that the said defendant would in all things comply with said statutory provisions, and resolutions adopted by said association aforesaid, did, on the 10th day of July, 1928, purchase from said association five (5) shares of paid-up or prepaid shares of stock of said association and paid the sum of One Thousand ($1,000.) Dollars therefor, and received from said association, certificate No. 224 of said association. A photostatic copy thereof is hereto annexed, made part hereof and marked "Exhibit A."

9. That on or about the 1st day of June, 1930, in compliance with the statutory provisions hereinabove referred to, and in pursuance to the resolutions adopted by the said defendant associa-

tion, and in pursuance to the express agreement provided for in "Exhibit A" hereto annexed, the plaintiff gave written notice to the defendant association, of her desire to withdraw the One Thousand ($1,000.) Dollars paid as aforesaid, and to surrender to the said defendant association, the said certificate of prepaid stock "Exhibit A"; that receipt of said written notice was duly acknowledged by the said defendant association, on June 7th, 1930.

10. The plaintiff charges that after the said defendant association received said notice, it thereby became the duty of said defendant association to pay or cause to be paid to the said plaintiff, the moneys so due her as aforesaid in accordance with Section 52 of the said Act and the resolutions and Exhibit aforesaid; and the said defendant totally disregarded the rights of the said plaintiff and did not pay her the moneys due her as aforesaid, but, on the contrary, wholly disregarded the rights of the said plaintiff, and in violation of the statutory provisions concerning the payment of the moneys due her, the said defendant from time to time and up to the present time continued to pay out moneys belonging to said association to other persons and stockholders who filed withdrawals with said association, after the plaintiff had filed and demanded payment as aforesaid, and that the said defendant association has not paid the moneys due to the said plaintiff and has postponed the payment thereof for a period longer than six months from the date of such notice, and from thence hitherto; and by reason thereof a right of action has accrued to the said plaintiff against said defendant association as provided for by Section 52 of the aforesaid Act.

Judgment will be claimed on this count for the sum of One Thousand ($1,000.) Dollars, together with interest from July 10, 1932.

SECOND COUNT.

1. For the purpose of brevity, the plaintiff repeats each and every allegation contained in the First Count hereof.

2. That Chapter 102 of the Laws of 1932 at page 175, being an Act to amend an Act entitled "An Act concerning Building Loan Associations, (Revision of 1925, approved March 12, 1925)" reads as follows:

> "1. Section fifty-two of the act of which this act is amendatory, be and the same is hereby amended so that the same shall read as follows:
>
> 52. PAYMENT OF WITHDRAWALS.
>
> Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdraw-

ing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein."

3. That the said defendant totally and wholly neglected and refused to pay to the plaintiff the moneys due her as aforesaid and totally disregarded the statutory provision above mentioned and made numerous and various payments of large sums of money, to wit, the sum of One Hundred Thousand ($100,000) Dollars to other stockholders who had filed notice of withdrawals with said defendant association after the date the plaintiff had filed her notice of withdrawal with said defendant association, and that the said defendant association paid moneys to other

class of stockholders in preference to and in violation of the statutory provisions, and by reason thereof a cause of action accrued to the plaintiff and against the said defendant association.

Judgment will be claimed on this count for the sum of One Thousand ($1,000) Dollars, together with interest from July 10, 1932.

THIRD COUNT.

1. For the purpose of brevity, the plaintiff repeats each and every allegation contained in the First and Second Counts.

2. That Chapter 48 of the Laws of 1933, at page 94, being a supplement to an Act "An Act concerning Building and Loan Associations (Revision of 1925)" declared that a public emergency exists and adopted and passed an Act which reads as follows:

> "1. The Commissioner of Banking and Insurance shall have power, in addition to such other powers as he may have, notwithstanding the provisions of the act to which this act is a supplement and the amendments and supplements thereof, from time to time, to make orders for the purpose of conserving the assets of the building and loan associations of this State, which Orders shall have the same force and effect as law and be binding on any/or all building and loan associations of this State, whereby:
>
> (a) to regulate the method of paying the withdrawal value and/or maturity value of shares of any and/or all such associations;
>
> (b) to regulate and/or postpone the filing of applications for withdrawal of shares and of requests for payment of maturity value of shares of any and/or all such associations;

Complaint.

(c) to regulate or postpone the payment of all or any part of the maturity value or of the withdrawal value of shares of any and/or all such associations;

(d) to require any and/or all such associations to establish additional reserves or increase present reserves and to regulate any reserves of any and/or all such associations and to prescribe the manner in which such reserves shall be established;

(e) to regulate, allocate, prohibit or postpone the receipt and/or disbursement of funds by any such association;

(f) to effect such changes and/or reorganizations in the business and/or affairs of any and/or all such associations as he shall deem necessary or proper.

2. The Commissioner shall not be liable in damages to any person by reason of errors of judgment in carrying out the powers herein conferred on him nor shall he be liable in damages for failure to act under said powers.

3. The Commissioner shall have authority to repeal, suspend or modify any order made by him pursuant to the provisions of this law.

4. No order made hereunder nor any suspension, modification or repealer thereof, shall be effective until a copy thereof shall be filed in the Department of Banking and Insurance and a copy thereof delivered or mailed to the association or associations affected.

5. This act shall take effect immediately and remain in effect one year from and after the date of approval.

Approved March 10, 1933."

3. That in pursuance to the said statutory provision, the Commissioner of Banking and Insurance promulgated an Order, under date of

March 14, 1933, being Order No. 1, a true copy of which is hereto annexed, made part hereof and marked "Exhibit B."

4. That notwithstanding the expressed provisions contained in the Order of the Commissioner of Banking and Insurance made in pursuance to the above statute, marked "Exhibit B" hereto annexed, the said defendant association failed and neglected to comply with said Order and contrary to said Order and against the rights of the said plaintiff, made payments of large sums of money, to wit, the sum of Fifty Thousand ($50,000) Dollars, to various members of the defendant association who had filed requests for withdrawals, after the plaintiff had filed her notice of withdrawal, and the said defendant association failed and neglected to pay to the plaintiff the sums of money due her in accordance with the said rules and regulations of the Banking Commissioner as aforesaid, and by reason thereof a right of action accrued to the said plaintiff against the said defendant.

Judgment will be claimed on this count for the sum of One Thousand ($1,000) Dollars, together with interest from July 10, 1932.

FOURTH COUNT.

1. The plaintiff repeats the allegations contained in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the First Count.

2. That on the 8th day of May, 1931, the said defendant did agree, in writing, with the plaintiff that it would pay to the plaintiff the sum of One Hundred ($100) Dollars each month, beginning immediately, until such time that the afore-

said Prepaid Certificate, "Exhibit A" representing an investment of One Thousand ($1,000) Dollars would be paid in full.

3. That the said defendant has never kept its promise in that regard and failed to make the monthly payments as aforesaid.

Judgment will be claimed on this count for the sum of One Thousand ($1,000) Dollars, together with interest from July 10, 1932.

FIFTH COUNT.

1. The plaintiff repeats the allegations contained in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the First Count.

2. That the said defendant on the 8th day of July, 1931, agreed, in writing, to repay to the plaintiff the One Thousand ($1,000) Dollars represented by the Prepaid Certificate, "Exhibit A" at the rate of One Hundred ($100) Dollars per month, commencing the first Tuesday of August, 1931.

3. That the said defendant failed to keep its agreement as aforesaid and failed to pay to the plaintiff the aforesaid One Thousand ($1,000) Dollars represented by the said Prepaid Certificate "Exhibit A."

Judgment will be claimed on this count for the sum of One Thousand Dollars, together with interest from July 10, 1932.

JOHN J. STAMLER,
Attorney for Plaintiff.

Defendant served September 18, 1934.

Complaint—Exhibit A.

"EXHIBIT A."

PREPAID SHARES OF STOCK

Number 224 Shares—5—

POWERFUL BUILDING AND LOAN ASSOCIATION
of Newark, New Jersey

THIS IS TO CERTIFY, That Ida Rocker is entitled to Five Shares of Stock of the

POWERFUL BUILDING ANL LOAN ASSOCIATION
OF NEWARK, NEW JERSEY,

transferable in person or by attorney only on the books of the Association upon surrender of this Certificate.

THE MATURITY VALUE OF THESE SHARES HAS BEEN FULLY PAID. An annual profit of six per cent per annum is guaranteed on these shares in lieu of all other profits, payable semi-annually from July 10-28. These shares may be redeemed by this Association at any time on 30 days written notice, and payment of the maturity value thereof, with such guaranteed profit to the date of redemption, and the holder thereof have the right to withdraw these shares at such maturity value and guaranteed profit to date of withdrawal upon giving 30 days written notice to this Association.

July 10th, 1928

W. A. EICHHORN,
Secretary

MICHAEL RABB
President

Shares $200.— Each

STATE OF NEW JERSEY

DEPARTMENT OF BANKING AND INSURANCE

BUREAU OF BUILDING AND LOAN ASSOCIATIONS

STATE HOUSE ANNEX
TRENTON

To the Cardinal Building and Loan Association of Newark, New Jersey

ORDER NUMBER ONE-A

I, WILLIAM H. KELLY, COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY, under and by virtue of the power, authority and duties conferred upon me by the provisions of an act entitled "A supplement to an act entitled 'An act concerning building and loan associations' (Revision of 1925)," being Chapter 48, P. L. 1933, approved March 10, 1933, copy of which is hereto attached and made part hereof, and all other power and authority otherwise conferred upon me by law do hereby make the following order:

Your Building and Loan Association shall resume operations subject to the following restrictions and limitations:

1. The sum of its contingency reserve, real estate reserve, undivided profit accounts and any other reserve account for the absorption of losses shall be not less that the total of:

(a) The difference between 70% of the original amount of the mortgage or mortgages taken by your Association upon real estate now owned by it and the total of the amount at which such real estate is now carried upon the books of your Association as an asset, plus all unpaid munici-

pal liens thereon, if such total exceeds such percentage.

(b) The difference between 70% of the original amount of the mortgage or mortgages held by your Association which is (are) excessively in arrears (except for dues) and the anticipated cost of the property so mortgaged to your Association when acquired by foreclosure or otherwise, plus all unpaid municipal liens thereon, if such anticipated cost exceeds 70% of the original amount of such mortgage or mortgages.

2. Until the further order of the Commissioner of Banking and Insurance your Association shall not receive dues and/or premiums on any shares or make payments of the withdrawal or maturity value of shares or make share loans except in the following manner:

(a) Dues and/or premiums received by your Association from members either on pledged or unpledged shares shall be segregated from all other receipts and held in a separate trust account for the benefit of such members. Such funds so held in trust shall not be disbursed or credited to the share accounts until the further order of the Commissioner of Banking and Insurance.

(b) Payments not in excess of $50 in any one month to any one member may be made where such member in the opinion of the Board of Directors is in extreme necessitous circumstances but the total of such payments to any member shall not exceed 25% of the dues paid in by such member upon his shares and standing to his credit upon the books of the Association on the day and date of this order.

(c) The Association may grant share loans in lieu of such payments in such extreme necessitous cases but not to exceed the amounts hereinbefore limited.

3. Dividends or profits shall not be declared, paid or apportioned upon or to any shares.

4. No member shall have a right to sue your Association to recover the withdrawal or maturity value of the shares so long as your Association complies with this and subsequent orders of the Commissioner of Banking and Insurance.

5. If your Association is subjected to suit or threats of suit, immediately notify the Commissioner of Banking and Insurance, State House Annex, Trenton, for further instructions or orders.

6. Your Association may make application to the Commissioner of Banking and Insurance for a change or modification of any order made by him and upon satisfactory evidence that change or modification of any said order should be made, said application may be granted upon such terms and conditions as he may determine.

7. Any real estate, the title to which is held by any individual or corporation (holding company) for the benefit of your Association and upon which your Association holds a mortgage, shall be deemed to be real estate owned by your Association within the meaning of this order, for the purpose of calculating the reserves provided in Paragraph 1 (a) hereof. All statements and reports to the members of your Association and to the Commissioner of Banking and Insurance shall set forth such real estate.

8. The President of each Association is hereby instructed to present this order to the Board

of Directors at a meeting to be held or called forthwith for the purpose of bringing this order in full detail to their attention and taking action for immediate compliance therewith.

This order has the same force and effect as law and is binding on your Association.

W. H. KELLY,
Commissioner of Banking and Insurance,
State of New Jersey.

Trenton, New Jersey,
March 14, 1933.

STATE OF NEW JERSEY

DEPARTMENT OF BANKING AND INSURANCE

BUREAU OF BUILDING AND LOAN ASSOCIATIONS

STATE HOUSE ANNEX
TRENTON

To the Cardinal Building and Loan Association of Newark, New Jersey.

ORDER NUMBER TWO-A.

I, WILLIAM H. KELLY, Commissioner of Banking and Insurance of the State of New Jersey, under and by virtue of the power, authority and duties conferred upon me by the provisions of an act entitled "A supplement to an act entitled 'An act concerning building and loan associations' (Revision of 1925)", being Chapter 48, P. L. 1933, approved March 10, 1933, copy of which is hereto attached and made part hereof, and all other power and authority otherwise conferred upon me by law do hereby make the following order:

1. Order Number One-A is hereby amended to read as follows:

"Dues and/or premiums received by your Association from members either on pledged or unpledged shares shall be segregated from all other receipts and held in a separate trust account for the benefit of such members. Such funds so held in trust shall not be disbursed or credited to the share accounts until the further order of the Commissioner of Banking and Insurance, but funds now held or on deposit or to be deposited in such trust account, and which have been or will be received upon mortgages heretofore assigned or which may hereafter with the consent of the Commissioner of Banking and Insurance, be assigned by your Association to secure its note or other obligation, may be paid to such assignee if the contract of your Association with such assignee so provides. The crediting of such funds by your Association upon either the principal of the mortgage or upon the dues on the shares pledged therewith, shall await the further order of the Commissioner."

2. The President of your Association is hereby instructed to present this order to the Board of Directors at a meeting to be held or called forthwith for the purpose of bringing this order in full detail to their attention and taking action for immediate compliance therewith.

3. This order has the same force and effect as law and is binding upon your Association.

W. H. KELLY,
Commissioner of Banking and Insurance
State of New Jersey.

Trenton, New Jersey,
April 13, 1933.

STATE OF NEW JERSEY

DEPARTMENT OF BANKING AND INSURANCE

BUREAU OF BUILDING AND LOAN ASSOCIATIONS

STATE HOUSE ANNEX
TRENTON

To the Cardinal Building and Loan Association of Newark, New Jersey.

ORDER NUMBER THREE-A.

I, WILLIAM H. KELLY, COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY, under and by virtue of the power, authority, and duties conferred upon me by the provisions of an act entitled "A supplement to an act entitled 'An act concerning building and loan associations' (Revision of 1925)", being Chapter 48, P. L. 1933, approved March 10, 1933, and by the provisions of an Act further amending Chapter 48, P. L. 1933, being Chapter 166, P. L. 1933, approved May 11, 1933, and all other power and authority otherwise conferred upon me by law, do hereby make the following order:

Sec. 1. Reserves to be set up in your Association under previous and subsequent Orders issued pursuant to Chapter 48, P. L. 1933, and Chapter 166, P. L. 1933, shall be established from the following sources and in the order set out below:

(a) From real estate reserves.

(b) From all other reserves, undivided profits or unapportioned profits.

(c) From net profits of the current fiscal period.

(d) From profits previously apportioned. In setting up reserves from this source, the

following method shall be used: The amount of reserves to be set aside from such apportioned profits as compared with the total amount of such apportioned profits shall be calculated on a percentage basis, and such percentage shall then be used in reducing the profits apportioned to the shares of each member.

(e) If any or all of the reserves set up from the above mentioned sources are insufficient to build up the required reserves, then all classes of shares shall be assessed pro rata upon actual payments on shares.

The amount of reserves to be set up from the sources outlined above in items (c), (d) and (e) shall be determined by the Commissioner of Banking and Insurance.

Your Association shall notify all shareholders whose shares are affected by setting up reserves by assessment against the capital.

(1) Any reserves set up from previously apportioned profits and/or from any assessment made against the capital of the shares, shall until further notice be retained and shall constitute a contingent reserve and shall be designated as such. Until further notice, such profits and/or capital established as a contingent reserve shall not be paid out as a withdrawal or maturity nor applied as a credit for reduction of any obligations of the shareholders so affected.

(2) Losses sustained upon the sale of any real estate owned by your Association shall be charged to the reserves as established in the above mentioned order of (a), (b), (c), (d), (e). Any portion of the reserves established from the sources outlined in sub-divisions (d) and/or (e) above that remain unused after all your real estate has been sold, shall be returned in equitable proportions in the form of credits to the

shares which have been affected, as provided by sub-divisions (d) and/or (e) above mentioned, and to the extent to which such shares are proportionately entitled to such credits, but not exceeding the amount by which such shares have been so affected, and provided further, that such shares thus previously affected have not been lapsed, withdrawn or paid out as matured shares.

(3) Real estate owned shall be carried as an asset in an amount shown to be the cost thereof to your Association. The reserves set up as herein required are to be shown on the liability side of the financial statement and are not to be charged off against the cost of real estate acquired until the real estate is disposed of. No variation of this rule shall be made except by written permission of the Commissioner of Banking and Insurance.

(4) If your Association has established the reserves required by this Department, your Association may then release to the general funds of the Association the dues and premium receipts which have been held in a separate trust account under the provisions of Section 2(a) of Order Number One-A; and may credit to the respective shareholders accounts entitled thereto, such payments of dues and premiums so held in such separate trust account.

Section 2. The following regulations shall apply to sale of real estate owned by your Association:

(1) The Board of Directors of your Association is hereby directly charged with full responsibility in permitting the sale of any real estate, to authorize such sale only at a fair price and to the best interests of the shareholders.

(2) No real estate owned by your Association shall be sold except upon the authorization of at least two-thirds of all members of your Board of Directors.

(3) Immediately after the sale of any parcel of real estate owned by your Association, a committee of at least three directors shall execute and file an affidavit in the form required by this Department and which is annexed hereto and made a part hereof. Said affidavit shall be executed in duplicate, the original to be filed with the Department and the copy to be retained with your records.

(4) No commission shall be paid by your Association for the sale of real estate if no cash payment is made by the purchaser at the time of conveyance thereof.

(5) If real estate owned by your Association is sold and paid for partly in cash and partly in shares of your Association or of another Association and/or partly by a purchase money mortgage, then the commission which your Association may pay shall be limited to not more than 50% of the cash actually paid to your Association in the purchase of such real estate, but in no event to exceed the commission usually paid in such transactions in the community in which the property is located.

(6) Before your Association may execute a contract for the sale of any of your real estate, your Association shall obtain from the prospective purchaser an affidavit that he has not paid and will not pay any commission to any person, partnership or corporation interested in or instrumental in effecting the sale of such real estate.

Section 3. Permission is hereby granted your Association to accept building and loan shares as part of the purchase price in the sale of any real estate, subject to the following conditions, restrictions and limitations:

(1) Unpledged shares of your Association based upon the withdrawal value (after the required reserves have been established) may be accepted towards the purchase price of any real estate agreed to be sold to the holders of such shares, regardless of whether or not a request for withdrawal of such shares has been made and regardless of the order or priority of such withdrawal notice, provided, however, that the value of such shares which may be applied towards the said purchase price shall not exceed 50% of the purchase price of such real estate contracted to be sold. Your Association may accept cash and/or a purchase money mortgage for the balance of such purchase price. If two or more members of your Association desire to purchase any property owned by your Association, such sale may likewise be consummated subject to the aforementioned conditions, provided, however, that the aggregate amount of the shares of such group of members offered in exchange for real estate, shall not exceed 50% of the agreed upon purchase price of such real estate.

(2) If a member or group of members of another Building and Loan Association of the State of New Jersey desire to purchase any property owned by your Association and to use the withdrawal value of his or their shares, after revision of such value has been made through setting up of required reserves by such other Association, such transaction may be completed provided, all the provisions and requirements ap-

plicable to such transaction hereinbefore set forth are strictly observed. In no case shall your Association accept shares of such other Association in an amount exceeding 50% of the purchase price of the property to be sold, the balance of such purchase price to be taken either in cash or in the form of a first mortgage. The withdrawal value of shares of any other Association, which your Association may thus accept as part payment upon the sale of your real estate shall be further limited as follows:

(a) If the total assets of the Association whose shares are offered to you in part payment for your real estate are more than the total assets of your Association, then in that case the withdrawal value of the shares of such other Association which you may thus accept as part payment for your real estate, shall not in the aggregate exceed 1% of the assets of your Association.

(b) If the total assets of the Association whose shares are offered to you in part payment for your real estate are less than the total assets of your Association, then in that case the withdrawal value of the shares of such other Association which you may thus accept as part payment for your real estate, shall not in the aggregate exceed 1% of the assets of such other Association.

(3) No shares either of your Association or of any other Association or Associations of this State shall be accepted by your Association as payment toward purchase price of property owned by your Association as provided by the foregoing sections of this Order, unless such shares have been carried on the books of the Association having issued such shares in the

name of the prospective purchaser or purchasers of such property prior to March 14, 1933.

Section 4. The withdrawal value of any class of unpledged shares of your Association after setting up required reserves as heretofore provided, regardless of whether or not a request for withdrawal of such shares has been made and regardless of the order of priority of said withdrawal notice, may be applied as a credit toward recasting of a mortgage loan, and/or toward the arrears of payments due on shares pledged against mortgage loans, and/or may be applied directly toward reduction or repayment of such mortgage loans, when in the judgment of the Board of Directors such application of the value of such unpledged shares as a credit is found to be necessary to avoid foreclosure of the mortgage or where such procedure is found to be justified in necessitous cases. Such application of the withdrawal value of unpledged shares to be made as herein provided, is permitted only in case such shares have been standing in the name of the mortgagor requesting the same prior to March 14, 1933. The withdrawal value of shares determined after establishing required reserves as heretofore provided, which shares have been pledged to your Association as collateral security to a mortgage loan, may likewise be applied toward recasting of such mortgage loan.

Section 5. The following general requirements are to be observed:

(1) The persons or companies managing the real estate of your Association shall keep adequate records of the management and operation of such real estate; shall make monthly detailed

report of the results of such management and operation to your Board of Directors; shall at least once each month turn over to the Association the gross rental receipts, making no deductions therefrom for payment of any expenses or commissions resulting from such management and operation; the association shall by its checks pay bills, commissions and expenses resulting from such management and operation. Your rent collectors must be adequately bonded to your Association. Your attention is directed to our circular letter of January 20, 1933, your Board of Directors shall appoint a real estate committee to check up on all bills submitted for payment of real estate operating expenses before disbursements are made by your Association for payment of such bills.

(2) If your Association has not as yet received the six page set of questionnaire forms relative to the first Orders issued to your Association March 14, 1933, please inform us promptly. This set of questionnaire forms if not already filed with this Department, must be filed here by your Association not later than June 30, 1933.

Section 6. Orders previously issued to your Association, unless they have already been rescinded or modified, shall continue in force until further notice or until modification or rescission may be subsequently granted.

Section 7. Your Association is hereby required to acknowledge receipt of this Order.

Section 8. The President of your Association is hereby instructed to present this Order to the Board of Directors at its meeting to be held within the next thirty days.

This Order has the same force and effect as law and is binding on your Association to the extent of the requirements herein set forth and has the same force and effect as law as to the permissions granted herein.

Orders Number Two and Number Two-A were issued only to a few Associations; therefore, if your Association did not receive Order Number Two or Order Number Two-A, your Association need not be concerned therewith.

W. H. KELLY,
Commissioner of Banking and Insurance
State of New Jersey.

Trenton, New Jersey
May 23, 1933.

Affidavit of Merits.

Affidavit of Merits.

Filed September 24, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Affidavit of Merits.*

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

HAROLD SIMANDL, of full age, being duly sworn, according to law, on his oath deposes and says that he is the attorney for the defendant in the above-stated cause, and has been authorized by the corporation to make this affidavit; and that the above answer is not filed for the purpose of delay, but in truth and in good faith, and that he believes that the defendant Cardinal Building and Loan Association of the City of Newark, a corporation, has a just and legal defense to the action on the merits of the case.

HAROLD SIMANDL.

Sworn and subscribed to before me
this 22nd day of September, 1934.

SELMA GERIBSKY,
A Notary Public of New Jersey.

Stipulation Extending Time to Answer.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Stipulation Extending Time to Answer.*

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time to file an answer in the above-entitled matter be and hereby is extended from the 8th of October, 1934 to the 18th of October, 1934.

JOHN J. STAMLER,
Attorney of Plaintiff.

HAROLD SIMANDL,
Attorney of Defendant.

Dated: October 6th, 1934.

Further Amended Answer.

Further Amended Answer.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION, a corporation of New Jersey, *Defendant.*	*Action at Law.* *Further Amended Answer.*

The defendant, Cardinal Building and Loan Association of New Jersey, having its principal office in the City of Newark, in the County of Essex, answering the complaint of the plaintiff says that:

ANSWER TO FIRST COUNT.

1. It admits the allegations contained in paragraphs 1 and 2 of the First Count of the complaint and says that not only was it subject to all of the provisions contained in the statute therein set forth, but that it was subject also to all acts amendatory thereof and supplemental thereto.

2. It admits that subdivision 4 of Section 73 of the aforesaid act, did read as set forth in paragraph 3 of the complaint, but says that the said section of the said act was amended by P. L. 1932, Chapter 91, which is still in force and binding upon both plaintiff and defendant.

Further Amended Answer.

3. It admits that Section 74 of the aforesaid act in part read as set forth in paragraph 4 of the First Count, but says that the said section was amended by P. L. 1932, Chapter 97, which is still in force and binding upon both plaintiff and defendant.

4. It admits that Section 49 of the act did read as set forth in paragraph 5 of the First Count, but says that the said section has been amended by P. L. 1932, Chapter 92, which is still in force and binding upon both plaintiff and defendant.

5. It admits that Section 52 of said act did read as set forth in paragraph 6 of the First Count, but says that the said section was amended by P. L. 1932, Chapter 102, which is still in force and binding upon both plaintiff and defendant.

6. It denies the allegations of paragraph 7 of the First Count.

7. It admits that plaintiff subscribed for the paid up shares set forth in paragraph 8 of the First Count and paid $1,000.00 on said subscription, but denies the other allegations of said paragraph.

8. It denies the allegations of paragraphs 9 and 10 of the First Count.

ANSWER TO SECOND COUNT.

1. It repeats its answer to the First Count to paragraph 1 of the Second Count.

2. It admits the allegations of paragraph 2 of the Second Count.

3. It denies the allegations of paragraph 3 of the Second Count.

Further Amended Answer.

ANSWER TO THIRD COUNT.

1. It repeats the answers to the First and Second Counts in answer to paragraph 1 of the Third Count.

2. It denies the allegations of paragraph 2 of the Third Count and says that the act therein set forth is P. L. 1933, Chapter 48 and that the same was amended by P. L. 1933, Chapters 166, 258 and 381.

3. It admits the allegations of paragraph 3 of the Third Count, but denies that the said order was issued to or binding upon the defendant.

4. It denies the allegations of paragraph 4 of the Third Count.

ANSWER TO FOURTH COUNT.

1. It repeats its answer to paragraphs 1 to 9 inclusive, of the First Count in answer to paragraph 1 of the Fourth Count.

2. It denies the allegations of paragraphs 2 and 3 of the Fourth Count.

ANSWER TO FIFTH COUNT.

1. It repeats its answer to paragraphs 1 to 9 inclusive, of the First Count in answer to paragraph 1 of the Fifth Count.

2. It denies the allegations of paragraphs 2 and 3 of the Fifth Count.

FIRST SEPARATE DEFENSE
TO ALL COUNTS.

1. The defendant association is incorporated under the act of the Legislature of the State of

New Jersey, entitled "An Act concerning building and loan associations (Revision of 1925)" being P. L. 1925, Chapter 65, and is subject to the provisions of the said act and all amendments thereof and supplements thereto.

2. The said statute, amendments and supplements evidence the public policy of the State with respect to the subject matter of the said acts and the defendant association is incorporated thereunder, for the purpose of effectuating such public policy.

3. The Commissioner of Banking and Insurance, by virtue of the statutes of the State, is charged with the responsibility for executing the building and loan laws of this State and supervising the building and loan associations incorporated under the aforesaid statutes, in order that the respective and relative rights of the members may be preserved and the investments of the members protected.

4. On March 6th, 1933, the President of the United States issued a proclamation, declaring a bank holiday, under which all banks in this country were temporarily closed, which bank holiday extended beyond March 10th, 1933, and said proclamation was construed by some officials of building and loan associations of this State to be applicable to such associations.

5. On March 10th, 1933, the Legislature of this State passed an act entitled "A supplement to an act entitled 'An act concerning building and loan associations' (Revision of 1925), approved March twelfth, one thousand nine hundred and twenty-five," which recited:

> "Whereas, A public emergency exists as the result of a prolonged period of economic depression"

and which gave to the Commissioner of Banking and Insurance power to issue orders to "have the same force and effect as law and be binding on any and/or all building and loan associations of this State, whereby:"

"(a) to regulate the method of paying the withdrawal value and/or maturity value of shares of any and/or all such associations;

(b) to regulate and/or postpone the filing of applications for withdrawal of shares and of requests for payment of maturity value of shares of any and/or all such associations;

(c) to regulate or postpone the payment of all or any part of the maturity value or of the withdrawal value of shares of any and/or all such associations;

(d) to require any and/or all such associations to establish additional reserves or increase present reserves and to regulate any reserves of any and/or all such associations and to prescribe the manner in which such reserves shall be established;

(e) to regulate, allocate, prohibit or postpone the receipt and/or disbursement of funds by any such association;

(f) to effect such changes and/or reorganizations in the business and/or affairs of any and/or all such associations as he shall deem necessary or proper."

6. The said supplement was amended by P. L. 1933, Chapters 166, 258 and 381.

7. On March 14th, 1933, the Commissioner of Banking and Insurance of this State, under the powers conferred upon him under said Emergency Act, issued Order Number One-A, applicable to certain building and loan associations of this State, including the defendant associa-

tion, whereby the amount of required reserves for the defendant association was fixed and which, in part, provided as follows:

"2. Until the further order of the Commissioner of Banking and Insurance your Association shall not receive dues and/or premiums on any shares or make payments of the withdrawal or maturity value of shares or make share loans except in the following manner:

(a) Dues and/or premiums received by your Association from members either on pledged or unpledged shares shall be segregated from all other receipts and held in a separate trust account for the benefit of such members. Such funds so held in trust shall not be disbursed or credited to the share accounts until the further order of the Commissioner of Banking and Insurance.

(b) Payments not in excess of $50 in any one month to any one member may be made where such member in the opinion of the Board of Directors is in extreme necessitous circumstances but the total of such payments to any member shall not exceed 25% of the dues paid in by such member upon his shares and standing to his credit upon the books of the Association on the day and date of this order.

(c) The Association may grant share loans in lieu of such payments in such extreme necessitous cases but not to exceed the amounts hereinbefore limited.

3. Dividends or profits shall not be declared, paid or apportioned upon or to any shares.

4. No member shall have a right to sue your Association to recover the withdrawal or maturity value of the shares so long as your Association complies with this and subsequent orders of the Commissioner of Banking and Insurance.

8. The President of each Association in hereby instructed to present this order to the Board of Directors at a meeting to be held or called forthwith for the purpose of bringing this order in full detail to their attention and taking action for immediate compliance therewith.

This order has the same force and effect as law and is binding on your Association."

8. The Commissioner of Banking and Insurance, on May 23rd, 1933, under the power conferred upon him by the said Emergency Act, as amended, issued his order Number Three-A, directed to some of the building and loan associations of this State, including the defendant association, which in part, provided as follows:

"Section 6. Orders previously issued to your Association, unless they have already been rescinded or modified, shall continue in force until further notice or until modification or rescission may be subsequently granted.

Section 7. Your Association is hereby required to acknowledge receipt of this Order.

Section 8. The President of your Association is hereby instructed to present this Order to the Board of Directors at its meeting to be held within the next thirty days.

This Order has the same force and effect as law and is binding on your Association to the extent of the requirements herein set forth and has the same force and effect as law as to the permissions granted herein."

9. On November 8th, 1933, the Commissioner of Banking and Insurance, under the authority conferred upon him by the said Emergency Act, as amended, issued his Order Number Four to all associations of the State, including the de-

fendant association, which provided in part, as follows:

"Section 5. (2) Your Association shall discontinue making new mortgage loans and making any further payments on maturities or withdrawal of shares, except in necessitous cases, which shall not exceed $50 per month per member thereon, until all tax liens on property owned by your Association are paid. You are therefore directed to immediately ascertain the unpaid taxes which have become liens on real estate owned by your Association.

Section 6. Order No. 1 or Order No. 1-A, whichever one was heretofore issued to your Association, to the extent of which it has remained unmodified or to the extent to which it has been modified, shall continue in force and effect until modification or rescission may hereafter be granted. Modification or removal of any or all restrictions contained in Order No. 1 or Order No. 1-A, whichever one was previously issued to your Association, shall not constitute modification or removal of any of the provisions of Order No. 3 or Order No. 3-A, whichever one was issued to your Association or Order No. 4 hereby issued to your Association, without approval by this Department.

Section 7. The President of your Association is hereby instructed to present this Order to the Board of Directors at its meeting to be held within the next month.

This Order has the same force and effect as law and is binding on your Association to the extent of the requirements herein set forth and has the same force and effect as law as to the permissions granted herein, and as to any modifications hereof subsequently granted."

10. Since the making of Order Number One-A, the defendant association has disbursed its

funds as required by the said Order and Orders Three-A and Four and has in all ways, complied with the aforesaid orders of the Commissioner of Banking and Insurance.

11. At the time of the institution of this suit, there were unpaid taxes and assessments which were liens on the real estate of the defendant association, which are still unpaid, and since the institution of this suit, other taxes have become liens upon the property of the defendant association which are still unpaid.

12. The plaintiff is a member of the defendant association and the statute entitled "An Act concerning building and loan associations (Revision of 1925)", being P. L. 1925, Chapter 65 and all amendments thereof and supplements thereto, are binding upon her and all other members of the defendant association, and are part of the membership contract of all members of the defendant association, and as such, the said supplement and amendments thereof and orders issued by the Commissioner of Banking and Insurance, by virtue of the authority and power conferred by the said supplement and amendments thereof, are part of the membership contracts of all members of the defendant association and are binding upon the plaintiff.

13. The aforesaid supplement and amendments thereof and orders issued by virtue of the power and authority conferred by the same, are in all respects, binding upon the defendant association which, by virtue of law, is compelled to comply therewith.

14. The defendant association has in all respects complied with Order Number One-A and

the aforesaid subsequent orders of the Commissioner of Banking and Insurance which were issued to the defendant association, and by virtue of the aforesaid orders and the compliance therewith by the defendant association, the plaintiff may not maintain an action at law against the defendant association.

SECOND SEPARATE DEFENSE
TO ALL COUNTS.

Plaintiff is a member of the defendant association and cannot sue at law.

THIRD SEPARATE DEFENSE
TO ALL COUNTS.

Plaintiff is not a creditor of the defendant association and the defendant association is not indebted to the plaintiff.

FOURTH SEPARATE DEFENSE
TO ALL COUNTS.

1. The defendant association is an incorporated association, being duly incorporated under an Act of the Legislature of the State of New Jersey, entitled "An Act concerning building and loan associations" (P. L. 1903, page 457), and at all times since its incorporation and until March 12th, 1925, was subject to said Act, the amendments thereof and the supplements thereto, and since the last mentioned date, has been at all times subject to the provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning building and loan associations (Revision of 1925)" and the amendments thereof and the supplements thereto.

2. The defendant association is a mutual and cooperative association, all the members of which

are entitled to equally participate and share in its assets in the proportion which each member contributes to the amount of capital thereof.

3. The plaintiff, since subscribing to the shares of the defendant association, has been and still is a member thereof.

4. Payment of the alleged withdrawal value of the plaintiff's shares as claimed in this suit, would materially reduce the value of the shares of the remaining continuing and withdrawing members of the defendant association, and would give to the plaintiff more than her proportionate share of the assets of the defendant association; would prevent the remaining members of the defendant association from equally participating with the plaintiff in the distribution of the assets of the defendant association; would give to the plaintiff undue and illegal preference over the members remaining in the defendant association; would deprive said remaining members of their property without due process of law and would result in an illegal discrimination and inequality in the distribution of the assets of the defendant association.

FIFTH SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiff is a member of the defendant association and her membership contract includes and is subject to the provisions of "An Act concerning building and loan associations (Revision of 1925)", being P. L. 1925, Chapter 65, and the amendments thereof and supplements thereto, and to the constitution of the defendant association and all amendments thereof and supplements thereto.

Further Amended Answer.

2. The shares held by plaintiff are paid up shares of the defendant association.

3. Section 74 of the aforesaid act, in part provides

> "paid up shares shall only be surrendered and withdrawn on the same terms and under the same conditions as provided in the constitution for the surrender and withdrawal of installment shares".

4. Section 73 of the said act was amended by P. L. 1932, Chapter 91, and by such amendment, the type of shares held by plaintiff are designated as "income shares".

5. Section 74 of the said act was amended by P. L. 1932, Chapter 97, which provides that:

> "All classes of shares shall be surrendered and withdrawn on the same terms, and under the same conditions as provided in the constitution and in this act for the surrender and withdrawal of shares."

6. The constitution of the defendant association in force at the time of plaintiff's subscription for her said shares and which has continued in force to the time of the institution of this suit, in part, provides as follows:

> "ARTICLE IV.
>
> *Members, Shareholders, etc.*
>
> Sec. 6. Any non-borrowing stockholders wishing to withdraw from this Association may do so by giving *to the Secretary*, in writing, ten days prior to the meeting of the board of directors hereinafter provided for, notice of intention so to do. If the withdrawal be made within the first year of his or her respective series of stock, the shareholder shall be entitled to receive, as the withdrawal value of the shares of stock so withdrawn, the actual amount of the install-

ments paid in, less any fines or penalties due from the said shareholder, and *a proportionate share of any loss sustained by the Association.* After the first year, a reasonable share of the profits and earnings (which said share shall be determined from time to time by the board of directors), shall be included in the withdrawal value and paid to the withdrawing stockholder. In case such shares are pledged as collateral security for the repayment of a loan, made thereon by the Association, the amount of such loan shall be deducted from such withdrawal value and the difference paid to the withdrawing shareholder. PROVIDING, that the amounts paid for salaries, commissions and other current expenses shall not be construed as losses under this section.

Sec. 7. The amounts due withdrawing shareholders shall be paid in the order and priority in which notice of withdrawal is received by the Secretary, as aforesaid, but not more than one-half of the receipts of the Association during any month shall be used for the redemption and payment of withdrawal claims, without the consent of the board of directors."

7. Plaintiff did not, in writing, give to the Secretary notice of her intention to withdraw from the defendant association.

SIXTH SEPARATE DEFENSE
TO ALL COUNTS.

1. Paragraphs 1 to 6 inclusive of the Fifth Separate Defense are herein repeated with the same force and effect as if they were fully set forth.

2. In accordance with the provisions of the said statute and by virtue of the authority thereof, the members of the defendant association, in

the constitution which they adopted, authorized the board of directors to borrow money on the notes and bonds of the defendant association for certain purposes therein specified and authorized by said statute.

3. The board of directors from time to time, by duly adopted resolutions, borrowed money on the notes of the defendant association, the proceeds of which notes were deposited in the treasury of said defendant association and disbursed in the ordinary course of business as permitted and required by law.

4. Notes of the defendant association so issued and delivered for money borrowed, are held by banks and individuals to whom a number of bonds, mortgages and shares in which they are payable, have been assigned as collateral security for the payment of said notes and which notes are still unpaid, and said creditors are entitled to all of the payments on such assigned bonds, mortgages and shares.

5. The board of directors, from time to time, by duly adopted resolutions, borrowed money on the bonds of the defendant association, secured by mortgages upon real estate owned by it, the proceeds of which loans were deposited in the treasury of the defendant association and disbursed in the ordinary course of business, as permitted and required by law.

6. Said bonds and mortgages are still unpaid.

7. In connection with the business of the defendant association, the defendant is indebted to municipalities for taxes and assessments for real estate owned by the defendant association and foreclosure proceedings for unpaid taxes have

been threatened by the purchasers of tax certificates; there are also bills for the care, preservation and upkeep and improvement of said real estate unpaid.

8. The plaintiff and all other members of the defendant association, whether they are continuing or withdrawing members, occupy the same relative status as to debts of the defendant association.

9. Outside general creditors to whom such debts are now owed are entitled to be paid out of the funds now in or to come into the treasury of the defendant association prior to the payment of claims of the withdrawing shareholders.

10. The defendant association has not postponed the payment of any withdrawals, but has used its entire receipts, after payment of operating expenses, indebtedness to outside general creditors, taxes, assessments, water rents and for the care, preservation, improvement and protection of the real estate owned by the defendant association, in the payment of withdrawals, in accordance with the statute and constitution and the orders and directions of the Commissioner of Banking and Insurance with respect to the payment of withdrawals.

SEVENTH SEPARATE DEFENSE
TO FIRST, SECOND AND THIRD COUNTS.

1. The statute governing the defendant association and which is a part of the membership contract of the plaintiff, designates all shares as common shares, prohibits the issuance of preferred shares, provides that all members shall have the same status as to debts and losses, and provides for the proportionate sharing of losses

by all members, without regard to the type of share held by them respectively.

2. The guarantee of profits as alleged in the said counts of the complaint, would make the shares held by the plaintiff preferred shares, would give to the plaintiff a preference in the distribution of income and assets, would enable plaintiff to avoid her proportionate share of loss and of the debts of the defendant association, would result in other members receiving less than their proportionate share of assets and throw upon them a disproportionate share of losses in violation of the membership contract of the plaintiff and all other members of the defendant association and of the statute aforesaid, governing the defendant association and all of the members thereof.

3. The guarantee of profits as alleged in the said counts is against public policy and void.

EIGHTH SEPARATE DEFENSE
TO FIRST, SECOND AND THIRD COUNTS.

1. Paragraphs 1 and 2 of the Seventh Separate Defense are herein repeated with the same force and effect as if they were fully set forth.

2. The guarantee of profits as alleged in the said counts is ultra vires and void.

NINTH SEPARATE DEFENSE
TO FOURTH AND FIFTH COUNTS.

1. At the time of plaintiff's subscription for shares, the defendant association was operating under and controlled by the provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning building and loan

associations (Revision of 1925)," being P. L. 1925, Chapter 65, and has since said time been subject to the provisions of said act and all amendments thereof and supplements thereto.

2. The plaintiff, by virtue of her subscription to the shares mentioned in the complaint, became a member of the defendant association and her membership contract included all the provisions of the said statute and all amendments thereof and supplements thereto.

3. Section 49 of the said statute, as in force at the time of plaintiff's subscription for shares and as since amended by P. L. 1932, Chapter 92, provides that every withdrawing member's proportionate share of any loss sustained by the defendant association, shall be deducted from the withdrawal value of the shares withdrawn and Section 52 of the aforesaid statute, provided for the payment of withdrawals in the order in which the notice shall have been received, and the allocation of receipts for such payments and the said section as amended by P. L. 1932, Chapter 102, provides that withdrawals shall be paid in the order in which the applications therefor are filed, except under certain circumstances, and provides for allocation of receipts for the payment thereof and prohibits suits for withdrawals if payments are made in accordance with the statute.

4. Section 74 of the said statute, in force at the time of the plaintiff's subscription for shares and as amended by P. L. 1932, Chapter 97, provides that the status of all members as to debts and losses shall be equal and that shares of the type held by plaintiff shall be withdrawn under the terms and conditions provided in the con-

stitution with reference to the withdrawal of shares.

5. Paragraph 6 of the Fifth Separate Defense is herein repeated with the same force and effect as if it were fully set forth.

6. On the day and dates of the alleged agreements set forth in Counts 4 and 5 of the complaint, there were on file with the defendant association written notices of withdrawal filed in accordance with the statute and the constitution of the defendant association, before the date of the alleged filing of the application of withdrawal by the plaintiff, which were then unpaid and which still remain unpaid.

7. Orders of the Commissioner of Banking and Insurance One-A, Three-A and Four, issued to the defendant association, required the setting up of reserves and the charging of losses against all members, which said orders were issued in the year 1933.

8. At the time of the alleged agreements set forth in the Fourth and Fifth Counts of the complaint, plaintiff was a member of the defendant association and as such entitled to withdraw from the defendant association and receive the withdrawal value of her shares, which are a part of the capital of the defendant association, only in accordance with the terms of her membership contract, including the aforesaid provisions of the statute in force at that time, and the amendments thereof and supplements thereto and the orders of the Commissioner of Banking and Insurance.

9. In accordance with the aforesaid membership contract, the members of the defendant

association who had filed applications for withdrawal of their shares prior to the filing of the applications aforesaid by the plaintiff, are entitled to payment in full of the withdrawal value of their shares, before plaintiff is entitled to any payment of the withdrawal value of her shares.

10. The defendant association has suffered losses on investments which were assets at the time of the alleged agreements.

11. The agreements as alleged in the said counts of the complaint, are in fraud of the rights of the members of the defendant association, whose right to payment of the withdrawal value of their shares is prior to that of the plaintiff; would give to plaintiff a status of creditor superior to that of all other members and would give to her as such creditor, a preference as to payment of the withdrawal value of her shares, to which she was not entitled by virtue of the membership contract, including the aforesaid statutes, and would entitle her as such creditor, to interest on the withdrawal value of her shares, to which she is not entitled as a member awaiting the payment of her withdrawal until all prior applications for withdrawal have been paid; would enable her to avoid her proportionate share of losses, give to her more than her proportionate shares of assets, throw upon the remaining members a disproportionate share of losses and deny them equal participation in assets with the plaintiff and destroy the equality of status of members as to debts and losses of the defendant association, and give to the plaintiff a right of payment superior to that to which she is entitled as a member.

Further Amended Answer.

12. The agreements alleged in the said counts of the complaint are against public policy, ultra vires and void.

TENTH SEPARATE DEFENSE
TO FOURTH AND FIFTH COUNTS.

1. The agreements alleged to be made by the defendant association, as set forth in the Fourth and Fifth Counts of the complaint, were without consideration.

ELEVENTH SEPARATE DEFENSE
TO THE FOURTH AND FIFTH COUNTS.

1. Paragraphs 1 to 8 of the Ninth Separate Defense are herein repeated with the same force and effect as if they were fully set forth.

2. Paragraphs 1 to 9 inclusive of the Sixth Separate Defense are herein repeated with the same force and effect as if they were fully set forth.

3. The aforesaid loans to the defendant association upon its notes and bonds were made upon the faith of the capital of the defendant association, of which the shares of the plaintiff aforesaid are a part.

4. The agreements alleged in the Fourth and Fifth Counts of the complaint are in fraud of the rights of the outside general creditors of the defendant association and of the rights of the other withdrawing and continuing members of the defendant association to have the funds in the treasury of the defendant association, applied to the payment of its indebtedness to outside general creditors and to payment of taxes, assessments so as to save the real estate assets

of the defendant association from sale for unpaid municipal liens and they gave to the plaintiff the status of a creditor and a right to payment equal to that of the outside general creditors of the defendant association, and to share with them in their preferential right of payment of the indebtedness of the defendant association, and they thus reduce the security of the said outside general creditors and give to plaintiff a right to suit and judgment prior to that of some of the outside general creditors and to prefer her by enabling her to obtain a judgment which would become a lien upon the assets of the defendant association prior to the lien of any judgment which might be obtained by an outside general creditor, to whom the indebtedness of the defendant association was or is not due and who, therefore, would have no right of action until after the entry of judgment in a suit by the plaintiff.

5. The agreements aforesaid do not operate to change the status of the plaintiff as a member of the defendant association and are violative of the obligation of the contracts of the defendant association with the outside general creditors and of the membership contracts of all other members of the defendant association and are against public policy, ultra vires and void.

6. Plaintiff is not entitled to payment until the outside general creditors of the defendant association have been paid and until the funds of the defendant association are not needed for the payment of municipal liens and for the care, preservation, improvement and protection of the assets of the defendant association, and until her application for withdrawal is required to be

paid by the statutes of the state, the constitution of the defendant association and the orders of the Commissioner of Banking and Insurance.

TWELFTH SEPARATE DEFENSE TO ALL COUNTS.

1. The defendant association has and will suffer losses on assets acquired prior to the plaintiff's alleged notice of withdrawal and the proportionate liability therefor of all members, both continuing and withdrawing, the preferential and respective rights of outside secured and unsecured general creditors, the municipalities and the various withdrawing and continuing members, cannot be ascertained, determined or be fixed in a suit at law, nor in such suit can the assets of the defendant association be marshalled for the payment of creditors and members in accordance with their respective rights.

2. This court has no jurisdiction over the claim of the plaintiff against the defendant association as the creditors and other members of the defendant association whose constitutional and contract rights which are affected by this suit, are not parties hereto and cannot be heard herein.

NOTICE OF MOTION.

At or after the trial of this cause, defendant association will move to strike out the complaint filed herein on the following grounds:

1. It is sham.

2. It is frivolous.

3. It does not set forth a valid cause of action at law.

Further Amended Answer.

4. It does not set forth sufficient facts to constitute a valid cause of action for the reasons that it:

(a) Does not show the plaintiff is a creditor of the defendant or that she is entitled to maintain this action or entitled to a judgment.

(b) Does not allege the performance by the plaintiff, or any breach by the defendant, of the contract of membership between the plaintiff, the defendant association and the other members of defendant association.

(c) Does not set forth the withdrawal value of the shares on the date of the institution of the suit.

(d) Does not set forth the fact that the defendant association has set up the necessary reserves required by the order issued by the Commissioner of Banking and Insurance in such case made and provided.

(e) Does not allege that the defendant association has not sustained losses prior to the filing by plaintiff of her notice of withdrawal and that it does not anticipate sustaining losses on investments made by said defendant association prior to the filing of said notice of withdrawal or that no actual or anticipated losses are proportionately legally chargeable to the plaintiff as a member of the defendant association.

(f) Does not allege provisions of the statute or the orders aforesaid under which a member in a building and loan association is entitled to withdraw his shares and/or maintain an action for the withdrawal value thereof.

HAROLD SIMANDL,
Attorney for Defendant.

Reply to Amended Answer and Separate Defenses.

Filed May 7, 1935.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant.*	*Action at Law.*

Reply to the Amended Answer and Separate Defenses to the Second and Third Counts of Plaintiff's Complaint.

The plaintiff replying to the amended answer and separate defenses to the second and third counts of plaintiff's complaint says:

1. The plaintiff denies each and every allegation contained in said amended answer and separate defenses thereto, excepting such part thereof as admits plaintiff's complaint.

JOHN J. STAMLER,
Attorney for Plaintiff.

Notice to Strike Answer and to Enter Judgment Final.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant.*	*Action at Law.*

To Harold Simandl, Esq., attorney for defendant.

DEAR SIR:

PLEASE TAKE NOTICE that on Friday, the 25th day of January, 1935, at *9:30 o'clock* in the forenoon of that day, at the Court House in the City of Elizabeth, I will make an application to the Justice of the Supreme Court holding the Union County Circuit, or to such a Supreme Court Commissioner who will sit in place of said Judge of the Supreme Court to hear Motions, for an Order

a. To strike the answer to the first, fourth and fifth counts of the complaint or to either of said counts.

b. To strike the first and second separate defenses, and all defenses thereto.

c. To strike the eighth and ninth separate defenses to the first, fourth and fifth counts of the complaint upon the following grounds:

1. That the said answer and separate defenses contained in the answer do not constitute a legal defense to the plaintiff's action.

2. That said answer and separate defenses to the first, fourth and fifth counts of the complaint are frivolous and/or sham.

3. That the said answer and separate defenses to the first, fourth and fifth counts were filed for the purpose of delay.

d. That the plaintiff will apply for an Order to enter judgment final against the defendant in favor of the plaintiff on the first, fourth and fifth counts of the complaint or either of said counts.

Please Take Further Notice that upon said motion to strike and application for judgment final the plaintiff will use the annexed affidavits in suport of said motion.

Please Take Further Notice, that at the same time and place I will demand the production of the original letters written by Abraham Rocker to the defendant Association, or to its Secretary, or to its Attorney Mr. Harold Simandl, and set forth in the affidavit of Abraham Rocker, dated May 16th, 1931, June 22nd, 1931, September 1st, 1931 and September 16th, 1931, and unless the same are produced the copies thereof will be used in evidence.

Dated January 16th, 1935.

Respectfully yours,

JOHN J. STAMLER,
Attorney for Plaintiff.

Affidavit of Abraham Rocker.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

Ida Rocker, Plaintiff, vs. Cardinal Building and Loan Association of the City of Newark, Defendant.	Action at Law. Affidavit.

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

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

1. I am the husband of Ida Rocker, the plaintiff herein and at her request I was authorized to invest her moneys as hereinafter stated and was her agent for all purposes, including the collection of the moneys due from the defendant.

2. That on the 10th day of July, 1928, the Powerful Building and Loan Association of Newark, New Jersey, was a corporation duly organized under an act, "An Act concerning Building and Loan Associations of the State of New Jersey" and was subject to all the provisions contained in Chapter 65 of the Laws of 1925, "An Act concerning Building and Loan Associations"; that sometime afterwards the said Association in pursuance to said statute caused its name to be changed to the Cardinal Building and Loan Association of Newark, who is the defendant in this suit.

3. That on or about the 10th day of July, 1928, Mr. Michael Rabb was the President and Mr. W. A. Eichhorn was Secretary of said Association.

4. That on the 10th day of July, 1928, at the solicitation of Mr. Michael Rabb, the President of defendant Association, I, for and on behalf of the plaintiff, Ida Rocker, my wife, purchased five (5) shares of the Pre-paid stock or Paid-up Stock of the said defendant Association and paid the sum of One Thousand ($1,000.) Dollars therefor and received in payment a certificate of stock, No. 224, the original I will produce in court and a copy thereof reads as follows:

"PREPAID SHARES OF STOCK

Number	Shares
224	5

POWERFUL BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

THIS IS TO CERTIFY, that Ida Rocker is entitled to Five Shares of Stock of the Powerful Building and Loan Association of Newark, New Jersey, transferable in person or by attorney only on the books of the Association upon surrender of this Certificate.

The maturity value of these shares has been fully paid. An annual profit of six per cent. per annum is guaranteed on these shares in lieu of all other profits, payable semi-annually, from July 10,/28. These shares may be redeemed by this Association at any time on 30 days written notice, and payment of the maturity value thereof, with such guaranteed profit to the date of redemption, and the holder thereof have the right to withdraw these shares at such maturity value and guaranteed profit to date of with-

drawal upon giving 30 days written notice to this Association.

July 10th, 1928.

W. A. EICHHORN,
Secretary.

MICHAEL RABB,
President.

SHARES
$200.—
EACH"

5. That sometime prior to the 8th day of May, 1931, in compliance with the terms expressed in said Certificate of Stock, I gave 30 days written notice to the said defendant, that my wife desired to surrender said Certificate of Stock and have returned to her the sum of One Thousand ($1,000.) Dollars, paid by her as aforesaid.

6. That on the 8th day of May, 1931, I received a letter from the defendant Building and Loan Association concerning the said Certificate of Stock and the withdrawal thereof; the original of which I bring into Court and a copy thereof reads as follows:

"CARDINAL BUILDING & LOAN ASS'N
(Formerly Powerful)
Meets Second Tuesday of each Month
30 Jones Street
Newark, N. J.
A. A. KURTZ, Secretary

May 8, 1931.

Mr. A. Rocker,
1137 E. Jersey Street,
Elizabeth, N. J.

Dear Sir:

After discussing your demand for the withdrawal of your prepaid stock certificate with Mr. Whitbeck, of the State Department of Banking and Insurance, we decided to

mail you $100.—each month beginning immediately until such time that the certificate will be fully paid off.

If it is possible for the association to increase the payment at any time, I wish to assure you, we will be glad to do so.

As you surely know, there will be no loss in interest to you on this arrangement.

Yours very truly,

A. A. KURTZ,
Secretary."

7. On May 16th, 1931, I received a further letter from the said defendant Building & Loan Association, the original of which I bring into Court and a copy thereof reads as follows:

"CARDINAL BUILDING & LOAN ASS'N
(Formerly Powerful)
Meets Second Tuesday of Each Month
20 Jones Street
Newark, N. J.

A. A. KURTZ, Secretary

May 16th, 1931.

Mr. A. Rocker,
1137 E. Jersey Street,
Elizabeth, N. J.

Dear Mr. Rocker:

I am rescinding my former letter to you wherein I stated that our association will make monthly payments to you until your prepaid stock was fully paid.

At our last meeting of the Board of Directors, Mr. Rabb, informed the Board that he met you on a train and you informed him that you do not desire to withdraw your money.

In view of this, your demand for withdrawal has been taken from our lists.

Very truly yours,

A. A. KURTZ,
Secretary."

AAK:FR

8. On May 16th, 1931, I replied to the letter of the said defendant association last mentioned, the original of which is in the possession of the defendant and a true copy thereof reads as follows:

"Mr. A. A. Kurtz, Sec.,
Cardinal Bldg. & Loan Ass'n.,
20 Jones St.,
Newark, N. J.

May 16, 1931.

Re: Mrs. Ida Rocker, Prepaid Stock

Dear Sir:

I am in receipt of your letter dated May 15th, and it is rather a shocking surprise to me, as to contents of same.

I met your President, Mr. Raab on a train, some time almost a year ago and at that time he offered me very small installments and I said I would rather not withdraw the money in that manner, and I have given the Building and Loan Association every opportunity to recuperate, and be able to pay my wife the money in one bulk sum, but seeing you cannot do this, I will ask you to be good enough to forward my wife a check for $100. per month, as per previous agreement made in your previous letter.

I certainly have never seen Mr. Raab since you have last written me, and as I mentioned in the beginning of this letter, I saw him almost a year ago, and the only reason that I was satisfied to allow the money to remain was that I had to be satisfied; what else could I do?

I will expect the first monthly check for $100. by return mail and then every month thereafter, until the full amount of $1,000 has been paid to us.

Yours very truly,

AR:SP Manager."

9. On June 22nd, 1931 I further addressed a letter to the said defendant association, the original of which is in the possession of the defendant and a true copy thereof reads as follows:

"Mr. A. A. Kurtz, Sec.,
Cardinal Bldg. & Loan Ass'n.,
20 Jones St.,
Newark, N. J.

June 22, 1931.

Re: Mrs. Ida Rocker, Prepaid Stock

Dear Sir:

Since May 16th, we have not heard anything from you regarding the monthly installments of $100. that the Cardinal Building & Loan Association agreed to send to Mrs. Rocker, until the $1,000 prepaid stock is cleared off.

Please let us hear from you as to when we may expect to receive the first check of $100. and $100. monthly thereafter.

Yours truly,

AR:SP Manager."

10. That on July 8th, 1931, I received a further letter from the said defendant Association concerning the said stock, the original of which I bring into Court and a copy thereof reads as follows:

"CARDINAL BUILDING & LOAN ASS'N
(Formerly Powerful)
Meets Second Tuesday of Each Month
20 Jones Street
Newark, N. J.
A. A. KURTZ, Secretary

July 8th, 1931.

Mr. Abraham Rocker,
1137 East Jersey Street,
Elizabeth, New Jersey.

Dear Sir:

This is in reply to your letter of June 22nd, regarding the withdrawal of your

$1,000.00 prepaid stock certificate in our Association.

I will have a resolution passed by our Board of Directors on the 14th day of July authorizing me to mail you $100.00 checks for the withdrawal of the above mentioned certificate.

The first check will be forwarded to you shortly after the second Tuesday in August.

On behalf of the Board I wish to take this means of thanking you for your patience in this matter.

Yours very truly,

AK:SC A. A. Kurtz."

11. That on September 1st, 1931, I addressed a letter to the said defendant Association, the original of which is in the possession of the defendant and a true copy thereof reads as follows:

"Mr. A. A. Kurtz, Secretary,
Cardinal Bldg. & Loan Ass'n.,
20 Jones St.,
Newark, N. J.

September 1, 1931.

Re: Mrs. Ida Rocker, Prepaid Stock

Dear Sir:

Under date of May 8th, you wrote me that you would start sending checks of $100. each month until the full $1,000 prepaid stock is paid off.

Under date of July 8th, you again wrote me, to the effect that the Board of Directors will pass a resolution authorizing you to mail us $100. checks monthly, the first check to be forwarded to us after the second Tuesday in August, but as yet we have not received same.

Will you please be good enough to send us two checks of $100. each, one for August and one for September, and see to it that these checks are sent to us right along, the second week of each month, in order to pay

out this prepaid stock, as Mrs. Rocker needs the money very much at this time.

Thanking you in advance, for your immediate attention to this matter, I am

Yours truly,

AR:SP Manager."

12. That on September 16th, 1931, I addressed a further letter to Mr. Harold Simandl, Attorney and Counsel for the said defendant Association, the original of which is in his possession, and a true copy thereof reads as follows:

"Judge Harold Simandl,
20 Branford Pl.
Newark, N. J.

Sept. 16, 1931.

Re: Mrs. Ida Rocker, Prepaid Stock
Dear Sir:

I am attaching hereto a copy of a letter that I have written to Mr. A. A. Kurtz, Secretary, Cardinal Building & Loan Association, under date of Sept. 1st, and same is self-explanatory.

This is in compliance with your request after our conversation yesterday, that I write you and call this matter to your personal attention, and you assured me that you will do everything in your power to see that you get this money for us.

Thanking you in advance for your prompt attention to this, I am

Yours very truly,

AR:SP Manager."

13. That afterwards, at various times between the 1st of October, 1931 and the 1st day of January, 1932, I had a talk with Mr. Michael Rabb, the President of said defendant Association, concerning the moneys due to my wife from the defendant Association, and on those occa-

sions Mr. Rabb informed me, that the said defendant Association did, at the meeting of the Board of Directors held during the month of August, 1931, direct the officers of the association to pay my wife, the plaintiff herein, the sum of $100.00 monthly until the full sum of $1,000.00 due her from said defendant Association, is fully paid and satisfied.

14. That I know of my own knowledge that the said defendant Association did not pay to my wife, the plaintiff herein, the aforesaid sum of $1,000.00 or any part thereof, notwithstanding the fact that the said moneys became due and payable to her on May 8th, 1931, as provided for by the said Certificate of Stock or in a reasonable time thereafter.

15. That I did not, on behalf of my wife, at any time, agree with any officer or director of said Association to waive the performance of the said defendant's obligation to pay my wife, the plaintiff herein, the money due her in manner other than set forth in the correspondence above referred to.

16. There is due to the plaintiff, Ida Rocker, from the said defendant the sum of $1,000.00, together with interest from July 10th, 1932.

17. I believe that the defendant has no defense to said action of the plaintiff and that the Answer filed herein to the Fourth and Fifth Counts of the Complaint discloses no legal defense and was filed for the purpose of delay.

ABRAHAM ROCKER.

Affidavit of Ida Rocker.

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

A. E. CORIELL,
Notary Public of New Jersey.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

Ida Rocker, Plaintiff, vs. Cardinal Building and Loan Association of the City of Newark, Defendant.	Action at Law. Affidavit.

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

IDA ROCKER, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the plaintiff herein. Abraham Rocker is my husband and he had full power and authority to purchase the Pre-paid Certificate of Stock in the defendant Association at my request and he was directed and authorized by me to surrender said 5 Shares of Pre-paid Stock for which I had paid $1,000.00, and to demand the payment thereof.

2. And I further state that the correspondence, contained in his said affidavit hereto an-

nexed, written by my husband, Abraham Rocker, were all written by him at my request.

3. That I, at no time, agreed with any officer or director of said defendant Association to waive or change the performance of the written agreement contained in said Certificate of Stock or in the correspondence, excepting that I was willing to accept the payment of $100.00 monthly, in place of the full sum of $1,000. in one payment, that I never authorized any person or my husband, Abraham Rocker to waive the performance of the agreement with the said Association otherwise than above stated.

4. There is due to me the sum of $1,000. together with interest from July 10, 1932.

5. That I believe that the said defendant has no defense to said Action and that the said Answer of the defendant was filed for the purpose of delay.

6. That the said Pre-paid Stock was issued to me by the said defendant Association by virtue of Section 73, Paragraph 4 of Chapter 65 of the Laws of 1925 which reads as follows:

> "Paid up shares shall be shares the maturity value of which shall be paid in advance."

And that by virtue of the above quoted law and particularly Paragraph 74, which reads as follows:

> "that agreements may be entered into by and between any such association and any of its members holding paid-up shares, as the constitution shall provide, whereby said members waive participation in the general profits of such association in consideration of a fixed profit on the paid-up shares; pro-

vided, further, that no member shall hold paid-up shares in any such association of a value in excess of two per centum of the liability of such association for dues on installment shares, and in no case shall a member hold paid-up shares in any such association of a value in excess of twenty-five thousand dollars; provided, further, however, that this limitation shall not apply to paid-up shares that are received by a person by will or under the statute of distribution, or held as collateral security.''

7. That the $1,000.00 investment that I made with said defendant Association and for which I received the 5 shares of Paid-up Stock of said Association, was less than 2% of the liability of such association for dues on installment shares and was the only Pre-paid shares of stock that I held in said Association.

IDA ROCKER,

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

A. E. CORIELL,
Notary Public of New Jersey.

Defendant's Replying Affidavits.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	*Action at Law.* *Defendant's Replying Affidavit.*

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

ABRAHAM A. KURTZ, being duly sworn on his oath deposes and says:

1. I am the secretary of the CARDINAL BUILDING AND LOAN ASSOCIATION, of the City of Newark, New Jersey, the defendant in the above-entitled matter. I was secretary during the year 1931.

2. It is true that the books of the Cardinal Building and Loan Association disclose that Ida Rocker is the holder of five (5) shares of pre-paid stock or paid-up shares of the said Cardinal Building and Loan Association. It is also true that some time prior to the 8th day of May, 1931, Mr. Abraham Rocker communicated with the building and loan association and requested a withdrawal of the said shares. I wrote the letter dated May 8th, 1931, which according to the calendar, was a Friday, and this date was four (4) days before the regular monthly meeting, which is held on the second Tuesday of each month.

3. Mr. Whitbeck of the State Department of Banking and Insurance took up with me the matter of several applications for withdrawal. I told him that I hoped to be able to obtain approval from the Association of an arrangement to pay Mrs. Rocker the sum of One Hundred ($100.00) Dollars per month. At the time I wrote the letter I was not authorized by the Board of Directors of the Cardinal Building and Loan Association to do so, nor in any wise to bind the Association to any agreement. In writing in the letter the following: "we decided to mail you $100.—each month beginning immediately until such time that the certificate will be fully paid off," I refer to the decision Mr. Whitbeck and I had made with respect to the disposition of Mrs. Rocker's withdrawal, intending to present this matter to the Board of Directors, at its regular monthly meeting on the second Tuesday of that month and expecting that the Board would ratify this decision.

4. The matter was presented to the Board of Directors at its regular meeting and the Board would not authorize the payment of Ida Rocker's withdrawal in this manner, and in fact ordered me to immediately rescind my previous letter, which I did on May 16, 1931. In my letter of May 16, 1931, a true copy of which is contained in paragraph 7 of the affidavit of Abraham Rocker, which I have read, the following statement appears: "At our last meeting of the Board of Directors, Mr. Rabb, informed the Board that he met you on a train and you informed him that you do not desire to withdraw your money. In view of this, your demand for withdrawal has been taken from our lists." I wrote this letter on information which I secured

from Mr. Rabb who presided at our regular meeting held in May, 1931, and who made that statement in the presence of the Board.

5. On July 8, 1931 I wrote the letter which appears in paragraph 10 of Abraham Rocker's affidavit, which I have read. Therein I stated the following: "I will have a resolution passed by our Board of Directors on the 14th day of July authorizing me to mail you $100.00 checks for the withdrawal of the above mentioned certificate. The first check will be forwarded to you shortly after the second Tuesday in August." At the time I wrote this letter I was not authorized by the Board of Directors of the Association to do so and when I did present the matter mentioned in the letter at the next regular meeting of the Board of Directors, the Board refused to pass the resolution and refused to authorize me or empower me to enter into any such arrangment or issue the checks, as I mentioned in my letter.

6. At no time did the Board of Directors authorize an agreement to be made to pay Ida Rocker One Hundred ($100.00) Dollars a month, and in fact at all times refused to make such an agreement and the Board at no time delegated to me, nor did I have the power to make any such agreement for the payment of withdrawals to Ida Rocker.

ABRAHAM A. KURTZ.

Sworn and Subscribed to before
me this 23rd day of January,
1934.

SELMA GERBINSKY,
A Notary Public of New Jersey.

Replying Affidavit of Michael Rabb.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

Ida Rocker, Plaintiff, vs. Cardinal Building and Loan Association, a corporation, Defendant.	Action at Law. Affidavit.

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

MICHAEL RABB, being duly sworn on his oath deposes and says:

1. I am the President of the CARDINAL BUILDING AND LOAN ASSOCIATION and was the President during the year 1931.

2. I know that Ida Rocker is the holder of five (5) shares of prepaid or paid-up stock of the CARDINAL BUILDING AND LOAN ASSOCIATION.

3. I recall having it called to my attention that Abraham Rocker, in behalf of Ida Rocker, was attempting to withdraw said paid-up shares from the said building and loan. I presided at the regular meeting of the Association on the second Tuesday in May, 1931, and at that meeting Mr. Kurtz, the Secretary, reported that he had written the letter, a copy of which is shown in paragraph 6 of the affidavit of Abraham Rocker, which I have read.

4. The Board of Directors had never given Mr. Kurtz authority to write such a letter or to make such arrangement or proposal, set forth

in said letter, and when he brought it to the attention of the Board he was severally reprimanded for having written such letter and instructed to immediately rescind same, which I was advised that Mr. Kurtz did.

10 5. I met Mr. Rocker a short time before the regular meeting in May, 1931, on a train, and discussed with him the affairs of the building and loan association, and in particular his withdrawal in behalf of his wife's shares. I told him that the circumstances of the building and loan association would not permit the withdrawal of the money at that time and he stated that his wife would wait until such time as the Association was able to pay the withdrawal.

20 6. I related this conversation to the Board of Directors at the regular May, 1931 meeting and Mr. Kurtz was ordered by the Board to include that fact in his letter of May 16, 1931, a copy of which is shown in paragraph 7 of the affidavit of Abraham Rocker, which I have read.

7. At no subsequent meeting of the Cardinal Building and Loan Association was Abraham A. Kurtz or any other person, authorized in behalf
30 of the Association to make an agreement to pay the shares of Ida Rocker in installments of One Hundred ($100.00) Dollars a month, or in any other way, and the Board of Directors never authorized such payment, nor did they ever ratify any such agreement, if any was made.

8. I deny that at any time I had a talk with Abraham Rocker wherein I informed the said Abraham Kurtz that the Cardinal Building and Loan Association at a meeting of the Board of
40 Directors held during the month of August, 1931,

directed the officers of the Association to pay to Ida Rocker the sum of One Hundred ($100.00) Dollars a month until the sum of One Thousand ($1,000.00) Dollars was paid, and as a matter of fact such a resolution was never passed by the Board of Directors in the month of August, 1931, or at any other time.

MICHAEL RABB.

Sworn and Subscribed to before
be this 24th day of January,
1935.

SELMA GERBINSKY,
A Notary Public of New Jersey.

Opinion.

Filed April 30, 1935.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Opinion.*

John J. Stamler, Esq., attorney for plaintiff.

Harold Simandl, Esq., attorney for defendant.

John Warren, Esq., of counsel with defendant.

CLEARY, *S. C. C.*

Plaintiff is a member of the defendant association and as such, the holder of five so-called "prepaid," really "paid-up" shares of the defendant association, which shares are now known as "income" shares. P. L. 1932, Chapter 91, further amended P. L. 1935, Chapter 59. The said shares were issued to the plaintiff April 10th, 1928.

A copy of plaintiff's certificate of shares is annexed to the complaint and reads as follows:

> "THIS IS TO CERTIFY, That Ida Rocker is entitled to Five Shares of stock of the POWERFUL BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, transferable in person or by attorney only on the books of the Association upon surrender of this Certificate.

Opinion.

THE MATURITY VALUE OF THESE SHARES HAS BEEN FULLY PAID. An annual profit of six per cent per annum is guaranteed on these shares in lieu of all other profits, payable semi-annually from July 10, 1928. These shares may be redeemed by this Association at any time on 30 days written notice, and payment of the maturity value thereof, with such guaranteed profits to the date of redemption, and the holder thereof have the right to withdraw these shares at such maturity value and guaranteed profit to date of withdrawal upon giving 30 days written notice to this Association."

The complaint alleges that the name of the defendant association was duly changed from Powerful Building and Loan Association to Cardinal Building and Loan Association.

It is alleged in the complaint that on June 1st, 1930, plaintiff filed with the defendant association her written notice of withdrawal and that payment thereof has been postponed by the defendant association for more than six months and that same has not as yet been paid.

The complaint sets forth that on the date of filing the said application for withdrawal, and at the expiration of six months thereafter, Sections 49, 52, 73 and 74 of "An Act concerning building and loan associations (Revision of 1925)," being P. L. 1925, Chapter 65, were in force.

Section 52 of the said Revision provides as follows:

"52. PAYMENT OF WITHDRAWALS.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without

the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

The suit in the case at bar was instituted September 10th, 1934. Before the institution of this suit, Section 49 of the 1925 Revision was amended by P. L. 1932, Chapter 92, effective April 21st, 1932; Section 52 of said Revision was amended by P. L. 1932, Chapter 102, effective April 22nd, 1932 and Sections 73 and 74 of the said Revision were respectively amended by P. L. 1932, Chapters 91 and 97, both effective April 21st, 1932.

Section 52 of the statute as amended in 1932, provides as follows:

"52. PAYMENT OF WITHDRAWALS.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one

month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein."

The complaint contains five counts. The first count is based upon a cause of action alleged to have accrued to the plaintiff under Section 52 of the 1925 Revision, six months after the filing of her written application for withdrawal. The second count is based upon the alleged violation

by the defendant association of the mandate of the 1932 amendment of Section 52. The third count is based upon an alleged violation of Order Number One issued by the Commissioner of Banking and Insurance March 14th, 1933, under the authority, as alleged, of P. L. 1933, Chapter 48, which it may be noted, has been amended by P. L. 1933, Chapters 166, 258 and 381. The fourth count repeats the first nine paragraphs of the first count and alleges "that on the eighth day of May, 1931, the said defendant did agree in writing with the plaintiff that it would pay to the plaintiff one hundred ($100.00) dollars each month beginning immediately until such time that the aforesaid prepaid certificate 'Exhibit A' representing an investment of One thousand ($1,000.00) dollars would be paid in full" and "that the said defendant has never kept its promise in that regard and failed to make the monthly payments as aforesaid." The fifth count is the same as the fourth count, except that it alleges a promise of the defendant made July 8th, 1931, to repay plaintiff's wthdrawal in monthly installments of $100.00, commencing on the first Tuesday of August, 1931.

Plaintiff moves to strike out the further amended answer and separate defenses to the first, fourth and fifth counts and for judgment on the fourth and fifth counts.

This motion is of the nature of a general demurrer and has opened up the pleadings and as the first faulty pleading must fall, it is appropriate to first examine the affected counts of the complaint to ascertain whether or not they respectively set forth legal causes of action. Defendant association does not move its motion

to strike the complaint, reserved in its further amended answer, and the consideration of the affected counts of the complaint is caused by the plaintiff's motion to strike the further amended answer and separate defenses thereto. The quality of the second and third counts of the complaint may not be considered on this motion to strike the further amended answer and defenses to the other counts, for the pleadings are only opened by the motion, as to the counts of the complaint, to which the answer and separate defenses sought to be struck, are responsive.

Giving first consideration to the first count of the complaint, it is apparent at the outset, that if the 1932 amendment of Section 52 controls the procedure herein that, inasmuch as this count is based entirely upon the statutory privilege to sue contained in Section 52 of the 1925 Revision and does not allege the violation by the defendant association of the mandate of the 1932 amendment of said section, that the said count does not state a cause of action and must be struck. The plaintiff contends that the said amendment does not affect what she claims, are her vested rights which accrued before its enactment and under the prior statute, and that, if the said amendment be construed as affecting her alleged vested right to sue, that it is unconstitutional and within the inhibitions of Article I, Section 10 of the constitution of the United States and of Section 1 of the Fourteenth Amendment of said constitution, and of Article IV, Section 7, paragraph 3 of the constitution of the State of New Jersey, and further, that the said amendment so construed, cannot affect plaintiff's vested rights as alleged in the first count of the complaint, because of the provisions

of 4 Comp. St., p. 4971, Sec. 3. The defendant association argues that plaintiff's rights were not vested, that the amendment was procedural and that it is a valid exercise of both the reserved and inherent police powers of the State.

A right is not vested unless it is something more than a mere expectation based upon an anticipated continuance of present laws and must be a right or interest in property that has become fixed and established and not open to doubt or controversy; Leach *v.* Commercial Savings Bank, 205 Ia. 1154, 213 N. W. 517, 521; and rights dependent upon a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute. Sutherland on St. Const. Sec. 163; Cooley's Constitutional Limitation (7th Ed.) p. 359, 360; Louisiana *v.* Mayor, etc. of New Orleans, 109 U. S. 285; Morley *v.* Railway Co., 146 U. S. 162.

Plaintiff's claim is that of a withdrawing member of the defendant association. The privilege of withdrawal of capital from a mutual building and loan association, and the privilege of suit therefor do not exist except as they may be conferred by by-laws or statute. Fitzgerald *v.* State Mutual B. & L. Assn., 76 N. J. Eq. 137; Thirteenth Ward B. & L. Assn. *v.* Weissberg, 115 N. J. Eq. 487, and the statutory privilege may not be exercised to defeat the primary equity of all members of a mutual building and loan association of equal participation in assets. Fitzgerald *v.* State Mutual B. & L. Assn., *supra.* In fact, in a withdrawal suit under Section 52 of the 1925 Revision, instituted before the enactment of the 1932 amendment, the revered late Chief Justice Gummere, refused to strike out

an answer filed by a building and loan association, which set up that the enforcement of the privilege of suit in that case would give the plaintiff therein a preference, would give to the plaintiff more than his proportionate share of assets and would deprive the remaining and continuing members of their right to proportionately share assets. See pleadings and orders in unreported cases of Meyer *v.* Creative B. & L. Assn., Richman *v.* Hercules B. & L. Assn. and Goldman *v.* Hercules B. & L. Assn., Nadel *v.* Tri-County B. & L. Assn. See also pleadings and order of Circuit Court Judge Henry E. Ackerson in the Supreme Court case of Bloomberg *v.* Basic B. & L. Assn. In view of the foregoing authorities, it is clear that the right or privilege of plaintiff under the 1925 Revision, was not vested within the meaning of the aforesaid constitutional and statutory provisions.

The 1932 amendment of Section 52 does not reduce the amount of plaintiff's monetary interest in the defendant association. It is true that it provides a different scheme for the payment of withdrawals than that provided by the section which it amends, but the statutory changes merely related to the time, and not the quantum, of payment. This being so, the said amendment may be upheld as a procedural statute and binding upon all members of building and loan associations instituting suits for withdrawal after its enactment. See Hourigan *v.* North Bergen Township, 113 N. J. L. 143; Rader *v.* Southeasterly Road etc., 36 N. J. L. 273; Bronson *v.* McKenzie, 1 How. 311; McCrackin *v.* Hayward, 2 How. 608; Newark Savings Institution *v.* Forman, 33 N. J. Eq. 436; Allen *v.* Allen, 34 N. J. Eq. 493; Toffey *v.* Atchison, 42 N. J. Eq. 182;

Potts *v.* New Jersey Arms and Ordnance Co., 17 N. J. Eq. 395; Potts *v.* Delaware Water Power Co., 9 N. J. Eq. 592, 615; Wooton *v.* Pollack, 116 N. J. Eq. 490; Klorman *v.* Westcliff Co., 12 N. J. Misc. 266.

The cited statute, 4 Comp. St. p. 4971, Sec. 3, is declaratory of the law and is of no aid to plaintiff. As the amendment being considered modifies the procedure for the enforcement of the withdrawal privilege, the terms of 4 Comp. St. p. 4971, Sec. 3, as well as the fundamental law of which it is declaratory, require that the proceedings herein conform with the modified procedure required by the amendment which does not deprive any one of a remedy which he could use for his legitimate use or without injury to others. People *v.* Title Mortgage Guaranty Co., 264 N. Y. 69, 190 N. E. 153.

The facts in this case do not differ greatly from those before the court in the case of Fornataro *v.* Atlantic Coast B. & L. Assn., 10 N. J. Misc. 1248, the only difference being that in that case, plaintiff's withdrawal application had been filed less than six months prior to the enactment of the 1932 amendment of Section 52. As it is my opinion that the privilege to sue under the Revision was not so constitutionally vested as to become a property right, it is my further opinion that the said amendment is constitutionally binding upon the plaintiff herein as a valid exercise of the reserved police power to amend corporate charters and validly controls the procedure in any suit instituted after its enactment for the recovery of a withdrawal. Fornataro *v.* Atlantic Coast B. & L. Assn., *supra.*

I further hold that the 1932 amendment of Section 52 is constitutional as a valid exercise of

the inherent police power of the state, an essential attribute of sovereignty, presupposed by the constitution which must be construed accordingly.

Building and loan associations are quasi-public instrumentalities and are of public utility and importance in fostering home ownership and systematic thrift. Our Legislature's recognition of this public service is found in the preambles and titles to P. L. 1847, p. 172; P. L. 1849, p. 227; P. L. 1852, p. 83; Revision of 1877, p. 92, General Statutes, p. 33 This public service is also recognized by text writers and the courts. The following citations will suffice. Sundheim (2nd Ed.) Sec. 7, p. 23, 24; Sec. 8, p. 25; 9 C. J. 920; Bath B. & L. Assn. 136 Atl. (Me.) 284, 286; State ex rel Bettman *v.* Court of Common Pleas, 124 Ohio St. 269, 178 N. E. (Ohio) 258, Treigel *v.* Acme Homestead Assn. (Louisiana Supreme Court decided March 4th, 1935, as yet unreported.)

The building and loan statutes enacted for the protection of the savings of the public, are enacted under the inherent police power of the state. Krimke *v.* Guarantee B. & L. Assn., 112 N. J. Law, p. 317; State *v.* Massillon S. & L. Co., 110 Ohio St. 320, 143 N. E. 894; Union Savings & Investment Co. *v.* District Court, 44 Utah 397, 140 Pac. (Utah) 221; Brady *v.* Mattern, 125 Ia. 158, 100 N. W. (Ia.) 358; In re Opinions of the Justices, 181 N. E. (Mass.) 833, 836.

This state first assumed to regulate withdrawals by the passage of P. L. 1899, p. 357, but not until the 1903 Revision did it regulate the method of paying withdrawals. P. L. 1903, p. 457. Statutes regulating withdrawals evidence the public policy of the state with reference to the subject matter. Latimer *v.* Equitable Loan & Investment

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Co., 81 Fed. 776. The Legislature, in enacting the 1903 Revision, for the first time completely legislated upon the subject of building and loan associations and in that revision, enacted the then public policy of this state with reference to such associations. The design of this statute was to reform building and loan operation as conducted by the national associations of other states operating within this state, (then emulated by some of the associations of this state), which was inimical to the best interests of the home owning and wage earning public of this state. Its designed object was speedily accomplished as the national associations could not operate under our act, with the same profit to management and underlying stockholders as theretofore. The rigid requirements of that Revision as to investments, expenses and withdrawals, as well as other matters, forced all associations operating in this state, to operate on a truly mutual basis for the proportionate benefit of all members. Many amendments of the various sections of the said Revision were enacted and in 1925, the Legislature enacted another general revision of the building and loan statutes. This later revision has likewise been amended and supplemented in many respects prior to the passage of the 1932 amendment of Section 52 and all such amendments were made necessary in the opinion of the Legislature, by the changing economic and social conditions affecting the operation of building and loan associations. Each revision, amendment and supplement evidenced the public policy of this state with reference to the subject matter of such legislation.

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Building and loan associations are incorporated under the said statutes as the instrumentalities for effectuating the public policy of the state enunciated in the said statutes. As the creatures of the state for such purpose, they must obey the mandate of the statute and, at all times make effective the public policy of the state, for the time being, as evidenced by the then existing statutes.

It is not to be presumed that in enacting the 1932 amendment of Section 52, that the Legislature was acting solely for the benefit of future members of associations. The economic conditions affecting building and loan associations were, at that time severe, as evidenced by the numerous amendments of the 1925 Revision enacted at that session of the Legislature, which conditions were noticed by Judge Sooy in his illuminating opinion in the Fornataro case. At the time of the enactment of the said amendments unemployment was increasing; the growing needs of the saving public to repossess their savings occasioned unprecedented withdrawals; at the same time, for the same reasons occasioning withdrawals; borrowers were becoming delinquent and associations were acquiring real estate through foreclosure, which real estate was then unsaleable and under the then provisions of the statute, wealthy insiders with large share holdings, by filing early applications for withdrawal, in many cases, preempted the entire receipts of an association for many months to the exclusion of needy unemployed members filing later applications for withdrawal. The design of the Legistlature in enacting the amendment was to spread the funds available for withdrawal over a larger number of members and those most

in need thereof, and also to prevent the wrecking of associations by numerous suits for withdrawals under the provisions of Section 52 of the Revision, which would have resulted in the insolvency of associations which, in turn, would have made all sinking fund mortgage loans of homeowning borrowers of insolvent associations immediately due for their face amount, at a time when there was no mortgage money available for refinancing. Weir *v.* Granite State Provident Assn., 56 N. J. Eq. 234; Harris *v.* Nevins, 68 N. J. Eq. 684.

A real emergency existed affecting the homes and savings of over 1,000,000 of the citizens of this state, which confronted the 1932 Legislature and the building and loan legislation of that year was emergency legislation enacted for the protection of a large proportion of the citizens of our State. The emergency character of legislation is not to be determined solely by its recital of the emergency requiring its enactment or a limitation of the period it shall remain in force. Legislation may be emergent in character although it does not recite the emergency. Township of North Bergen *v.* Hourigan, 113 N. J. L. 143; People *v* Title Mortgage Guaranty Co. 264 N. Y. 69, 190 N. E. 153. The emergency requiring the enactment of legislation and characterizing it as emergent, are evidenced by the economic facts and circumstances existing at the time of and motivating its enactment, of which the court will take judicial notice. And an emergency statute, the life of which is not limited by its terms, may cease to operate upon the passing of the emergency. People *v.* Title Mortgage Guaranty, *supra;* and, in any event, such a statute

may be later repealed or amended, as the emergency passes, intensifies or wanes.

All presumptions are in favor of the constitutionality of an act enacted by the votes of legislators who have sworn to uphold the constitutions of the state and of the United States.

In construing statutes, the authority of the Court is exhausted when it has ascertained that the Legislature had power to legislate in matters of police and it is not concerned with the policy of the legislation. Ascertaining the power to legislate, which is apparent in the case of P. L. 1932, Chapter 102, unless the statute appears clearly to be arbitrary or unreasonable and without substantial relation to its object, the judgment of the Legislature is final and the statute must be sustained. Williams *v.* Baltimore, 289 U. S. 36; Hodge *v.* Cincinnati, 284 U. S. 335; Price *v.* Illinois, 238 U. S. 446; McLean *v.* Arkansas, 211 U. S. 539; Purity Extract & Tonic Co. *v.* Lynch, 226 U. S. 192, Green *v.* Frazier, 253 U. S. 223; C. B. & Q. R. R. Co. *v.* McGuire, 219 U. S. 549; Stephenson *v.* Binford, 287 U. S. 251; Sproler *v.* Binford, 286 U. S. 374; McCray *v.* U. S. 195 U. S. 27. That the legislation in question was, not arbitrary or unreasonable, is evidenced by an inspection of similar legislation cited in defendant's brief, passed by many states of the Union in 1931 and 1932, which changed the withdrawal privileges of then members. It is quite likely that the exercise of rights as claimed by the plaintiff herein, under the economic conditions affecting building and loan associations in 1932 and up to the present time, would have resulted in the insolvency of associations and the delayed and reduced payments to withdrawing shareholders of their proportionate share of as-

sets. It cannot, therefore, be confidently asserted that the amendment before the court delayed plaintiff's recovery of the withdrawal value of her shares. It was apparently the judgment of the Legislature that the contrary would result through the preservation of the solvency of associations from attacks by an importunate minority desiring to withdraw from the common partnership enterprise, when economic conditions made it impossible for associations to pay all withdrawals promptly. It was the protection of the interests of members of the association holding shares at the time of the enactment of said amendments, which motivated the legislators in enacting the amendment of those years, for in this state, as in other states, chaos and destruction of institutions and loss to homeowners and savers would have resulted from the enforcement of rights under preceding statutes enacted under different economic conditions.

Public policy is not constant. It is ever changing, varying with circumstances caused by new economic and social conditions. Merrick *v.* N. W. Halsey & Co., 242 U. S. 568; Williams *v.* Baltimore, *supra;* and a building and loan association, incorporated under a statute enacted under the police power, and subject to amendment under the same power, must effectuate at all times the public policy of such regulatory statutes in force at the time. As the creature of the statute for such purpose, it may not disobey, or, in any way, contravene, the statute. It must be kept in mind that the privileges of plaintiff were acquired under an amendable statute enacted under the inherent police power of the state and subject to future amendment under the same power and this was known by the plaintiff. Fornataro *v.* Atlantic Coast B. & L. Assn., *supra.*

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The building and loan statute and the constitution of every association are constituent parts of the membership contracts of every member of a building and loan association. Both are amendable—the former by the Legislature under its constitutional power—the latter by action of the members or directors in accordance with its terms. When the statute is amended, the membership contract is correspondingly amended and such statutory amendment becomes part of the membership contract. Constitutions may not be in derogation of the statute evidencing the public policy of the state and when the statute is amended, such amendment controls the rights and privileges of the association and its members and any existing provision of the constitution, in conflict with such amendment, becomes a nullity. The contract, therefore, which includes the amendable statute, is itself amended by an amendment of the statute and is not within the constitutional interdictions as the obligation of such contract or a remedy for its enforcement, is not impaired by such statutory amendment.

But the plaintiff asserts that upon the maturity of her withdrawal notice or, at the end of six months after the filing thereof, that she became a creditor and that as such her rights were not affected by the amendment of the statute, passed after the termination of her membership by her attempted withdrawal. It is true that withdrawing shareholders have been held to be general creditors, U. S. B. & L. Assn. *v.* Silverman, 85 Pa. 394 (1877), a rule quickly modified in that state, Christians Appeal, 102 Pa. 184 (1883) and now entirely discarded by the courts of Pennsylvania. Brown *v.* Victor B. & L. Assn., 302 Pa. 254, 153 Atl. 349; Stone *v.* New Schiller B. & L.

Assn., 302 Pa. 544, 153 Atl. 758; Publicker *v.* Potash Bros. B. & L. Assn., 159 Atl. 58; Weinroth *v.* Homer B. & L. Assn., 310 Pa. 265, 165 Atl. 28. It has also been held that they are quasi-creditors, Heinbokel *v.* National S. & L. Assn., 58 Minn. 340, 59 N. W. 1050; but this rule, in these times, works great hardship on needy withdrawing members from solvent but frozen associations, for they cannot share in profits or claim interest, from the maturity of their notices until the funds in the treasury enable the associations to pay their withdrawals when reached in the order provided by the statute or by-law. Synott *v.* Iron Belt B. & L. Assn., 89 Fed. 292. This rule, it seems to me, defeats equal participation in assets for it deprives a withdrawing member, unpaid perhaps for a long period, of dividends on his shares representing his proportionate share of earnings, the right to which is an incident of share ownership. The better rule is that membership continues after withdrawal and until payment or, at least, until the association breaches the membership contract by failing to obey the mandate of the statute as to payment of withdrawals. This rule preserves solvency and that it is the New Jersey rule is, I think, evident in the decisions of our Courts in Fitzgerald *v.* State Mutual B. & L. Assn., *supra;* Meyer *v.* Creative B. &. L. Assn., and Richman, Goldman *v.* Hercules B. & L. Assn., *supra.* A mere attempt to withdraw cannot transmute the status of a member into that of a creditor. Mutual B. & I. Co. *v.* Frederick, 43 Ohio App. 270, 183 N. S. 114; affirmed *sub nomine,* Frederick *v.* Mutual B. & I. Co., 128 Ohio St. 474, 191 N. E. 729. For a full discussion of the status of a withdrawing member see Building and Loan Annals, 1932, pp. 281-298.

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But even assuming for the purpose of argument solely, that plaintiff's status is that of creditor, P. L. 1932, Chapter 102, constitutionally binds her because of the rules of law now to be stated.

Defendant's brief cites numerous cases holding that contracts made with institutions regulated under the police power, or contracts, the future regulation of which is appropriate under the police power, may not be enforced in the face of later enacted legislation, prohibiting their enforcement and that such statutes enacted under the police power do not come within the interdiction of the constitutional prohibition against the impairment of the obligations of contracts or of the Fourteenth Amendment of the Constitution of the United States. Gold Clause cases, Norman *v.* B. & O. R. R. Co., 555 Ct. 407; Nortz *v.* U. S. 555 Ct. 428; Perry *v.* U. S. 555 Ct. 432, recently decided by the United States Supreme Court are the latest decisions enunciating these now well settled rules of law. These rules are applicable to building and loan statutes and are authority for the holding herein, that P. L. 1932 Chap. 102, amending Section 52 of the 1925 Revision of the Building and Loan Act, retrospectively construed, is a valid exercise of the inherent police power and is constitutionally binding upon the plaintiff herein. Treigle *v.* Acme Homestead Assn., *supra.* This case deals with facts and statutes quite similar to those under consideration in the case at bar. The logic of that decision is apparent, is applicable to the present situation and is adopted by this Court. See also Building and Loan Annals, 1932, pp. 299-307 for the first, and excellent, statement of the rules

of law enunciated in the Fornataro and Treigle cases and upon which this decision is based.

The plaintiff contends that the 1925 statute in force at the times of her subscription for shares, withdrawal thereof and at the expiration of six months thereafter, gave her a vested contractual right constitutionally protected from subsequent legislation, and that the contract contained in the certificate itself, is likewise untouched by the subsequent legislation. What has heretofore been said concerning contracts made unenforceable by later enactments under the inherent police power negatives this argument. It may also be noted that no legislature can curtail the power of its successors to make such laws as they deem proper in matters of police, Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; Boyd *v.* Alabama, 94 U. S. 645; Stone *v.* Mississippi, 101 U. S. 814, and parties may not by their contracts, oust the state of its right to exercise its police power, Manigault *v.* Springs, 199 U. S. 473, 480; Louisville & Nashville R. R. Co. *v.* Mottley, 219 U. S. 467, 482; Atlantic Coast Line R. R. Co. *v.* Goldsboro, 232 U. S. 548, 553; Denver *v.* Rio Grande R. R. Co., 250 U. S. 241, 244; Union Dry Goods Co. *v.* Georgia Public Service Corp., 248 U. S. 372; Dillingham *v.* McLoughlin, 264 U. S. 370 and the Gold Clause cases, 55 Supreme Court 407, *et seq.;* Home B. & L. Assn. *v.* Blaisdell, 290 U. S. 398; Erie R. R. Co. *v.* Public Utilities Commission, 89 N. J. L. 57, affirmed 90 N. J. L. 673.

Examples of the rights and privileges of members and creditors of building and loan associations under statutes and contracts falling upon the enactment of subsequent legislation under the police power, are found in State *v.* Massillon

S. & L. Co., *supra;* Shore v. Lone Star B. &. L. Assn., 71 S. W. (2nd) 863; Dillingham *v.* McLoughlin, *supra; In re* opinions of the Justices, *supra;* Hacker v. Farm & Home S. & L. Assn., 6 Fed. Supp. 610; Lowell Co-Operative Bank *v.* Co-Operative Central Bank, 191 N. E. (Mass.) 921; Egg Harbor B. & L. Assn. *v.* Baake, 72 N. J. Eq. 603; Huber *v.* Home S. & L. Assn., 169 Pac. (Wash.) 979; Krimke *v.* Guarantee B. & L. Assn., *supra;* State *ex rel* Contonio *v.* Italo-American Homestead Assn., 149 So. (La.) 449; Iowa Central B. & L. Assn. *v.* Klock, 104 N. W. (Ia.) 352.

Plaintiff relies upon the decision in Intiso *v.* Metropolitan S. & L. Assn., 68 N. J. L. 588, but this decision is not in point for the reasons that there the statute impaired contractual rights while here, it modified a statutory privilege and amended the membership contract; there it reduced the quantum of the recovery whereas here, it merely modified the remedy for the enforcement of a statutory privilege. Besides this, the right of the state to enact the legislation there in question under the police power, was apparently not called to the attention of the Court. The decision in that case was before judicial recognition of the extent of the police power and if this power had been considered by the court in that case, it might have upheld the constitutionality of the legislation there questioned. The case cannot be considered as a precedent for the case at bar.

I have dealt at length with the questions involved because of their great public importance. The inherent police power of the Legislature to legislate from time to time so as to preserve the financial institutions of our state and thereby protect the homes and savings of their members,

depositors and policy holders (for what has been here said as to statutes affecting building and loan associations is applicable to statutes affecting banks and insurance companies), should be, unequivocally and judicially, settled. The protection of the economic system of the state, as well as social justice for many citizens, whose homes and savings are involved, require it.

For the reasons hereinbefore expressed, the first count of the complaint must be struck, as it does not allege that the defendant association violated the statutory mandate contained in P. L. 1932, Chapter 102, as to the payment of withdrawals. Complaints in similar cases have, on motions to strike answers, been struck by Circuit Judge William A. Smith in the unreported case of Horowitz *v.* Guarantee B. & L. Assn. (Essex County Circuit Court), and Circuit Judge Newton H. Porter, sitting in the unreported Supreme Court case of Bucsi *v.* Longworth Building & Loan Assn.

The fourth and fifth counts set up contracts to pay withdrawals in accordance with the terms of the contracts. As the statute concerning withdrawals evidences the public policy of the state, any contract contravening such public policy is void for the parties cannot waive or contract away the provisions thereof or rights or privileges acquired thereunder. Latimer *v.* Equitable Loan & Investment Co., *supra;* Appeal of Powell & Doyle, 93 Missouri App. 296; Shapiro *v.* Mortgage B. & L. Assn., 158 Atl. (Pa.) 573; Adams *v.* Union National S. & L. Assn., 100 N. E. (Ind.) 389, 102 N. E. 145. Such contracts as alleged in the fourth and fifth counts providing for payments to a withdrawing member in installments not provided for by the statute, would

give to such withdrawing member a preferential right of payment over other members, violate mutuality, contravene the statute and, likewise, are void. Publicker *v.* Pottash Bros. B. & L. Assn., 159 Atl. (Pa.) 58; Weinroth *v.* Homer, 310 Pa. 265, 165 Atl. 28; Conservative Homestead Assn. *v.* Dreyfuss, 175 La. 404; 143 So. 356.

For the reasons stated, the fourth and fifth counts do not disclose causes of action and should be struck.

Plaintiff has so vigorously urged both in argument and brief, that the shares held by her are preferred stock and therefore, she has a preferential right as to payment, that some mention should be made as to this point. Plaintiff relies largely upon the decision in the case of Newark Twenty-one B. & L. Assn. *v.* Zukerberg, 115 N. J. Eq. 579. I cannot give that decision the effect contended by the plaintiff. Section 73 of the 1925 Revision and as amended by P. L. 1932, Chapter 91, defines all types of shares which associations of this state are authorized to issue and speaks of "their status as common shares." Section 74 of the same Revision and its amendment, P. L. 1932, Chapter 97, provides that "no such association shall issue preferred or other than common shares." Section 74 of the 1925 Revision further provided that "paid up shares shall only be surrendered and withdrawn on the same terms and under the same conditions as provided in the constitution for the surrender and withdrawal of installment shares" and the 1932 amendment of said section provides that "all classes of shares shall be surrendered and withdrawn on the same terms and under the same conditions as provided in the constitution

and in this act, for the surrender and withdrawal of shares." Section 49 of the said Revision and its amendments, P. L. 1932, Chapter 92, provides the procedure for withdrawal of all shares and the amount to be paid thereon and the losses to be shared by all members. Section 52 of the said Revision and its aforesaid amendment in 1932, provide the method of payment of withdrawals.

From a reading the said statute, it is apparent that the holder of once called "paid up," but now called "income," shares, holds common shares, is a shareholder and is not a creditor, Fitzgerald *v.* State Mutual B. & L. Assn., *supra.* The quoted extracts of these enactments were not mentioned in the opinion in the Zukerberg case and their significance could not have been called to the attention of the court, and, in view of them, it is impossible to adopt the construction of the opinion in that case which is placed upon it by the plaintiff herein. Both under the 1925 Revision and the stated amendments thereof, the withdrawal privileges of all members other than with respect to the withdrawal of profits upon income shares, were identical, without regard to the type of shares held by them. As those holding income shares had withdrawn their profits at stated periods, there are no profits to be paid upon withdrawal, as the withdrawal profits to which they have agreed with the association, under the authority of Section 74, have been withdrawn by them, the said permission being an exception to the preceding language of the same sentence that all shares shall be withdrawn under the same terms and conditions. The plaintiff as the holder of income shares has no rights as to withdrawal, or pay-

ment of withdrawal, different or superior to those of members holding other types of shares and her withdrawal privileges are, in all respects, controlled by the statutory provisions concerning withdrawals. John Marshall Law Journal, Vol. IV, No. 3, p. 53.

The foregoing conclusions make it unnecessary to consider the motion to strike the further amended answer and separate defense to the first, fourth and fifth counts. The case will proceed to trial on the second and third counts of the complaint and the further amended answer and separate defenses thereto. An order may be presented in accordance with these views.

FRANK L. CLEARY,
S. C. C.

Order.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*On Motion to Strike Answer.* *Order.*

This matter being opened to the Court by John J. Stamler, attorney for the plaintiff, in the presence of Harold Simandl and John Warren, respectively attorney and of counsel with defendant, and the plaintiff moving to strike out the answer and separate defenses to the First, Fourth and Fifth Counts of the complaint, and the defendant at the argument orally moving to strike out the said counts of the complaint as being insufficient in law, and the Court having considered the arguments, briefs and pleadings, being of the opinion that the First, Fourth and Fifth Counts of the complaint do not set forth legal causes of action;

It is on this 16th day of May, 1935, ORDERED that the plaintiff's application to strike the answer and separate defenses to the First, Fourth and Fifth Counts of the complaint and for the entry of judgment in favor of the plaintiff and against the defendant, upon said counts, be, and the same is hereby denied; and it is further ORDERED that the First, Fourth and Fifth Counts

Order.

of the complaint be, and they hereby are struck, and an exception is allowed to the plaintiff;

And it is further ORDERED upon application of the plaintiff, that a voluntary non-suit be, and the same hereby is granted on the Second and Third Counts of the complaint herein, without costs to either party as against the other.

FRANK L. CLEARY,
Judge of the Union County Circuit Court
sitting as a Supreme Court Commissioner.

Judgment of Non-suit.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Judgment of Non-suit.*

In pursuance of the Order made in this cause, on the 16th day of May, 1935, and with the leave of the Court first had and obtained, the plaintiff does hereby enter a voluntary non-suit on the Second and Third Counts of the complaint;

Whereupon, it is adjudged that the Second and Third Counts of the complaint of the plaintiff be dismissed without costs to either party as against the other.

Rule actually entered
the 29th day of May, 1935.

On motion of
JOHN J. STAMLER,
Attorney of Plaintiff.

I consent to the entry of the foregoing judgment.

HAROLD SIMANDL,
Attorney of Defendant.

Notice.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Notice.*

To Harold Simandl, Esq., attorney for defendant:

DEAR SIR:

PLEASE TAKE NOTICE that I will apply to the Honorable Clarence E. Case, Justice of the Supreme Court, holding the Union County Circuit at the Court House in the City of Elizabeth, on Saturday, August 3, 1935 at 9:30 o'clock in the forenoon of that day (Eastern Daylight Saving Time) for the following relief:

1. For an Order amending the judgment of non-suit on the Second and Third Counts of the complaint entered in this cause on the 29th day of May, 1935, by adding thereto a judgment final in favor of the defendant against the plaintiff on the First, Fourth and Fifth Counts of the complaint.

2. In the alternative for an Order vacating the judgment of non-suit, and entering a new Order for judgment of voluntary non-suit on the Second and Third Counts of the complaint and a judgment final in favor of the defendant against

Notice.

the plaintiff on the First, Fourth and Fifth Counts of the complaint.

3. For such further or other relief as the Court may find just.

JOHN J. STAMLER,
Attorney for Plaintiff.

Order Amending Judgment.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Order Amending Judgment.*

This matter coming on to be heard in the presence of counsel for the respective parties, on notice duly given and after hearing argument for counsel of the respective parties;

It is, on this third day of August, 1935, ORDERED that the judgment of non-suit heretofore entered in this cause be and the same is hereby amended to include a judgment final against the plaintiff and in favor of the defendant on the First, Fourth and Fifth Counts of the complaint, as heretofore on the 16th day of May, 1935 ORDERED by Frank L. Cleary, Judge of the Union County Circuit Court, sitting as a Supreme Court Commissioner.

CLARENCE E. CASE,
Justice of the Supreme Court.

Entered Aug. 5, 1935,

On motion of
JOHN J. STAMLER,
Atty.

Amended Order Amending Judgment.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,*	*Action at Law.*
vs.	*Amended Order Amending Judgment.*
CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	

It appearing that an Order was entered on August 3, 1935, in the above-entitled matter, amending the judgment of non-suit heretofore entered and that said Order was not submitted to the attorney for the defendant for his approval as to form, and

It appearing that said attorney for the defendant has objected to the form of said Order,

It is on this 31st day of August, 1935, ORDERED that said Order of August 3, 1935, be amended to read as follows: "that the judgment of non-suit heretofore entered in this case be/and the same is hereby amended to include the judgment final against the plaintiff and in favor of the defendant on the First, Fourth and Fifth Counts of the complaint which were stricken out by the Hon. Frank L. Cleary, Judge of the Union County Circuit Court, sitting as Supreme Court Commissioner, by his Order dated May 16, 1935, and an exception is allowed to the defendant."

CLARENCE E. CASE,
Justice of the Supreme Court.

We hereby approve the above Order as to form.

JOHN J. STAMLER,
Attorney for Plaintiff.

HAROLD SIMANDL,
Attorney for Defendant.

Notice and Grounds of Appeal.

Filed September 10, 1935.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Notice and Ground of Appeal.*

To Harold Simandl, Esq.,
Attorney for the Defendant, Cardinal
Building and Loan Association of Newark.

DEAR SIR:

PLEASE TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the Order made by the Honorable Frank L. Cleary, Judge of the Union County Circuit Court sitting as a Supreme Court Commissioner, dated the 16th day of May, 1935, and the judgment entered in pursuant to said Order dated August 31, 1935, striking the First, Fourth and Fifth Counts of plaintiff's complaint on the following grounds:

1. That the Judge erroneously determined that the First Count of the complaint must be struck, as it does not allege that the defendant association violated the statutory mandate contained in P. L. 1932, Chapter 102, as to the payment of withdrawals.

2. That the Judge erroneously determined that the Fourth and Fifth Counts of

the complaint do not set up a cause of action for the reason that the statute concerning withdrawals evidences the public policy of the state, any contract contravening such public policy is void for the parties cannot waive or contract away the provisions thereof or rights or privileges acquired thereunder and that such contracts as alleged in the Fourth and Fifth Counts of the complaint providing for payments to a withdrawing member in installments not provided for by the statute, would give to such withdrawing member a preferential right of payment over other members, violate mutuality, contravene the statute and, likewise, are void.

3. That the said Judge erroneously determined that Chapter 91 of the Laws of 1932 and all subsequent amendments to the Building Loan Act of the State of New Jersey, deprived the plaintiff of her right of recovery as set forth in the complaint.

4. That Chapter 91 of the Laws of 1932 and all subsequent amendments to the Building Loan Act of the State of New Jersey are unconstitutional in so far as they concern the plaintiff's right of recovery, as her cause of action accrued prior to the enactment of said statute.

5. That the said Order and Judgment are in violation of the New Jersey Constitution, Par. 3, Sec. 7, Article 4, and contrary to the Fourteenth Amendment of the United States Constitution, Article 1, Secs. 1 and 10.

6. That the Court in striking the First Count of said complaint did not give due

consideration to the 10th paragraph of said count.

7. That the Court was without lawful authority to determine that an emergency existed, which would deprive the plaintiff of her remedy.

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8. That the entry of the Order and Judgment are erroneous and constitute an abuse of judicial discretion.

9. That each of said counts, by virtue of the laws of this State, set forth a legal cause of action.

10. That upon the plaintiff's affidavits presented to the Court below the plaintiff was entitled to judgment against the defendant.

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Dated September 4, 1935.

JOHN J. STAMLER,
Attorney of Plaintiff.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 5th day of September, 1935.

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HAROLD SIMANDL,
Attorney for Defendant.

Filed with Clerk of Supreme Court September 10, 1935.

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Notice and Grounds of Cross-Appeal.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

IDA ROCKER, *Plaintiff,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant.*	*Action at Law.* *Notice and Grounds of Cross-Appeal.*

To: Ida Rocker, Plaintiff and John J. Stamler, her Attorney.

PLEASE TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the order of August 3rd, 1935 as amended by the order of August 31st, 1935 amending the judgment of voluntary non-suit entered in the above entitled matter upon the following grounds:

1. That the court was without jurisdiction to amend the judgment of voluntary non-suit entered in the above entitled matter.

2. Because the court in the absence of any proof of fraud, mistake, and error in form in the entry of the voluntary judgment of non-suit heretofore entered in this cause amended said judgment of voluntary non-suit over the objection of the defendant so as to vary the rights of the parties as fixed by the judgment of voluntary non-suit.

Notice and Grounds of Cross-Appeal.

3. Because the court amended the judgment of non-suit entered in the above matter to include a judgment for the defendant on the first, fourth and fifth counts over the objection of the defendant, whereas, no judgment on said counts had ever been ordered by the Judge who entered the order striking the first, fourth and fifth counts of the complaint.

4. Because of the judgment of voluntary non-suit dated May 16th, 1935 was a complete withdrawal of said cause from the court and left no cause which was subject to amendment as entered by this court, under date of August 31st, 1935.

5. That the sole legal judgment entered in this cause was the judgment of voluntary non-suit entered May 16th, 1935 from which the plaintiff had no right of appeal.

HAROLD SIMANDL,
Attorney for Defendant.

Notice of Motion to Dismiss.

NEW JERSEY COURT OF ERRORS AND APPEALS.

IDA ROCKER, *Plaintiff-Appellant,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant-Appellee.*	*Notice of Motion to Dismiss.*

To: Ida Rocker, Plaintiff and John J. Stamler, her Attorney.

PLEASE TAKE NOTICE that on Tuesday, October 15, 1935 at 11:00 o'clock in the forenoon E. S. T., or as soon thereafter as counsel may be heard at the State House, Trenton, before this court, I shall move to dismiss the appeal in the above entitled matter for the following reasons:

1. The sole legal judgment entered terminating this cause is a judgment for voluntary non-suit from which the plaintiff has no legal right to appeal.

2. The plaintiff's appeal is in reality an attempt to review the mesne and interlocutory order entered by the Supreme Court Commissioner on May 16, 1935, striking the first, fourth and fifth counts of the complaint, which order under the law and rules of this court was not a final judgment subject to appeal.

3. The order amending the judgment of voluntary non-suit entered in this cause from which

the plaintiff purports to appeal is a nullity as the court was without jurisdiction to enter the same, and therefore no lawful appeal can be based thereon.

HAROLD SIMANDL,
Attorney for Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IDA ROCKER, *Plaintiff-Appellant,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF NEWARK, *Defendant-Appellee.*	*Action at Law.* *Appeal from New Jersey Supreme Court.*

BRIEF FOR APPELLANT.

Statement.

The appellant commenced suit in the New Jersey Supreme Court, Union Circuit, by a complaint containing five separate and distinct counts (S. C. p. 2). Appellee filed an answer to all these counts (S. C. p. 30). Appellant thereupon moved to strike the answer to the first, fourth and fifth counts and the motion was heard by Circuit Judge Cleary, sitting as a Supreme Court Commissioner.

Reviewing the pleadings from their inception the Court below ordered the first, fourth and fifth counts of the complaint be stricken as not stating a legal cause of action (S. C. p. 98). Appellant thereupon submitted to a voluntary nonsuit on the Second and Third causes of action (S. C. p. 100) in order that the major issues involved in this case might be more speedily brought before this tribunal for determination.

This Court, therefore, is now called upon to review the action of the Supreme Court in striking the *first, fourth and fifth counts of the complaint.*

Facts.

In 1928 the Cardinal Building and Loan Association of Newark (then known as the Powerful Building and Loan Association) was subject to all of the provisions contained in P. L. 1925, Ch. 65, being "An Act Concerning Building and Loan Associations." Under this Act the Association was authorized to issue prepaid or paid-up shares, and stockholders who wished to withdraw from the Association, were by Section 52 of the Act given the privilege of suing the Association if their demand for payment of the withdrawal shares was not met within six months.

Relying on this Statute, the resolution of the Association and the agreement set forth in the stock certificate, Ida Rocker, the appellant herein, purchased five shares of prepaid stock of the appellee Association for the sum of $1,000. A copy of the stock certificate issued was made part of the complaint and attached thereto (S. C. p. 13). By this certificate the Association reserved the right to redeem the stock on thirty days' notice by payment of the maturity value thereof (S. C. p. 13, ll. 23 to 26), *and the holder of the certificate had the right "to withdraw these shares at such maturity value and guaranteed profit to date of withdrawal upon giving thirty days' written notice to the Association"* (S. C. p. 53, ll. 26 to 30).

On or about the first day of June, 1930, the appellant gave written notice to the Association of her demand to withdraw her shares, and be paid the $1,000.00 that she had paid for the five shares of stock. Receipt of this notice was acknowledged by the defendant Association June 7, 1930.

The Association failed to take any action on this application of the appellant, but continued to pay out withdrawal requests of other shareholders. These payments continued even after the passage of P. L. 1932, Ch. 102, which amended Section 52 of the 1925 Building and Loan Act so as to protect the Association against large withdrawals.

Notwithstanding the protection seemingly afforded by this Statute, the appellee Association continued to favor certain shareholders with large payments on their demands for withdrawals, but the appellant received nothing.

Upon the expiration of six months after the demand for withdrawal was first filed by appellant, she had a right to commence suit. This right was granted her by Section 52 of the Building and Loan Act of 1925. However, duly authorized representatives of the appellee assured her that payment would shortly be forthcoming; and twice, once on May 8, 1931, and once on July 8, 1931, agreed in writing to pay the demands of the appellant. By these writings the appellee agreed to make payments of $100.00 per month until the full sum due and owing the appellant should be paid. Relying on these written promises the appellant still forebore to bring suit. Up until the time of the commencement of this suit, September 18, 1934, and since that time, the appellant has been paid nothing by the appellee.

The first count of the complaint is based on the Statutory right confirmed by Section 52 of the Building and Loan Act of 1925 giving the appellant the right to sue the Building and Loan Association six months after her demand for withdrawal had not been met.

The fourth count is based on the promise in writing made by the Building and Loan Association on May 8, 1931 to pay $100.00 per month until the claim of the appellant should be paid in full.

The fifth count is based on the promise made by the appellee on July 8, 1931 to the same effect.

At the argument before Judge Cleary upon the motion to strike the pleadings, the appellee relied upon the moratory legislation pertaining to Building and Loans passed in 1932 and 1933 by the legislature, and by the regulations of the Commissioner of Banking and Insurance issued in accordance therewith. It is not the purpose of the appellant to argue the general unconstitutionality of all this legislation. Appellant's position is that any acts which may be applicable to this case are unconstititional as regards herself as a holder of prepaid stock, in that holders of prepaid stock are discriminated against in favor of those members of the Association who hold or held matured installment shares. It is also the contention of the appellant that any rule issued by the Commissioner of Banking and Insurance can not be taken into account by this Court at this time, *as the first, fourth and fifth counts do not contain any such rule or reference thereto.*

In considering whether or not the respective counts of the complaint set forth a good cause of action, which is the only matter now before the Court, only those matters pleaded in these counts, and those matters of which this Court may take judicial notice can be considered. It has already been decided that in this State the orders of the Commissioner of Banking and Insurance are not matters cognizable by judicial notice.

LAW.

POINT I.

P. L. 1932, Ch. 102 amending Section 52 of the 1925 Building and Loan Act violates the rights guaranteed to the appellant by the Constitution of the United States and of New Jersey.

The first count of the complaint (S. C. p. 2) is based upon the purchase by the appellant in 1928 of five shares of prepaid or paid up stock of the appellee Building and Loan Association, the demand by the appellant on June 1, 1930 for the withdrawal value of the stock, demand for said withdrawal having been made by due and proper notice, and the failure of the Building and Loan Association to honor this demand for withdrawal. Under Section 52 of the Building and Loan Revision of 1925 (P. L. 1925, Ch. 65), appellant then had an absolute right to sue for the withdrawal value of the shares six months after demand had been made upon the Association.

At the argument below it was claimed that by virtue of the authority vested in him by P. L. 1933, Ch. 166, and P. L. 1933, Ch. 258, giving him the right to issue rules and regulations to Building and Loan Associations to negotiate the method of paying the withdrawal value and maturity value of shares of any and all Associations, the Commissioner of Banking and Insurance issued certain rules whereby the appellee was restricted to paying out $50.00 per month to any one member.

The 1933 Acts themselves *do not restrict* the Building and Loans *from paying upon demands for withdrawal,* nor is the right to sue conferred by Section 52 of the 1925 Revision of the Build-

ing and Loan Act in anyway impaired by these Acts. *The first count does not plead any order of the Commissioner of Banking and Insurance,* and therefore none is before this Court on the determination of the correctness of the rulings of the Supreme Court in striking the first count of the complaint, nor can this Court take judicial notice of any order issued by the Commissioner of Banking and Insurance. This point was decided by Chief Justice Brogan in the case of *Apgar* vs. *Weona Building and Loan Association,* 13 N. J. Misc. 121.

On motion to strike the Court can consider only that which is cognizable by judicial notice. The orders of the Commissioner come under neither of these heads, and for purposes of this case the said orders are non-existent. Therefore, the 1933 Acts need not be considered at this time because there is no restriction imposed by their terms, and if any restriction was imposed upon the appellee by virtue of the authority conferred in those Acts, said restrictions are not properly before the Court, and cannot be considered by it.

However, it is claimed that P. L. 1932, Chapter 102 which amends Section 52 of the Building and Loan Revision of 1925 is a bar to the appellant's right to recover under the first count. Prior to the passage of this amendment to Section 52 there can be no question but that the appellant would have succeeded in this action.

In *Guild* vs. *Baker,* 68 N. J. Equity 61, Vice-Chancellor Pitney held that a prepaid certificate of stock of a Building and Loan Association was in effect a promise to pay.

At page 66 the Vice-Chancellor said:

> "Now, upon mature consideration, I come to the conclusion that the certificate of stock,

> with those words printed upon it, was, in effect, a promise by the corporation, under its seal, to repay, with interest, the amount paid by Mrs. Baker in accordance with the terms of the special imprint above mentioned, and that she, upon reading it, had a right so to treat it, and to hold the mortgage as security for what, in effect, was a promise in writing to pay her $1,000, with interest."

In *Fitzgerald* vs. *The State Mutual Building and Loan Association*, 74 N. J. Equity 440, one who owns stock of a Building and Loan Association, and put in a demand for withdrawal thereof was given a status of "quasi creditor."

These two cases and Section 52 of the 1925 Building and Loan Revision indicate that immediately upon the expiration of six months after demand for withdrawal, the holder of prepaid certificates in a Building and Loan becomes a creditor thereof with an *accrued vested right* to sue the Association for the value of the stock.

P. L. 1932, Ch. 102, in depriving the appellant of this vested right, violated both the New Jersey and the United States Constitution.

Recently the United States Supreme Court and the New Jersey Court of Errors and Appeals have been called upon to adjudicate much legislation passed to alleviate hardship caused by prevailing economic conditions. In view of these decisions it would be an imposition upon the time of this Court to go into any extended discussion of the cases pertaining to the right of a State to effect the vested right of an individual by the exercise of its police power. A recent case in this Court, *Vanderbilt* vs. *The Brunton Piano Company*, 111 N. J. Law 596; and one in the United States Supreme Court, *Home Building and Loan Association* vs. *Blaisdell*, 290 U. S.

398, go into this question exhaustively. Since all the prevailing law on this subject is summarized and brought down to date in these cases, and since these cases are authority as to what legislation is permissible in the light of economic conditions prevailing in 1932 when the legislation now under consideration was passed, P. L. 1932, Ch. 102 amending Section 52 of the 1925 Act will be considered in the light of the tests laid down by these two cases.

The exercise of the police power of a State in such drastic fashion as exercised by this Statute can be justified, if at all, only by a finding by the legislature that a severe state of economic emergency exists. *Home Building and Loan Association* vs. *Blaisdell, supra; Vanderbilt* vs. *The Brunton Piano Company, supra.*

Those vices which this Court found rendered unconstitutional the mortgage deficiency legislation considered in the Vanderbilt case are all present in the 1932 Statute amending Section 52 of the 1925 Building and Loan Act. To begin with, there is no declaration of a state of emergency, nor is there any evidence before the Court now that a state of economic emergency existed at the time, so that under the cited cases it is incumbent upon this Court to rule that the exercise of the police power was an unconstitutional deprivation of the appellant's vested rights. In addition, there is no limitation of the time during which the legislation is to remain in force and effect.

The United States Supreme Court in the Blaisdell case was careful to point out that one of the reasons for sustaining the Minnesota mortgage moratorium statute was the very short time for which the moratorium was to be in effect. The

1932 amendment to Section 52 of the Building and Loan Association Act, if found constitutional, will be a permanent Statute, and the vested right which the appellant had before the 1932 Statute was passed will be permanently taken from her.

The Blaisdell case is careful to point out that the unusual exercise of the police power permitted in times of economic stress must, by its very terms, be limited to such periods, and by inference the Court says any legislation which is to be in effect for a longer period of time is unconstitutional.

In the *Vanderbilt* case at page 602, the Court said:

> "As has been already stated, the appellants rely wholly and exclusively upon the statute; and the statute neither purports to be directed towards an emergency nor limits the application of the enactment either in field or in time. Its purview is absolute, final and permanent. It extends to all classes of property—homes, business properties, speculative ventures, everything. According to its terms it is in force henceforth and forever. If effective now, it will be just as effective after, and entirely regardless of, the passing of the emergency. To hold that the police power enables the legislature to do that against an existing contract would be to contravene the provisions, supra, of the constitutions, both federal and state."

This quotation is complete authority for the proposition that P. L. 1932, Ch. 102, amending Section 52 of the Building and Loan Act, is taking a vested right from the appellant, and therefore is unconstitutional.

Chief Justice Hughes in his opinion in the Blaisdell case is very careful to point out that

the legislation must not be discriminatory. The 1932 amendment of Section 52 discriminates viciously against those shareholders who are withdrawing before maturity and who hold paid-up stock in favor of those shareholders whose shares have matured. *The amended section provides that no withdrawals are to be paid until all maturities have been paid.* There is no justification for this discrimination against shareholders whose shares have not matured and who hold paid-up stock as in the case of the appellant.

This discrimination cannot be justified either by logic or any intuitive feeling of justice. In exercising the police power the legislature cannot discriminate in favor of one class to the detriment of another, and this is especially true when there is no public necessity for this discrimination. Shareholders had been promised the right to withdraw their shares at any time they wished. It is penalty enough for them that their right to withdraw had been taken away from them by the legislation. Even if the Court would allow that state of affairs to exist, it is inconceivable that this Court would sustain the act of the legislature which does not give withdrawing and paid-up shareholders a right to share at least pro rata with maturing stockholders. The only basis for this discrimination is to hold a whip over withdrawing and paid up shareholders, and to try to intimidate them from exercising their right to withdraw, a right promised them by the Building and Loan constitution by the very terms of the paid-up stock certificate, and by the Statutes of the State of New Jersey. It is submitted therefore that P. L. 1932, Ch. 102 which amends Section 52 of the Building and Loan Act of 1925 so as to prevent the appellant from suing after six months had expired from the date of her de-

mand for the withdrawal of her shares is a direct violation of the provisions and guarantees of the Constitution of the United States and the State of New Jersey, because:

a. There being no declaration of a state of emergency or duration of time during which this legislation is to be in effect, it is not such an exercise of police power as a period of economic emergency would give to a state legislature.

b. It is an unconstitutional discrimination against paid-up shareholders who are withdrawing in favor of those shareholders whose shares have already matured.

If the Court finds that this legislation is unconstitutional it is mandatory upon this Court to send the first count back for trial since Section 52 of the 1925 Act is then in effect unamended, and any rules promulgated by the Commissioner of Banking and Insurance by virtue of the authority conferred upon him by the 1933 Acts are not before the Court.

Were it not for the alleged existence of the economic emergency this case would be on all fours with *Intiso* vs. *The Metropolitan Savings and Loan Association,* 68 N. J. Law 588. Therein it was held that legislation could not be retroactive in impairing the obligation of the contract implied in pre-existed membership in any Building and Loan Association. *Since the 1932 Act was not put on a basis of emergency legislation, but was passed as a permanent act, it must of necessity be held unconstitutional for the same reason as was passed upon in the Intiso case.*

In the argument below, much stress was laid by counsel for the appellee upon an unreported opinion of the late Chief Justice Gummere in *Richmond* v. *Hercules Building and Loan Asso-*

ciation. That was an action brought by a withdrawing shareholder whose demand had not been met for six months, and was brought under Section 52 of the 1925 Revision. The answer set forth the hardship which would result to the other shareholders who had not withdrawn if this suit was allowed. Motion was made to strike the answer. Chief Justice Gummere's first reaction to the motion is contained in the following letter which was sent to counsel in that case.

"June 20, 1932.

My examination and consideration of the motion to strike out the answer in the above case leads me to the conclusion that that motion should be granted.

The latter part of section 52 of the Act concerning building and loan associations (L. L. 1925, p. 213) provides that where a notice of withdrawal is duly served upon the corporation by a stockholder thereof and payment is not made within six months after the service of such notice, the member who has given the same may sue for the recover and withdrawal value of his shares in any such association in any court of competent jurisdiction. The statute is mandatory, and applied to all notices of withdrawal, except, perhaps, where the compliance with the notice and the payment of the withdrawal amount would operate to render the corporation insolvent or materially depreciate the value of the stock of other stockholders. No such exemption is specified in the statute, but assuming that it exists by implication, there is no claim in the answer filed in this case that the payment of the plaintiff of the withdrawal value of his stock will have any such result.

My conclusion, therefore, as I have already indicated is that the answer sets up no valid defense against the right asserted by the plaintiff in his complaint.

I have left all the papers in the case with my sergeant-at-arms, who will deliver them to you upon your call.

Very truly yours,
WILLIAM S. GUMMERE,
Chief Justice."

After writing this letter, for some reason, it is claimed that the late Chief Justice changed his mind, and filed no opinion or memorandum. With all the reverence and respect due him as great a jurist as this or any other State has been blessed with, it is submitted that this alleged decision should be disregarded by this Court. It is not the province of the judiciary to change definite and clear legislation. If Section 52 of the 1925 Act worked a hardship upon the people of this State, it was the duty and the right of the legislature, and of the legislature only, to change that rule and alleviate any hardship. The Courts has no option in the matter, no matter where their sympathy may lie.

The Anglo Saxon system of jurisprudence is not based upon the reactions of the Courts which hear the cases, nor upon their sympathies, nor upon any system of "natural justice". Our system of jurisprudence is based upon Statute and *stare decisis,* and there is no justification or right for any court of this state to fly directly in the face of Section 52 of the Building and Loan Act of 1925 when such act is still the law of the State, and unmistakably clear in its terms. Appellant respectfully submits that for those reasons stated above, the amendment to Section 52 of the Building and Loan Act contained in P. L. 1932, Ch. 102 is essentially violative of both Federal and State Constitutions, and therefore null and void.

With the amendment declared unconstitutional the original Act stands, and by the terms thereof this Court has no choice but to allow a suit after the expiration of six months from the date of demand for withdrawal.

Even if the 1932 amendment to Section 52 of the Building and Loan Act (P. L. 1932, Ch. 102) is held to be constitutional by this Court, the appellee can not urge it as a bar to this suit. The amended section specifically says: *"A member who has filed a notice or request for withdrawal shall not have the right to sue any such Association to recover the withdrawal value of his shares, or any such part thereof as may not be paid, so long as the funds in the treasury of such Association are applied as required herein."*

The first count of the complaint definitely alleges that the appellee *"continued to pay out moneys belonging to said Association to other persons and stockholders who filed notices of withdrawals after the plaintiff had filed and demanded payment as aforesaid"* (S. C. p. 6, ll. 28 to 32).

The 1932 Act at its very beginning says: "Withdrawals from any such Association shall be paid in the order in which the notices thereof shall have been received." We find therefore that the first count of the complaint alleges that the appellee did not comply with the terms of the amendment which it now seeks to use as a bar to this suit. We also find that the amendment bars shareholders from suing the Association *only so long as there has been strict compliance with the terms of the amendment.* The appellant should have a day in Court to prove non-compliance as alleged. The Supreme Court erred in striking the first count of the complaint,

because even if P. L. 1932, Ch. 102 is constitutional, it is still no bar to this suit. There can be no quibbling about the intention of the legislature. The legislation is clear and explicit, that the right to sue granted by Section 52 of the 1925 Act is lost only so long as the funds in the treasury of such Association are applied as set forth in the amendment, and the amendment commences with the requirement that withdrawals must be paid in the order in which they are received.

This Court has no problem of construction confronting it in the face of this clear and unmistakable language. As was written in *Carley v. The Liberty Hat Manufacturing Company,* 81 N. J. Law 502 at 507, "The fundamental canon of construction is that the intention of the legislature shall prevail, and that it shall be gotten from the plain meaning of the enactment."

POINT II.

The fourth and fifth counts of the Complaint state a legal cause of action as the conduct of the appellee as alleged therein estops it from taking advantage of any legislation passed subsequent to July 8, 1931.

Appellant demanded the withdrawal value of her shares from the Association on July 1, 1930. Under the terms of the Statute then in force her right to sue the Association on this claim became vested December 1, 1930. Not wishing to embarrass the Association at that time by a suit, she forebore to commence immediate action as was her right, and entered into friendly negotiations with the Association. Instead of reciprocating this fair treatment, the appellee made numerous

promises to pay the debt as alleged in the fourth and fifth counts (S. C. pp. 11 and 12), which promises were never kept.

This double dealing treachery of the Association's officers *lulled the appellant into a sense of security* until the moratory legislation referred to above has been passed. This conduct should not be tolerated by this Court. The doctrine of *estoppel in pais* should operate here although this doctrine is fundamentally a creature of equity. Still it can be applied in actions at law, and especially in such a flagrant case of unconscionable conduct as was exhibited here by the officers of the Association.

Chancellor Walker, speaking of the doctrine of *estoppel in pais* for the Court of Errors and Appeals in *LaRosa* vs. *Nichols,* 92 N. J. Law 375, at 377, said:

> "But this doctrine is not now one of exclusively equitable cognizance; for, as this court, in Central Railroad Co. *v.* MacCartney, 68 N. J. L. 165, speaking by Mr. Justice Pitney (at p. 175), said, the doctrine of equitable estoppel, although the creature of equity and depending upon equitable principles, is recognized and enforced alike by courts of law and equity."

The facts of this case present a striking similarity to those presented in *Howard* against *West Jersey and Seashore Railroad Company,* 102 Equity 517. Therein an injured party in an accident suit forebore to bring suit because of continuous negotiations and half promises on the part of the insurance company's adjuster. As soon as the Statute of Limitations on this suit had run, the insurance company refused to do anything for the injured party. After commencing a suit at law the plaintiff brought a bill in equity to enjoin the defendant from using

the Statute of Limitations as a bar to the action at law. Vice-Chancellor Leaming, in an able and learned opinion, held that such conduct did estop the defendant, and granted the injunction as prayed for. In the case at bar the same set of circumstances presents itself as alleged by the fourth and fifth counts. Were it not for the promises and misrepresentation of the officers of the Association suit on this claim would have been commenced long before the legislature passed any moratory legislation, and when Section 52 of the 1925 Building and Loan Revision was still in force.

The new legislation drastically affects appellant's constitutional rights. The Association should not be permitted to take advantage of this new legislation, as were it not for the misconduct of the appellee's officers, this suit would have been commenced long before 1932, and judgment would have been entered as required by the clear terms of Section 52 of the 1925 Building and Loan Act.

CONCLUSION.

It is, therefore, respectfully submitted that the Supreme Court erred in striking the first, fourth and fifth counts of the bill of complaint, because the amendment to Section 52 of the Building and Loan Act (P. L. 1932, Ch. 102) is unconstitutional as it is not by its terms made an emergency measure, or limited in its duration; as it unjustly discriminates against paid up and withdrawing shareholders against those shareholders whose shares had matured; that the Building and Loan Association Act of 1933 does not by its terms take away the right to sue vested in the paid up and withdrawing shareholders given by Section

52 of the 1925 Building and Loan Act, and that no regulations of the Commissioner of Banking and Insurance authorized to be issued by P. L. 1933, Ch. 166 are before the Court; that even if the Court should find the 1932 amendment to Section 52 is constitutional, the appellee should not be permitted to plead it as a bar to this suit, because it is estopped from doing so by its own inequitable conduct.

Respectfully submitted,

JOHN J. STAMLER,
Counsel and Attorney for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

IDA ROCKER, *Plaintiff-Appellant,* vs. CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant-Appellee.*	*Action at Law.* *Appeal from New Jersey Supreme Court.*

BRIEF OF DEFENDANT-APPELLEE.

(Italics are not of Court unless otherwise indicated.)

There is no justification for the allegations of fact concerning the payment of withdrawals contained in the brief of plaintiff-appellant. No question of fact was before the court below, which merely passed upon the quality of the complaint. While the court did not consider the affidavit filed on plaintiff-appellant's motion to strike the answer, even such affidavits do not sustain the allegations of fact which appear in the plaintiff-appellant's brief.

The argument in the court below was made and defendant-appellee's brief filed before the decision of *Apgar* v. *Weona B. & L. Assn.*, 13 N. J. Misc. 121. Upon the argument and in the brief, defendant-appellee erroneously assumed that the court below could take judicial notice of the orders of the Commissioner of Banking and Insurance, but upon the filing of the decision in *Apgar* v. *Weona B. & L. Assn., supra,* the de-

fendant-appellee filed an additional brief in which it was stated:

> "Since the preparation of defendant's original brief, the case of Apgar *v.* Weona Building and Loan Association, 13 N. J. Misc. 121, has come to our attention. The decision in that case is, of course, binding upon this Court and we must admit error in our original brief in assuming that this Court could take judicial notice of the orders of the Commissioner of Banking and Insurance applicable to building and loan associations and issued under the authority of the Emergency Act of 1933, and that therefore, the Court could strike out the counts of a complaint in a suit for withdrawal barred by such orders. Therefore, admitting our error, we withdraw our argument on the motion to strike the complaint, to the effect that the said orders bar causes of action alleged in the complaint."

Therefore, the court below did not take notice of the aforesaid administrative orders nor pass its opinion upon them, as reference to such opinion clearly appears and the applicability of such orders is not before this Court.

The case of *Guild* v. *Baker,* 68 N. J. E. 61, passed upon a situation where the statute did not authorize the issuance of income shares and where the association involved had a receiver appointed in November, 1902 and prior, therefore, to the passage of the 1903 revision, which authorized issuance of such shares. The certificate there before the court did not state that it represented shares. On the other hand, in the case of *Harrison* v. *Fleischman,* 70 N. J. E. 301, it was held that where the certificate for income shares recited the shares but agreed to pay interest, that the holder was a shareholder and not a creditor, which case distinguishes *Guild* v. *Baker, supra.*

In *Bettle* v. *Republic S. & L. Assn.*, 71 N. J. E. 613, a case not controlled by the 1903 statute, it was held that the issuance of income shares was *ultra vires* and that the certificates in the case there before the court did not evidence that they represented shares, but was simply a receipt for money.

Under *Sections 73 and 74 of P. L. 1925, C. 65,* as amended respectively by *P. L. 1932, C. 91 and C. 97,* and again by *P. L. 1935, C. 59,* there can be no question but that the plaintiff-appellant and all other holders of income shares are members and not creditors.

Endlich on Bldg. Assns. (2nd Ed.) Sec. 494, p. 441;

Piquet Building & Loan in New Jersey, p. 76;

Folk v. *State Capital S. & L. Assn.*, 214 Pa. 529, 63 Atl. 1013 (Opinion of Endlich, *J.* adopted by Supreme Court).

John Marshall Law Journal, Vol. IV, No. 3, p. 53. While the decision in *Fitzgerald* v. *State Mutual B. & L. Assn.*, 74 N. J. E. 440, stated that the complainant was not only a shareholder, but a quasi-creditor because of default in payment of his withdrawals within six months after notice, it is apparent that this court in that case did not intend to define the status of the complainant as that of a *general* creditor, which is the status contended for by plaintiff-appellant, and that the statement therein as to status has been qualified, for the withdrawing members whose withdrawals had not been paid within six months after the filing of notices were denied a creditor status which would have entitled them to preference upon distribution and held to be required to share ratably with shareholders who had not filed applications for withdrawal in the

case of *Fitzgerald* v. *State Mutual B. & L. Assn.*, 76 N. J. E. 137, which opinion was highly approved by this Court in *French* v. *Wolfson*, 88 N. J. L. 669.

It is submitted that in view of the two last cited decisions that plaintiff-appellant did not become a general creditor at the expiration of six months after the filing of her notice of withdrawal and she did not, at that time, acquire a vested right, but that she did remain a member of the defendant-appellee as is hereinafter more fully set forth.

Plaintiff-appellant contends that *P. L. 1932, C. 102*, may not be upheld as emergency legislation and contends that emergency legislation must recite the emergency requiring its enactment and a limited life. It is submitted that on the authority of the cases cited in the opinion of the court below, that this contention is erroneous, but even so, the act before the court meets the tests of the plaintiff-appellant.

The essential difference between *Section 52, P. L. 1925, C. 65* and *P. L. 1932, C. 102*, amending it, is as to the distribution of funds when an association becomes unable to pay all withdrawals promptly. Both the original section and its amendment provide for the payment of withdrawals in the order in which the applications therefor are filed and the change in the statute made by the amendment which limits the payments in the order filed to $500.00 in one month, is applicable only when the association, by reason of emergent conditions, is unable to pay all withdrawals. The emergencies affecting the ability of building and loan associations to pay withdrawals as requested, are the products of the times and due to economic conditions,

and the Legislature, with great wisdom, enacted the amendment which, while permanent in form, is emergent in character as that portion of the amendatory statute of which plaintiff-appellant complains, becomes effective only in an emergency, when the particular association affected thereby is unable to pay in full in one month, all withdrawals in the statutory order.

The change in the statute affected by the amendment is also limited as to time for the partial payment of withdrawals and the prohibition of suit therefor is, as to each association affected by economic conditions and thus unable to pay all withdrawals within the month, effective temporarily and only during the period that the association because of such emergent conditions, is unable to pay all withdrawals in full within the month in which filed, in the statutory order.

The plaintiff-appellant should derive no comfort from the letter of the late Chief Justice Gummere in *Richman* v. *Hercules B. & L. Assn.*, addressed to counsel, for it says:

> "The statute is mandatory and apply to all notices of withdrawal, except, perhaps, where the compliance with the notice and the payment of the withdrawal made would operate to render the corporation insolvent or materially depreciate the value of the stock of other stockholders."

for later, upon the filing of an amended answer, meeting the suggestions of the possible exceptions as contained in his letter, he upheld such defense.

A valuable opinion on the mandatory nature of a somewhat similar withdrawal statute, but the superior right of creditors and continuing

members to prevent such privilege being exercised so as to jeopardize their interest and that of the association is *State Ex rel Orlando* v. *Reliance Homestead Assn.*, 174 La. 980, 142 So. 146, a copy of which opinion was delivered to the late Chief Justice Gummere before his denial of the argument to strike the Seventh Defense of the amended complaint in the *Richman* case.

The argument of the plaintiff-appellant that the allegation that payments were made by the defendant-appellee to other members who filed later notices of withdrawal, states a cause of action under *P. L. 1932, C. 102*, is without merit for the conclusion of paragraph 10 of the complaint states a right of action under *Section 52 of P. L. 1925, C. 65* and it is to be noted from the state of the case (p. 7) that the second count alleged a cause of action under *P. L. 1932, C. 102,* upon which count the plaintiff-appellant took a voluntary non-suit. There can be no question but that the first count states a cause of action under Section 52 prior to its amendment and for the reasons hereinafter stated, should have been struck, for the statute upon which it was based was not in force at the time of the institution of this action.

POINT I.

P. L. 1932, Chapter 102, is constitutional as a valid exercise of the inherent police power of the State.

The points, arguments and cases upon which the defendant-appellee relies, are comprehensively covered in the opinions of the court below in this case, *13 N. J. Misc. 397,* and in *Treigle* v. *Acme Homestead Association,* 160 So. 637, and,

for the sake of brevity, such points, arguments and citations have not been repeated herein, but as set forth in the said two opinions, are adopted by the defendant-appellee, who respectfully requests that this Court will consider them as set forth in the said two opinions, as part of this brief.

In support of the statement in the opinion of the court below that the police power is an attribute of sovereignty and that all contracts are subject to its future exercise, the following cases may be cited:

Home B. & L. Assn. v. *Blaisdell,* 290 U. S. 398;

Brown v. *Feldman,* 256 U. S. 170;

Levy Leasing Co. v. *Siegel,* 258 U. S. 242;

Block v. *Hirsh,* 256 U. S. 135;

Norman v. *B. & L. R. R. Co.,* 55 Sup. Ct. 407;

Nortz v. *U. S.* 55 Sup. Ct. 428;

Perry v. *U. S.,* 55 Sup. Ct. 432;

Hourigan v. *Township of North Bergen,* 113 N. J. L. 143.

The statement in the opinion below that:

> "Contracts made with institutions regulated under the police power, or contracts, the future regulation of which is appropriate under the police power, may not be enforced in the face of later enacted legislalation, prohibiting their enforcement and that such statutes enacted under the police power do not come within the interdiction of the constitutional prohibition against the impairment of the obligations of contracts or of the Fourteenth Amendment of the constitution of the United States."

is supported by:

Manigault v. *Springs,* 199 U. S. 473; 26 S. Ct. 127, 50 L. Ed. 274;

Stone v. *Mississippi,* 101 U. S. 814; 25 L. Ed. 1079;

Boston Beer Co. v. *Massachusetts,* 97 U. S. 25, 24 L. Ed. 989;

Northern Pac. Ry. Co. v. *Minnesota,* 208 U. S. 583; 28 S. Ct. 341; 52 L. Ed. 828;

Hudson C. S. Co. v. *McCarter,* 209 U. S. 349, 29 S. Ct. 529, 52 L. Ed. 828;

Douglas v. *Commonwealth of Kentucky,* 168 U. S. 488, 18 S. C. 199, 42 L. Ed. 553;

New Orleans Gaslight Co. v. *Drainage Commission of New Orleans,* 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831;

Chicago B. & Q. R. Co. v. *Nebraska,* 170 U. S. 57, 18 S. Ct. 513; 42 L. Ed. 948;

New York & N. E. R. Co. v. *Town of Bristol,* 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269;

Butcher's Union Slaughterhouse & Livestock Landing Co. v. *Crescent,* 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585;

Minneapolis & St. L. Ry. Co. v. *Emmons,* 149 U. S. 364, 13 S. Ct. 870, 37 L. Ed. 769;

Knoxville Water Co. v. *Knoxville,* 189 U. S. 434, 23 S. C. 531, 47 L. Ed. 887;

Dillingham v. *McLaughlin,* 264 U. S. 370;

Sutter Butte Canal Co. v. *Railroad Commission,* 279 U. S. 125;

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 549;

United States v. *United Shoe Machinery Co.,* 264 F. 138;

Colorado Postal Tel. Co. v. *City of Colorado Springs,* 61 Colo. 560, 158 Pac. 816;

Texas & New Orleans R. R. Co. v. *Miller,* 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789;

Northwestern Fertilizing Co. v. *Hyde Park,* 97 U. S. 659, 24 L. Ed. 1036;

Mott v. *Cline,* 200 Cal. 434, 253 Pac. 718;

Dobbins v. *City of Los Angeles,* 139 Cal. 179, 72 Pac. 970.

This is the law even though the consideration for the contract has been entirely executed.

Louisville & Nashville R. R. Co. v. *Mottley,* 219 U. S. 467;

Schmoele v. *Atlantic City R. R. Co.,* 108 N. J. E. 353;

Seaman v. *Minneapolis Ry. Co.,* 127 Minn. 180, 149 N. W. 134;

Minneapolis St. P. & S. S. M. Ry. Co. vs. *Menasha Woodenware Co.,* 159 Wis. 130, 150 N. W. 411-413;

City of Durant v. *Consumers Light & Power Co.,* 71 Okla. 282, 177 Pac. 361;

Leiper v. *Baltimore R. R. Co.,* 262 Pa. 328, 105 Atl. 551.

There can be no doubt that *P. L. 1932, Chapter 102* was enacted under the police power. The power to legislate existing, the court is not concerned with the policy of the legislation and cannot substitute its judgment as to policy for that of the Legislature. Only where the legislation enacted under the police power is arbitrary or capricious may it be struck down by the court. That it is not arbitrary or capricious is evidenced by similar legislation passed by the various states in the years 1931 to 1935 inclusive, which is noted in the opinion herein of the court below, and in *Treigle* vs. *Acme Homestead Association, supra.* A list of this legislation is set forth in Appendix "A" of this brief.

Prior to the legislation cited in Appendix "A", the states so legislating almost without exception, had in force statutes which required the payment of withdrawals in the order the notices therefor were filed out of one-half of the monthly receipts. (Ohio statute had previously not regulated the withdrawal privilege which was regulated by the by-laws of each association.) The statutes of such states, so amended by the legislation aforesaid (Appendix "A"), were identical in principle with Section 52 of P. L. 1925, C. 65, with the exception of the six months' provision, which, however, did not have greater privileges than such statutes of other states.

The case of *Sinteff* v. *Peoples B. & L. Assn.*, 57 N. Y. Supp. 611, cited in plaintiff-appellant's brief (p. 10), is also a by-law case which was effectively distinguished by the court in the *Treigle* case.

It is noteworthy that the plaintiff-appellant does not in her brief, cite a single case contradictory of the decisions, in the court below in this case, in *Treigle* v. *Acme Homestead Association, supra,* and in *Fornataro* vs. *Atlantic Coast B. & L. Assn.*, 10 N. J. Misc. 1248. It is submitted that there is no authority in opposition to the cases upon which the defendant-appellee relies and has cited, including those cited in the opinions of the court below and in the *Treigle* case.

The case of *Kelly* v. *Republic B. & L. Assn.*, 34 S. W. (2nd) 924, which was disapproved by the court in the *Treigle* case, is easily distinguishable. The comment of the court as to the unconstitutionality of the statute in that case was *obiter dicta* for the reason that the plaintiff therein was at the top of the withdrawal list,

having filed the oldest application unpaid, the association had funds with which to pay the withdrawal as required by the by-laws and the suit was instituted one month before the effective date of the resolution of the board of directors providing for proration of funds, which resolution was passed under the authority of a newly enacted statute. In that case, therefore, the act of the directors authorized by the statute, was not effective until after the institution of the action and without question the defendant therein should have paid the withdrawal of plaintiff prior to the institution of the action, out of funds available and then required to be used for such purpose. Besides, in that case, the question of the police power to enact the statute was not raised. The case is distinguished and criticized in the *1932 Building and Loan Annals, pages 300-301,* and its correctness doubted but followed in the later *Texas* case of *Wood* v. *Wichita Falls B. & L. Assn.,* 66 S. W. (2nd) 718, in which, however, the police power was not considered. It is noteworthy that in the later case of *Shaw* v. *Lone Star B. & L. Assn.,* 71 S. W. (2nd) 863, the Texas court upheld a building and loan statute affecting creditor rights and building and loan powers as a valid exercise of the police power.

So, too, cases involving amendments of the building and loan statute, where in the amendment the Legislature has included a savings clause distinctly exempting from the operation of the amendment any rights which had accrued prior to its enactment, such as *Larson* v. *Fidelity S. & L. Assn.,* 35 Pac. (Wash.) (2nd) 108, are not in point. In the *Larson* case, the court based its decision entirely upon the savings clause of the act as evidencing the intention of the Legislature that the act should not be applicable to

rights accrued under the statute prior to the amendment and expressly refused to consider the right of the Legislature under the police power, to enact legislation affecting such rights, by an amendment which did not indicate a contrary intent. The same court previously, in *Huber* v. *Home S. & L. Assn.*, 169 P. 979, held that the withdrawal value of shares was controlled by the statute in force at the time of withdrawal—not by the earlier statute in force at the time the shares were issued.

POINT II.

P. L. 1932, Chapter 102, is constitutional as a valid exercise of the reserved police power.

Any argument under this point is adequately covered by the opinions in

Fornataro v. *Atlantic Coast B. & L. Assn.*, *supra* and the court below herein.

POINT III.

P. L. 1932, Chapter 102, is a procedural statute and as such, is binding upon the plaintiff-appellant.

This point is fully covered in the opinion of the court below herein.

POINT IV.

Plaintiff's contract included the statute and was amended by the amendment of the statute.

The Building and Loan Statute is a part of the membership contract of every member of a building and loan association.

9 C. J. 936.

Every member knows that the statute is amendable and that the privileges conferred by the statute may be enlarged or diminished by further statutory enactments and that when the statute is amended, the amendment becomes a part of the membership contract, which itself is amended accordingly, P. L. 1932, Chapter 102, therefore, amends the membership contract of the plaintiff-appellant and as it amends the contract, it cannot impair the obligation of such contract or a remedy for the enforcement thereof and is consequently, not within the constitutional interdictions.

POINT V.

P. L. 1932, Chapter 102, is binding upon all members of building and loan associations holding shares at the time of its enactment.

That this amendment is to be so construed and that such was the intent of the Legislature, has been held in the opinion in the court below and in *Fornataro* v. *Atlantic Coast B. & L. Assn., supra,* and *Horowitz* v. *Guarantee B. & L. Assn.,* (Essex County Circuit Court unreported opinion by Judge William A. Smith). A similar but more drastic change in the withdrawal section of the act was held to be binding upon members whose withdrawal notices had matured in *Treigle* v. *Acme Homestead Assn., supra.*

The foregoing cases all take notice of the extraordinary economic conditions motivating the enactment of the legislation. The economic conditions affecting building and loan associations in 1932 caused the Legislature to enact the statute in question, and it is to be noted as will appear from Appendix "C," that our Legislatures

in that year amended sixteen sections of the Building and Loan Act.

Appendix "C" lists all the changes in the Building and Loan statutes since 1925. The sections most numerously amended in that period and the years of their amendment evidence the recognition by the Legislature of the need of changes in the statute in order to accommodate the operation of building and loan associations of this state to changing economic conditions. Section 5, "Membership" was amended twice in 1932 and 1935; Section 7, "Directors" was amended three times, in 1929, 1930 and 1935; Section 8, "Officers" was amended once, in 1929; Section 9, "Duties of President" was amended twice, in 1930 and 1932; Section 11, "Duties of Secretary" amended once, in 1930; Section 13, "Examining Committee" amended once in 1929; Section 18, "Dividends and Profits," amended three times, in 1929, 1932 and 1935; Section 20, "May Borrow Money," amended four times, once in 1929, once in 1932 and twice in 1933; Section 23, "May merge or consolidate" amended four times in 1929, 1932 and twice in 1933; Section 26, regulating investments, amended three times in 1930, 1933 and 1935; Section 27 "Limitation on Mortgage Loans," amended once, in 1935; Section 28, "Appraisal Committee," amended once, in 1930; Section 49, pertaining to the withdrawal of shares, amended twice, in 1932 and 1935; Section 52, pertaining to the payment of withdrawals, amended twice, in 1932 and 1935; Section 55, amended once in 1935, to regulate the payment of lapsed shares and remove the hazard of the claim that the holder of shares which are lapsed, becomes a creditor; Section 56, empowering the Department of Banking and In-

surance to examine associations, amended once, in 1933; Section 59, "Proceedings against delinquent or unsafe Associations," amended three times, in 1930, 1931 and 1933; Section 69, "Establishment of Reserve Fund," amended four times in 1929, 1930, 1932 and 1935; Section 73, "Designation of Shares," amended twice, in 1932 and 1935; and Section 74, "Status of Shares," amended twice, in 1932 and 1935.

It will be seen that the said sections amended, all pertain to operation of the associations. The most numerous amendments were of Section 20, to enlarge the power of associations to borrow money to meet the needs of maturing and withdrawing shareholders, and Section 69, requiring the increase of reserves. The other sections most numerously amended were those pertaining to the rehabilitation or the liquidation of associations, being Section 18, the amendments of 1932 and 1935, permitting the segregation of assets; Section 23, regulating mergers; Section 59, regulating procedure in the case of failing associations and *P. L. 1933, Chapter 48*, being the emergency act. The declaratory amendment of Section 5 in 1932, was to remove all possible contention that upon withdrawal, the status of a member changed to that of a creditor and the amendments of Section 74 were to insure mutuality and the equality of the withdrawal privileges by all members, without regard to the type of shares held by them and the proportionate sharing of assets and losses by all members.

These acts "plugged up the leaks" in the building and loan structure and were designated by the Legislature to safeguard the interest of all members. It cannot be successfully contended that the motive of the Legislature was to ignore the rights, privileges and interests of the

members of building and loan associations at the time of its passage and to legislate only for the benefit of those who might become members after the passage of such legislation, for an inspection of the legislation in recent years will make evident that the Legislature was attempting by the strengthening of the building and loan structure, the enlarging of the powers of associations to borrow money from Federal agencies, the emphasizing of the mutuality of the institution, the safeguarding of it against insolvency by suits, to safeguard the interests of the then members, the security of whose homes and savings depended upon the solvency and liquidity of the building and loan associations.

While the construction of Section 52 of the 1925 Revision urged by the plaintiff-appellant is vigorously disputed by the defendant-appellee, certainly as pointed out in the court below and in *Reigle* vs. *Acme Homestead Association, supra,* the interests of previously withdrawing members were served by *P. L. 1932, Chapter 102* and the 1932 Louisiana statute, because such acts were designated by the Legislature to preserve the solvency of building and loan associations and by keeping the associations solvent and going concerns, they improved the chances of then withdrawing members to recover their savings and these chances were improved by such legislation, both as to the time of payment and as to the amount, for insolvency and liquidation would not only postpone payment, but reduce it.

If plaintiff-appellant's contention herein is correct, then it must logically follow that every member of a building and loan association has his rights and privileges fixed for the entire period of his membership, by the statute in force at the time of his subscription for shares, and

if this be so, then his interests may not be either limited or enlarged by subsequent legislation during his membership. This would require an association at all times, to keep separate records of the various rights of various members, depending upon the statutes in force at the time of their subscriptions for shares. The amendment in question allocates certain funds to the payment of withdrawals and this amendment is part of the membership contracts of those subscribing for shares after its enactment, and as such, so long as it is in force, they certainly are entitled to the payment of withdrawals in accordance with that statute. The plaintiff-appellant contends that the funds must be disbursed to her in accordance with the statute in force in 1919, when she subscribed for shares. Thus, the logical result of her contention is that the Legislature by two enactments, has created different preemptive rights in the same funds, such rights varying, due to the time that membership was acquired. It is apparent that if plaintiff-appellant's contention is correct, that all receipts would have to be used to pay members subscribing to shares prior to 1932 and this would make nugatory the statutory privileges of withdrawal of members acquiring shares thereafter. This is unthinkable and as was said in *Fornataro* vs. *Atlantic Coast Building & Loan Assn., supra,* it would be impossible to set up books to accommodate such clashing claims. And it must be kept in mind that if plaintiff-appellant's contention is correct, that those members who acquired shares prior to the passage of the 1932 amendment of *Section 52,* will, so long as they have shares, be entitled to have the funds disbursed in accordance with the statute passed in 1925 and in force at the time they subscribed for shares.

Building and loans are financial institutions. Their operations must be regulated so that at any one time, the rights of all members are equal. Many associations are operated as neighborhood institutions by men who know their neighbors and neighborhood values, but who have had little, if any, experience in high finance, who are neither certified public accountants nor constitutional lawyers, and it therefore, must be presumed that the Legislature intended by all of its legislation, to have laid down rules of procedure for this type of official to follow, which would be simple and not confusing, and it also must be presumed that because of the humble circumstances of the most numerous members in these institutions, that the Legislature intended that they could at all times, have equal rights and privileges easily ascertainable and easily enforced, without litigation expensive both to the member and to the association.

This being so, it naturally follows that the Legislature, as has so far been unanimously held by the lower court Judges of this state and by the highest court in Louisiana, intended by the 1932 legislation in the said two states to benefit the then members of associations through the preservation of the associations as instrumentalities of public service, to avoid their insolvency and thus to better enable the then withdrawing members to receive payment of their withdrawals.

P. L. 1932, C. 102, is prospective as it relates solely to the *future* dispersal of funds by all associations, *the future payment of all withdrawals* without regard to whether or not the notices had been, or would be, filed and *future* suits for withdrawals. As to suits for withdrawal it was said

in the opinion in *Horowitz* v. *Guarantee B. & L. Assn., supra*:

> "By its wording the 1932 amendment applies to all actions commenced after it took effect. * * * The very wording of the act directs its application to the time suit is instituted."

Obedience to the mandate of the statute under which it is incorporated for the very purpose of effectuating the statutory purpose, cannot be a breach, by the association, of the membership contract, which would render it liable for damages at the suit of a *member* whose privileges arise, by virtue of his membership in the association, out of the same statute under which the association is incorporated.

POINT VI.

Plaintiff-appellant is still a member of defendant-appellee association.

There has been no question of building and loan law which has so troubled the courts, as has the question of status of a withdrawing member. This has been due in part, to the lack of understanding of the nature of building and loan associations in the early days, when there were few associations and some of them operated for the benefit of the operators and not of the members, but due also in large measure, to the fact that until the subject of withdrawals was regulated by statute, withdrawal was in all instances a contractual right, provided by the by-laws of each association and, as these by-laws varied in various associations, so did the withdrawal rights arising therefrom. It is because of this that early decisions conflict and it is because also of the varying statutes regulating withdrawals that the decisions of the different states vary.

The privilege of withdrawal does not exist except as it may be conferred by by-law or statute, and a statute enacted upon the subject exclusively regulates the privilege.

Fitzgerald v. *State Mutual B. & L. Assn., supra;*

Thirteenth Ward B. & L. Assn. v. *Weissberg*, 115 N. J. E. 487;

Fornataro v. *Atlantic Coast B. & L. Assn., supra;*

Opinion of Court below.

In the last analysis, therefore, the determination of the status of a withdrawing member in any given state, depends upon the statutes of that state which regulate the withdrawal privilege.

As noted in the opinion below the rule that a withdrawing member becomes a general creditor upon the maturity of his withdrawal notice, and is at that time entitled to sue to recover the withdrawal value of his shares, first laid down in the case of *U. S. B. & L. Assn.* v. *Silverman,* 85 Pa. 394, was quickly modified and finally discarded in the State of Pennsylvania and is no longer the rule in any state of the Union.

It is unfortunate that early texts were written before the decision in the *Silverman* case had been criticized and overruled and before *Englehardt* v. *Fifth Ward Assn.*, 25 N. Y. Supp. 835, 5 Misc. 518, had been reversed, for *Endlich* cites both these cases as authority for *Section 110* of his text and the *Silverman* case is cited in *2 American and English Enc. of Law,* (1st Ed.) p. 625, both of said texts stating that a withdrawing shareholder upon maturity of his withdrawal notice, attains a creditor status. It was unfortunate because other courts relied upon these

texts as authority. For instance, the *Endlich* text and the *Englehardt* lower court decision (later reversed), were relied upon in *Society* v. *Bolin*, 12 Colo. App. 304, 55 Pac. 740, which in turn was cited as authority in *Tillinghast* v. *United States S. & L. Assn., supra.* The *Tillinghast* case also cites as authority upon the status of a withdrawing member, the cases of *McNab* and *Moore* v. *Southern Mutual B. & L. Assn.*, 50 S. C. 89, 27 S. E. 543 and the *McNab* case cites as its authority *2 Amer. & Eng. Enc. of Law*, (1st Ed.) 625, which has been stated, in turn relies largely upon *United States B. & L. Assn.* v. *Silverman, supra.*

A review of the Pennsylvania decisions evidences the continued efforts of the courts of that state to avoid the consequences of the rule of the *Silverman* case and while in that state, it is still held that a quasi-creditor status is attained by a withdrawing member upon maturity of his notice and that under certain circumstances, he may maintain an action for withdrawal, the courts of that state have exercised even at law, equitable powers to avoid the consequences of such practice. The hazard and preferences created by the obtaining of judgments, even though the judgments may not be executed, is well noted in the *Heinbokel* case cited in the opinion below, and were recognized by the Supreme Court of Pennsylvania in *Brown* v. *Victor Bldg. Assn.*, 302 Pa. 254, 153 Atl. 349, where the court said:

> "The situation at the present time confronting building associations and their many stockholders is of grave moment. The magnitude of their operations throughout the commonwealth is realizable from the report of the secretary of banking for the year 1929, which shows that the installment dues paid on their stock for that year

> amounted to $958,490,459.90, that mortgage loans on shares to stock were granted totalling $1,166,299,428.97, and that there were 3,892 associations and 1,626,015 shareholders. We are advised by judges of the courts of common pleas, particularly in Philadelphia, that the litigation against these associations has reached the point of public concern, and that unless wisdom is exercised, very disastrous consequences in the way of financial losses are likely to result to a large number of persons whose savings are invested in them."

And the same court, on the same day, filed the remarkable opinion in *Stone* v. *New Schiller B. & L. Assn.*, 302 Pa. 544, 153 Atl. 758, which for the first time in that State, denied the absolute right of suit theretofore admitted.

The litigation referred to in the quotation from the opinion in the *Brown* case, consisted of thousand of suits instituted by withdrawing shareholders against the Philadelphia building and loan associations. The numerous judgments entered against such associations were largely responsible for the forced liquidation of many associations, with consequent large losses to the shareholders. The decision in the *Stone* case came too late—the quasi-creditor rule as applied in Pennsylvania alone, had already wrecked many Philadelphia associations. The rule as modified in the *Stone* case is hazardous to associations because it requires a defense of potential insolvency to defeat the action.

There are still many thousands of shareholders of New Jersey building and loan associations, who hold shares issued prior to the enactment of *P. L. 1932, Chapter 102,* and if the rule of the *Silverman* case or the modified rule of later Pennsylvania cases is adopted by this court, the

associations of this state will, as were the associations of Philadelphia, be subject to numerous suits by those whose creditor rights as to withdrawal would be controlled by *Section 52* of the *1925 Revision.*

It may be noted that Pennsylvania is the only state which permits suits for withdrawal upon the maturity of the withdrawal notice, although it controls the execution.

Other states which also hold that a withdrawing member attains a quasi-creditor status on the maturity of the withdrawal notice, further hold that where the statute requires the payment of withdrawals in the order of the filing of the notices therefor, out of a specified portion of the receipts, that while the amount of the withdrawal value is fixed upon the maturity of the notice, suit to recover it cannot be instituted until funds required to be used for the payment of withdrawals are in the treasury of the association and are sufficient to pay the withdrawal of the plaintiff and all prior withdrawals and that between the maturity of the notice and the time that the association is in a position to pay the wihdrawal in its required order and at which time, suit may be instituted, that the withdrawing member is not entitled to participate in profits nor obligated to share losses, nor is he entitled to receive interest upon the withdrawal value of his shares.

The inequity of this rule and its violation of mutuality may be best appreciated by three examples.

Example 1.

An association is absolutely solvent, but an unusual number of withdrawal applications is filed so that its normal receipts are insufficient to pay all withdrawals in thirty days, and perhaps for some lengthy time, for unpaid withdrawals produce additional withdrawals. The only thing that prevents the association from paying the withdrawal is the fact that its cash receipts are inadequate to meet the exceptional and increasing withdrawal demands. In this example no losses are suffered, but the withdrawing member is not entitled to share in the profits earned during the delinquency in the payment of his withdrawal nor to receive interest for such period. Here the withdrawing member is deprived of his proportionate share of assets, as he receives no earnings upon his capital, the delayed repayment of which is not his fault. Here the continuing members profit at the expense of the withdrawing members.

Example 2.

The same situation exists as stated in the first example, except that during the period of nonpayment of withdrawals, asset values depreciate. There have been no new investments since the association became unable to pay withdrawals. The withdrawing member whose notice has matured is entitled to receive the withdrawal value of his shares as of the time of the maturity of his notice and the members who have not withdrawn must bear all the losses upon the assets of which the withdrawing member owns a proportionate part. Here the withdrawing members profit at the expense of the continuing members.

Example 3.

In a number of instances, all savings members whose shares are unpledged, have filed application for withdrawal which, of course, the association cannot meet. It makes no new investments after its inability to pay the earliest withdrawal, but economic conditions result in a depreciation in asset value after the notices of all savings members have matured. As the withdrawing members are entitled to the withdrawal value of their shares upon the maturity of their notices and as the losses on the assets in which their funds have been invested, are ascertained only after the maturity of their withdrawal notices, the losses must fall entirely upon the borrowing member who cannot withdraw and whose shares are assigned to the association for the repayment of the advance to him by the association and thus, the home owning borrowers for whose benefit the institution was designed by the Legislature, are charged with all the losses of the common partnership enterprise. Here all withdrawing members profit at the expense of the borrower who cannot withdraw.

It is apparent that the quasi-creditor status rule works inequitably in all cases; under some circumstances penalizing the withdrawing members, under other circumstances, penalizing the continuing members and under still other circumstances penalizing the borrowing members alone.

In *In Re Norwich Bldg. Society,* 45 L. J. C. N. S. 785, the withdrawing members were paid in full and the non-withdrawing members received nothing on liquidation. A rule achieving such inequitable, unmutual result is not the law of this State. *Fitzgerald* vs. *State Mutual B. & L.*

Assn., 76 N. J. E. 137. In order to avoid the consequences of such rule, states which hold that a quasi-creditor status is attained upon the maturity of a withdrawal notice, also hold that the subsequent insolvency of an association cancels all notices and that members who have filed withdrawal notices are to be paid upon a parity with members who have not filed such notices. Thus, in these states, in order to avoid the inequitable consequences of the quasi-creditor status rule, insolvency proceedings must be instituted in order that mutuality and equity may be preserved and so that the members shall share assets and losses proportionately.

It is respectfully submitted that such a rule is not in the interests of the state which desires to preserve the solvency of these institutions as instrumentalities of public service.

How can a mere attempt to exercise the privilege of the withdrawal of capital from the common partnership enterprise create any preferred rights whatsoever upon the part of the member exercising the privilege? Certainly the act of withdrawal is not an irrevocable act, for withdrawal notices may be cancelled and frequently are cancelled and may be waived. In this state a withdrawing member has, as a member, the right to inspect books. A writ of mandamus to enforce this right was ordered by Gummere, *C. J.* in *Zuckerberg* v. *Lincoln High B. & L. Assn.*, and the only reason for denial by Brogan, *C. J.* of the application for a writ of mandamus to compel inspection in the case of *Zukerberg* v. *Gem B. & L. Assn.*, was that applicant did not satisfy the court of the bona fides of his application, that it was for a proper *shareholder*

purpose. The right of inspection is a valuable right incident to share ownership and is lost on withdrawal in states where withdrawing members are deemed quasi-creditors. In this state the withdrawing member continues to participate in the affairs of the association, he must be counted as a member for the purpose of merger and he must be counted as a member for the purpose of conversion into a Federal Savings and Loan Association, and most important of all, he continues to vote to elect officers and directors, on merger, on conversion, on amendments of the constitution and by-laws and attends meetings of the association, hears officers report, questions them and makes suggestions as to the conduct of the affairs of the association. He thus has the opportunity to meet his fellow members and, if desirable, cooperate with them to elect a new management, and for that purpose, to inspect the shareholder list. *Zuckerberg* v. *Lincoln Highway B. & L. Assn.* It has been done with benefit to all associations and the interests of withdrawing and continuing members. This valuable right of participating in the election of management so long as the member has an interest in the common capital risked in the business, incident to share ownership, does not exist in states following the quasi-creditor rule. In fact, in those states, participation by a withdrawing member in an election is deemed incompatible with his status as a creditor and is held a waiver of his withdrawal notice. *Decatur B. & I. Co.* v. *Neal,* 97 Ala. 717. In this state a withdrawing member has always participated in the profits after notice of withdrawal and until payment, and has likewise during such period, when his capital is still at the risk of the common enterprise, if losses occurred, been charged with his

proportionate share thereof. The right to profits is incident to share ownership.

Mutual B. & I. Co. v. *Frederick,* 43 Ohio App. 270, 183 N. E. 114, affirmed *sub nomine; Frederick* v. *Mutual B. & I. Co.,* 128 Ohio St. 474, 191 N. E. 729.

So, likewise, is the obligation to share losses.

That withdrawing members are not creditors and therefore, may not file a petition in bankruptcy against a building and loan association, has been held in

Curtis v. *Dade County Securities Co.,* 30 Fed. (2nd) 325;

In Re Guaranty B. & L. Assn., 49 Fed. (2nd) 776;

In Re Puget Sound S. & L. Assn., 49 Fed. (2nd) 922.

Many cases, on the doctrine of *stare decisis,* following the quasi-creditor status rule, have, in order to avoid its fatal consequences in these days of unprecedented economic stress, so modified the rule that it is hard to recognize it. An example is *Gilligan* v. *Portland B. & L. Assn.,* 52 S. W. (2nd) (Ky.) 981, where it was held that a withdrawing shareholder retains between the time of withdrawal and payment, all the rights of a stockholder and is burdened with all the obligations of one. (The criticism of an earlier filed memorandum opinion in the *Gilligan* case (1932 Building and Loan Annals, pp. 281-282) resulted in said opinion being withdrawn from the files of the court and the one cited substituted in its place.) Other states have avoided the ruinous effects of the quasi-creditor status rule first enunciated in the Minnesota case of *Heinbokel* v. *S. L. B. Assn.,* 25 L. R. A. 215, decided 1894, by enacting statutes (Appendix "A")

declaring that the membership status continues after withdrawal. One of these states is Minnesota, L. 1933, C. 100. In that state it took 39 years and a major depression to conclusively demonstrate the disastrous consequences of this inequitable, absurd, illogical rule. It took the economic stress of the times to demonstrate the fact. In normal times when withdrawals are paid as soon as requested without requiring notice, no one then thinks about the status of a withdrawing member, as there is no status—he is paid immediately and he departs. It is only in an emergency or in a prolonged period of depression when withdrawals cannot be paid promptly, that the status of a withdrawing member, after notice and before payment is important —it determines solvency or insolvency—loss of homes and savings or their safety. The creditor rule induces insolvency—the membership rule preserves solvency. Such recent amendments are listed in Appendix "A".

It must be kept in mind that Pennsylvania is the only state following the quasi-creditor status rule which permits suit for withdrawal upon the maturity of the notice. In all other jurisdictions where that rule is in force, including England, suit by a withdrawing member is barred until the association has funds in its treasury to pay the withdrawal when reached in the order required by the statute or by-law.

> "It would not be reasonable that a society * * * should be called upon suddenly to repay sums of money which they might not have in hand or under their immediate control. Such a contingency would not be beneficial either to the society or to the depositors. Owing to some panic or want of confidence there might at any time be a run upon the defendants which would end in

their ruin if they could be called upon to pay all depositors at once. * * * The construction contended for by the plaintiff would afford no protection to the defendant society, and would leave it in the power of a certain number of panic-stricken depositors to wreck the society which would not be for the interest of the society or of the depositors."

Brett v. *Monarch Investment Bldg. Society,* 1 Q. B. (1894) 367.

"It would completely wreck any association * * * if all of its members who chose to withdraw from the organization could sue and recover judgments before there were any funds in the treasury for paying the claims, as contemplated by the articles of association. Such a condition of things would necessarily result in the appointment of a receiver to wind up the business of the association, which would defeat the very object of the statute which was enacted to aid the laboring classes in acquiring homes from their accumulated earnings."

Pawlick v. *Homestead Loan Assn.,* 37 N. Y. Supp. 164.

"If no restrictions existed preventing withdrawing members from immediately maintaining actions to recover their dues and enforcing judgments obtained, it is evident that this and similar associations would have a precarious existence. They would be in peril at almost any moment to have their operations arrested, and to be thrown into a receivership, by the conjoint action of a few withdrawing members. The beneficial purpose of the statute for the encouragement of small savings would be frustrated, and the assets of the association subjected to costs and expenses which would seriously impair the general fund contributed by the members."

Englehardt v. *Fifth Ward Permanent Dime Savings & Loan Assn.,* 148 N. Y. 281.

"It has been stated that such action may be pursued to judgment in all cases. *U. S. Building & Loan Ass'n* v. *Silverman, supra.* This is not a correct view. * * * Insolvency, actual or potential, is incompatible with the right to withdraw. A withdrawing member can obtain no advantage or priority over his fellow members through suit and judgment under such circumstances (Christian's Appeal, supra); a judgment is ineffective for any purpose except that it may hasten further liquidation. If the association were liable to judgment and execution at the hands of every withdrawing shareholder, it would result in a race for judgment whereby the assets would be eaten up through forced sales. * * * Where a succession of withdrawals would precipitate insolvency, or have a strong tendency to do so, a judgment should not be entered in an action by a withdrawing member. A judgment under such circumstances would not be effective. * * * A shareholder owes a duty to his fellow members of the so-called partnership to not place them, as well as himself, in a position where unnecessary loss must be suffered. He should not embarass the association by suit and judgment. Such actions accentuate an already distressed real estate market, imperil loans, bring on execution sales, forced liquidation, or a state of insolvency."

Stone v. *New Schiller B. & L. Assn.*, 153 Atl. 748.

That a creditor status, general or quasi, is not achieved by the exercise of the statutory withdrawal privilege, after the end of the thirty day notice and until payment, but that the membership status continues in New Jersey, is apparent

from an inspection of the following statutory language:

1903 Revision, 1 Comp. St. 336, Sec. 5:
"When a series of stock matures *and is paid,* the subscribers thereto or owners thereof shall cease to be *members.*"

1903 Revision, 1 Comp. St. p. 347, Sec. 38:
"Withdrawal value * * * shall be paid to the withdrawing *shareholder* * * * paid to such *member.*"

1903 Revision, 1 Comp. St. p. 347, Sec. 39:
"Any *shareholder* who has given the said notice (six months prior) may sue" (five months after the maturity of the notice).

1925 Revision, C. 65, p. 191, Sec. 5:
"When shares mature *and are paid,* the subscribers thereto or owners thereof shall cease to be *members.*"

1925 Revision, P. L. 1925, C. 65, p. 211, Sec. 49:
"Withdrawal value * * * paid to such *member.*"

1925 Revision, P. L. 1925, C. 65, p. 212, Sec. 52:
Re-enacts *Sec. 39 of 1903 Revision,* but substitutes "*member*" for "*shareholder.*"

P. L. 1932, C. 101, p. 175, changes title of subdivision one of Article three of *1925 Revision* to
"Rights of *members* and order of payment of matured shares and withdrawals."

P. L. 1932, C. 92, p. 162, Sec. 49:
"Withdrawal value * * * paid to such *member.*"

P. L. 1932, C. 90, p. 159, Sec. 5:
"When the matured or *withdrawal value* of shares *has been paid,* the subscribers thereto or owners thereof shall cease to be *members.*"

P. L. 1932, C. 102, p. 175, Sec. 52:
"*Withdrawing member,*" "*members* who have thus requested payment of their *matured shares,*" "*members* who have requested payment of the withdrawal value," "a *member* who has requested payment of the withdrawal value," "a *member* who has filed a notice or request for withdrawal shall not sue."

P. L. 1935, C. 59, p. 143, Sec. 5:
"*When the retirement, lapsed, matured or withdrawal value of shares has been paid,* the subscribers thereto or owners thereof shall cease to be *members.*"

P. L. 1935, C. 59, p. 147, Sec. 18 on segregation of assets:
"*The share liability* of such association *to each member thereof,* * * * *without regard to whether notice of withdrawal shall have been filed or the shares shall have been retired, lapsed or matured, shall be reduced on an equal percentage basis.*"

P. L. 1935, C. 59, p. 152, Sec. 49:
Regulates amount of withdrawal value to be "paid to the withdrawing *member,* provided, however, that this section shall not be construed to prevent a reduction of the share liability of any such association to its *members* for the purpose of providing for losses or anticipated losses or of reserving against them as otherwise provided in this act."

P. L. 1935, C. 59, p. 154, Sec. 52:
"No *member* to whom any such association shall be obligated for the payment of *any maturity or withdrawal* shall have the right to bring suit * * * so long as the funds * * * shall be applied as required by this section."

P. L. 1935, C. 59, p. 155, Sec. 55:
"This section shall not be construed as to make any *member* whose shares shall be lapsed a general creditor * * * and

such member shall be paid the balance due on said lapsed shares in the same manner as if such *member were a withdrawing shareholder who had filed notice of withdrawal at the time of lapsing said shares.*"

P. L. 1935, C. 59, p. 161, Sec. 74:

"In the event that the *losses or anticipated losses* * * * the *share liability* of such association *to each member* thereof, * * * *without regard to whether notice of withdrawal shall have been filed or the shares shall have been retired, lapsed or matured, BUT NOT PAID, may* * * * *be reduced on an equal percentage basis to an extent sufficient to provide for such loss or anticipated loss or to reserve against them or either of them.*"

These statutes are declaratory of the reciprocal mutual rights and obligations incident to the continued proportionate interest of withdrawing members in the common capital, after withdrawal and until payment, equitably and exactly effectuated only by the rule that the membership status is not transmuted into a creditor status by the filing or maturity of, a notice of withdrawal, the rule of this state.

What has here been said under this point has been in support of the opinion in the *Rocker* case, holding that the status of a withdrawing member under the 1925 Act, did not change to that of a creditor by his attempt to withdraw his capital, for the rule of law enunciated in that decision is the modern and only rule providing for the orderly liquidation of withdrawal claims, without hazard of suit as exists in Pennsylvania, or the hazard from attempts to have the association decreed insolvent in order to preserve the mutual and equitable interests of continuing members, as exists in other states following the quasi-creditor status rule.

It is respectfully submitted that the court below enunciated the true rule of law as to the status of a withdrawing member. Such being the law, did *Section 52 of P. L. 1925, C. 65*, give a different status to a withdrawing member?

Section 52 of the 1925 Revision was a re-enactment of *Section 39* of the *1903 Revision, 1 Comp. St. 347.* The construction of *Section 52* of the *1925 Revision* is aided by an inspection of other provisions of the *1903 Revision, 1 Comp. St. 336, Sec. 5,* providing that:

> "When a series of stock matures and is paid, the subscribers thereto or owners thereof shall cease to be members unless they have subscribed for or purchased shares of another series."

The courts of this state in opinions which, however, do not construe Section 5, have held that a matured shareholder is a creditor and as such could sue at law.

> *Cunningham* v. *Perth Amboy Mutual Loan Assn.*, 72 N. J. L. 175;
>
> *Ryle* v. *Manchester B. & L. Assn.*, 74 N. J. L. 840.

This was undoubtedly in the minds of the Legislature when it enacted *Section 19* of the *1903 Revision, 1 Comp. St. 338,* which authorized an association to borrow money to

> "be used for no other purpose than to pay in whole or in part of a loan already made to a member of said association or a maturing series of stock."

Assuming that a maturing shareholder was a creditor, it was also the fact that the association had a contractual obligation to make a loan, which it had contracted to make and it was apparently the intent of the Legislature, in enacting

said *Section 19,* to enable the association to borrow money to meet its creditor obligations. A maturing member has completed his contract of savings, but a withdrawing member has not, but upon withdrawal he exercised a statutory privilege to breach his contract without liability for damages.

> *Thirteenth Ward B. & L. Assn.* v. *Weissberg, supra.*

Certainly, if the Legislature in the enactment of *Section 39* of the *1903 Revision,* intended to give to withdrawing members a creditor status or to give to them an absolute and vested right of suit, it would have authorized the association to borrow money to pay its indebtedness to such creditors and so avoid suit, just as it did authorize the association to borrow money to pay shareholders whose shares had matured and thus avoid suits by them. And it is further evident that if the Legislature intended by the enactment of *Section 5* that the membership of the holder of matured shares should continue until the association was able to pay the maturity value thereof, that it did not at the same time, intend that a person who exercised the statutory privilege of withdrawal would attain a creditor status superior to that of the member who by later maturity had completed his contract.

It has universally been held that outside general creditors are entitled to payment of their claims in preference to the claims of withdrawing shareholders and even matured shareholders. *Sperling* vs. *Euclid B. & L. Assn.,* 308 Pa. 143, 162 Atl. 201; *State ex rel Orlando* vs. *Reliance Homestead Assn.,* 174 La. 980, 142 So. 146. It is therefore, apparent that the contention of the plaintiff-appellant is incorrect and that her

status did not change to that of a creditor, entitled, without regard for the association's ability to pay, to maintain an action for the withdrawal value of her shares, for if such were the case, she would be able to obtain a judgment and a lien upon association assets before the obligations of the association to outside general creditors became due, and thus attain a preference over general creditors. Such could not have been the intention of the Legislature in enacting *Section 39.*

The contention of the plaintiff-appellant ignores the other language of said *Section 39* and similar language in *Section 52* of the *1925 Revision,* to wit, that:

> "Withdrawals shall be paid in the order in which the notice thereof shall have been received."

This language cannot be ignored and its operation is not limited to six months or any other period. How then can effect be given to this language and to the other language in the said section that:

> "In no case shall payment be *postponed* for a period longer than six months from the date of such notice and any shareholder who has given the said notice may sue for and recover the withdrawal value of his shares in any such association, in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of such notice of withdrawal?"

The answer lies in the use of the word "postponed," for the provision for the payment of the withdrawals in the order of filing is not limited as to time. The section requires the use of only one-half of the monthly receipts for the payment of withdrawals until the oldest is unpaid for six months. Thereafter, all receipts must be used

for the payment of withdrawals, *but payment in the order of the filing of the application.* The word "postponed" was judicially construed in *Bisham* v. *Tucker,* 2 N. J. L. 237, where it was said:

> "If there could be any doubt upon the import of the term *adjourned,* it is explained in the subsequent clause of the section. There the word *postponed* is used to signify precisely the same thing. The definition of this word, according to Johnson, is *to put off, to delay.* It will read according to this definition, the justice may *put off, may delay* the trial for any time not exceeding 15 days." (The words italicized are italicized in the opinion.)

To *"postpone"*, to *"adjourn"*, to *"put off"*, to *"delay"*, requires an act postponing, adjourning, putting off or delaying. The word *"postponed"* was used in this sense in *Section 74* of the same revision, *P. L. 1925, C. 65,* which provides:

> "No agreement or understanding shall be made or entered into whereby the time for surrendering paid up shares to such association and withdrawing the value thereof shall be postponed."

The word as used in *Section 52* is not without significance, value or weight, and must have been used by the Legislature in *Section 52* in the same sense the Legislature used it in *Section 74.* The prohibition against the postponement of the payment of a withdrawal for a period longer than six months, was a prohibition against the use by the directors of the receipts of the association for investments which would delay the payment of the withdrawal in the statutory order. This must be the true construction because the receipts of the association required to be used were net receipts remaining after the pay-

ment of the expenses of the association, of creditor obligations and of matured shares, and not the gross receipts of the association.

Orlando v. *Reliance Homestead Assn.*, 142 So. (La.) 146.

The privilege of suit conferred by this section can only have been intended by the Legislature to have been granted in the event that the association violated its obligation to use the required net receipts for the payment of withdrawals *in the order of their filing,* as fixed by that section. The Legislature could not have intended to require all of the gross receipts to be used for the payment of withdrawals in preference to the claims of outside general creditors and matured shareholders, the payment of expenses necessary for the operation of the association and for taxes and repairs upon its real estate. It is unthinkable to consider that the Legislature in enacting the wholesome provisions of the 1903 and 1925 Revisions, intended by the enactment respectively of *Section 39* of the earlier act and *Section 52* of the later act, to give to a withdrawing member whose withdrawal could not be paid within six months because of the financial condition of the association in a time when unusual withdrawal demands were filed, an arbitrary and absolute right of action, for if such right were pursued, it would result in a race for judgments, in judgments *which likewise could not be paid,* and the consequent insolvency of the association, which would bring about, as was noted in the opinion herein below, the calling of all mortgage loans for their original amount, without credit for the withdrawal value of the pledged shares. It cannot be considered for a moment that the Legislature intended by the enactment

of the few words of *Section 39* of the *1903 Revision,* which are relied upon by the plaintiff-appellant to give to an impatient withdrawing member the right to wreck the association and hurt the home-owning borrower, for whose benefit the institution was designed by the Legislature.

That the privilege of suit so granted was not absolute, is evident from a consideration of the New Jersey cases cited in the opinion below. It was a qualified privilege conditioned upon the association not applying all of its available funds not needed for the payment of superior claims, to the payment of withdrawals in the statutory order and was qualified as appears from the decisions cited, by the right of continuing members, including the home-owning borrowers, that the privilege of suit could not be exercised if it would destroy the mutuality of the institution and the fundamental equity of all members to proportionately share assets and their corresponding obligation to proportionately share losses. It was a privilege which the Legislature granted to enforce the privilege of withdrawal, and the orderly and eventual payment of withdrawals in the order of filing, so as to prevent the management of an association from continuing to invest and re-invest receipts and thus make the privilege of withdrawal nugatory.

It is respectfully submitted that not only does the complaint not state a cause of action under the 1932 amendment of *Section 52, Apgar* v. *Weona B. & L. Assn., supra,* but it does not state a cause of action under either *Section 52* of the *1925 Revision,* or *Section 39* of the *1903 Revision,* for it does not allege that the association either has funds in its treasury legally available for the payment of the withdrawal of plain-

tiff-appellant and all withdrawals for which prior applications have been filed, or that the association has not used its funds for the payment of withdrawals as required by the said sections of the said Revisions, for the burden of pleading and proof that the association has funds in its treasury legally available for the payment of plaintiff-appellant's withdrawal in the statutory order, is upon the plaintiff-appellant.

Heinbokel v. *National S. L. & B. Assn.*, 58 Minn. 340, 25 L. R. A. 215;

Ronca v. *New York B. L. B. Co.*, 84 N. Y. Supp. 879;

Stilwell v. *Peoples B. L. & S. Assn.*, 57 P. (Utah) 14, 17;

Smith v. *Reserve Fund B. & L. Assn.*, 156 Atl. (Pa.) 902;

Texas Homestead B. & L. Assn., v. *Kerr*, 13 S. W. (Tex.) 1020;

Hoyt v. *Harbor & Suburban B. & S. Assn.*, 197 N. Y. 113, 90 N. E. 349;

Maloney v. *Real Estate B. & L. Assn.*, 57 Mo. App. 384.

POINT VII.

The fourth and fifth counts of the complaint do not state legal causes of action.

The fourth and fifth counts state agreements to repay the withdrawal value of the shares of plaintiff-appellant in specified installments. The said counts do not state any considerations for such promise. Withdrawal does not exist except as may be conferred by a by-law and statute and a statute enacted upon this subject exclusively regulates the privilege. The statute concerning withdrawals evidences the public policy of the State in any contract or agree-

ment contravening such public policy is void, for members and associations cannot waive or contract away the provisions thereof or rights or privileges acquired thereunder.

Latimer vs. *Equitable L. & Investment Co.*, 81 Fed. 776;

Appeal of Powell & Doyle, 93 Mo. App. 296;

Shapiro vs. *Mortgage B. & L. Assn.*, 158 Atl. (Pa.) 573;

Adam vs. *Union National S. & L. Assn.*, 100 N. E. (Ind.) 389, 102 N. E. 145.

Agreements as alleged in the fourth and fifth counts of the complaint provide for payments of withdrawals in installments not provided for by the statute and such agreements would give to the plaintiff-appellant a preferential right of payment over other members, would violate mutuality, contravene the statute and are void.

Conservative Homestead Assn. vs. *Dreyfus*, 175 La. 404, 143 So. 356.

A factual situation similar to that alleged in the fourth and fifth counts of the complaint, existed in the case of *Publicker* vs. *Potash Bros. B. & L. Assn.*, 159 Atl. 58, in which case a judgment had been obtained upon the agreement to pay the withdrawal in installments, and the court held that the agreement did not change the withdrawing member's status as such, and that the association could not by such an agreement, give her a preference over other shareholders, and that even the fact that she had obtained a judgment did not alter the character of the claim or the nature of her status as a member of the association.

In the case of *Weinroth* vs. *Homer B. & L. Assn.*, 310 Pa. 265, 165 Atl. 28, the plaintiff was

the owner of income shares and applied for withdrawal, which was not paid, the association, however, giving her ten notes of $1,000.00 each upon surrender of her shares. Three of the notes were paid and an action was instituted upon the remaining seven against another association into which the first association had later merged, and the Supreme Court of Pennsylvania permitting judgment to be entered upon the notes, restrained execution, holding that the plaintiff there was still a withdrawing member and could not obtain any preference by the surrender of her shares and the receipt of notes and by suit thereon, and that she was only entitled to the proportionate value of her surrendered shares at the date of the merger occurring *after* such surrender.

In view of these authorities the agreements alleged in the fourth and fifth counts of the complaint are void. If the law were otherwise, the door would be opened for the making of agreements for the benefit of "insiders" of frozen associations to subvert the statute and obtain preferences on withdrawals.

The claim of estoppel raised by the plaintiff-appellant is without merit. Plaintiff-appellant had over a year after the agreements were made to bring action for the non-payment of the installments, but did not institute suit until long after the enactment of *P. L. 1932, C. 102.* She has not changed her position and cannot assert estoppel, for she is a member of the defendant-appellee and has acquired her privilege of withdrawal under the statute governing the defendant-appellee and she is charged with the same notice as to the lack of power of the defendant-appellee to make the agreements alleged in the said counts as is the association itself. On the

question of estoppel, see *Conservative B. & L. Assn.* vs. *Dreyfus, supra.*

The question involved under this point was considered by the late revered Circuit Court Judge Nelson Y. Dungan in two Essex County Circuit Court cases of *Dobrin* vs. *Green Star B. & L. Assn.* There the plaintiffs had obtained notes for the withdrawal value of their shares, which notes were issued to them prior to the enactment of *P. L. 1932, C. 102* and more than six months after the withdrawal applications of plaintiffs had been filed. Judge Dungan struck out an answer, but upon application permitted an amended answer to be filed, which set up that the notes were issued in violation of the provisions of *Section 52 of P. L. 1925, C. 65* and that judgment would give to the plaintiffs a preference over other members of the defendant association not accorded by the statutes, that plaintiffs continued to be members and shareholders of the defendant association and that the notes were void and he denied a motion to strike out the amended answer.

It is respectfully submitted that the court below did not commit error in striking out the fourth and fifth counts of the complaint.

SUMMARY.

An examination of Appendices "B" and "C" evidences that the Legislature has always assumed it had the right to exercise its inherent police power in amending, supplementing and revising the building and loan statutes of this State. The case of *Fornataro* v. *Atlantic Coast B. & L. Assn., supra,* so deciding with respect to the particular statute now being considered, was decided November 28, 1932. The decisions in

Horowitz v. *Guarantee B. & L. Assn., supra,* decided March 22, 1933, and the recent decision of the court below have confirmed it. Since the decision in the *Fornataro* case, the Legislature has amended 21 sections of the 1925 Revision of the building and loan laws, 24 times, and has passed 10 other acts supplementary to said Revision or otherwise affecting building and loan associations or a total of 34 statutory changes since that decision. In fact, *P. L. 1935, C. 59,* further amended *Section 52* so as to *enlarge* the privilege of withdrawal as it allocates a specific portion of receipts to the payment of withdrawals which prior thereto were required to be used to pay matured shares.

After the enactment of *P. L. 1932, C. 48,* the Department of Banking and Insurance enforced it, requiring all associations to pay withdrawals in accordance with its mandate. In the three years since its enactment, and in the two and a half years since the decision in the *Fornataro* case, many millions of dollars have been disbursed by the building and loan associations of this state, in obedience to the amendment held legally enacted by the court. In fact, most of $32,000,000 borrowed by New Jersey Building and Loan Associations from the Reconstruction Finance Corporation, $14,000,000 likewise borrowed from the Newark Federal Home Loan Bank and over $60,000,000 received by them from the Home Owners' Loan Corporation in cash and bonds, or the proceeds of such bonds, a total of $104,000,000 was paid by the building and loan associations for maturities and withdrawals as directed by *P. L. 1932, C. 102.* To now hold that that statute is unconstitutional as applied to then issued shares, would cause much litigation against associations by members hold-

ing shares issued prior to its enactment and by associations against former members to recover moneys paid for withdrawals in accordance with the amendment. Such could only result in the future impairment if not total destruction, of association good will.

It is submitted that the design of the Legislature in enacting the amendment was to preserve the solvency of the associations for the benefit, chiefly, of those holding shares at the time of its passage. That it has served its purpose is evident as very few associations have since been placed in forced liquidation, a situation quite different from that obtaining in Pennsylvania, where the quasi-creditor rule was in force, permitting suits upon the maturity of the notices.

The time of payment of withdrawals, is not as socially or economically important as the quantum of payment. The security of savings in building and loan associations of New Jersey, is insured by *P. L. 1932, C. 102,* and by *P. L. 1935, C. 59,* further amending *Section 52 of P. L. 1925, C. 65,* which prevent the forced liquidation of their real estate assets. This amendment has enabled New Jersey to avoid the building and loan debacle of Pennsylvania, and has thus saved, without doubt, hundreds of millions of dollars for the many humble members of our associations as well as the homes of the borrowing members, in associations which would otherwise have been forced into liquidation.

It was the shareholders at the time of its enactment whom the Legislature intended to benefit by the amendment and, they have been benefitted. One may not be heard to complain or to insist that his selfish, private, personal, financial, interest shall override the public policy of the state,

and give him a preference over his fellow members.

For the decision of this case, it makes no difference whether the plaintiff-appellant is a creditor, quasi-creditor or member, for the amendment was enacted under the police power and therefore, affects creditor rights if such be those involved.

But it would be disastrous to hold that plaintiff-appellant's status is that of a creditor or quasi-creditor for, the result would be litigation and insolvency of associations with the consequent losses for the many members, both home-owning borrowers and savers. *P. L. 1932, C. 59,* is merely declaratory of the law of this state, to wit, that membership continues until the withdrawal is paid and even though it were not declaratory of existing law it is binding upon and determines the status of, the plaintiff-appellant, to wit, a membership status, for the same reasons that *P. L. 1932, C. 102* is binding upon her. *Fornataro* v. *Atlantic Coast B. & L. Assn., supra.*

The fact that from 1930 to date, the worst period of the depression, so many states passed laws similar to the one here questioned, and in the same period, Congress passed the Reconstruction Finance Corporation, the Home Owners' Loan Corporation and Federal Home Bank acts, to supply needed credit and liquidity to building and loan associations, so that they could pay their maturities and withdrawals, evidences a national emergency requiring their enactment. It is indicative of changed economic conditions that in the 22 years from 1903 to 1925, the statutory changes in New Jersey totaled 25 (Appendix "B"), while in the ten years succeeding, they have totaled 72, of which 61 occurred in the six

years from 1930 to 1935 (both years inclusive) (Appendix "C").

It was the changing economic conditions which made necessary the enactment of these statutes, including *P. L. 1932, C. 102.*

For the reasons set forth and upon the authority of the cases cited in the opinion herein below and *Treigle* vs. *Acme Homestead Assn., supra,* and in this brief, *P. L. 1932, C. 102* is constitutional and binding upon the plaintiff-appellant and the judgment of the Supreme Court should be affirmed.

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JOHN WARREN,
Of Counsel.

APPENDIX "A."

Statutes of All States Pertaining To Withdrawals Passed 1930—1935.

ALABAMA: Act of 1927, pages 431-432—1928 Code, Sec. 7097, provided that withdrawal should be in accordance with the by-laws of the association.

New Code P. L. 1931, page 230, 1932 amendment of the Code, Sec. 7111 (26), the legislature limited withdrawal charge by association. Pages 232-233, Sec. 7111 (33) the legislature for the first time, regulated the payment of withdrawals, providing if funds insufficient to pay all, they must be paid in the order of filing notices, but the association would not be required to use more than one-half of net monthly receipts, no withdrawal payment to any member to exceed $1,000 in each thirty days ahead of other applications and that the board of directors might pay from said half of receipts, withdrawals not exceeding $50 to any one member at any one time, or not exceeding $100 to any one member within thirty days, regardless of the order of the application.

Act No. 119, October 22nd, 1932, provides that any building and loan association not able to pay all withdrawing shareholders, may through its board of directors, with the consent of the Commissioner of Building and Loan Associations, in lieu of paying withdrawals, distribute its net income, or any other funds which it may have, subject to distribution, ratably among all its investing shareholders.

ARIZONA: P. L. 1931, Chap. 40, page 82, regulates the withdrawal value and funds from which withdrawals are to be paid.

CALIFORNIA: G. L. 1931, Act 986, p. 457. New Code—Notice may be revoked or waived, if withdrawal claims exceed 3% of all shares and investment certificates, association shall be "on notice," if claim exceed 15%, association shall be on "pro rata" basis, if claims exceed 10%, directors may put association on pro rata basis (6.01) payment of withdrawals subject to claims of creditors, expenses, etc.; if association on notice payments in order of maturity of notices except $50 per person per month may be paid with or without notice; if on a pro rata basis or on notice, dividends and new investments prohibited; if on a pro rata basis quarterly pro rata payment of all withdrawals; (6.02) association not on notice or on pro rata basis may pay withdrawals without notice (6.03).

P. 1933, C. 4, amends Sec. 6.02 (pertaining to withdrawals) of 1931 Code.

COLORADO: P. L. 1931, Chap. 58, Sec. 4, limits the withdrawal fee which may be charged.

P. L. 1933, Chap. 47, p. 284, Article V, Sec. 5, if funds applicable to withdrawals are insufficient to pay all, depending upon the desire of the board of directors, shall be paid either in full, in the order of filing notices, or on a pro rata basis, if the former method is used, no withdrawal by one shareholder shall exceed $1,000 in thirty days ahead of other applications, and the board may pay out of the funds applicable to withdrawals, not exceeding $50 to one shareholder within thirty days, regardless of the order of application. If the pro rata method is used, accounts not exceeding $25 may be paid in full. It provides that *the withdrawing shareholder shall not become a creditor*, that pending payment of withdrawal shares on the withdrawal list

shall only be entitled to half of the dividends currently declared on such shares.

Sec. 8, *all stock shares or certificates or instruments issued by associations prior to the passage of the Code,* except permanent, or non-withdrawable stock, *shall be subject to all the rights and all the liabilities of this Article concerning withdrawals and that the holders shall be treated as shareholders.*

CONNECTICUT: L. 1933, C. 210—By-laws fix terms of withdrawals not more than one-half funds in treasury applicable to payment of matured shares and withdrawls without consent of directors.

FLORIDA: P. L. 1931, Chap. 15606 (No. 5) page 1050, one-half the cash received from collection of share or stock dues, cash payments applied directly in reduction of mortgage or other loans, the net income from the lease or rental of assets, the cash derived from the sale of assets * * * shall be distributed quarterly when sufficient funds have accumulated, to members whose notices of withdrawal have been on file ten days previous to such distribution, on a pro rata basis of not less than 1% of the original amount to be paid to each such withdrawing member, except that any member whose payment other than the last payment shall amount to less than one dollar, may receive a distribution of the cash so set aside when the accumulated percentages equal or exceed one dollar in amount, if doubtful assets exceed 20% of total assets, association shall quarterly distribute net cash receipts to all members on the same percentage basis as if each member had filed a notice of withdrawal; members who apply for

withdrawal, shall receive no dividends after filing notice.

P. L. 1933, Chap. 15908 (No. 51) page 111, further amends the 1931 statute in various respects concerning the payment of withdrawals and also provides (Sec. 10), *that members shall be deemed stockholders and not creditors, regardless of whether or not their notices of withdrawal have been filed or matured;* binds all members on re-organization as to all matters including reduction of liability, limitation on withdrawals on a majority vote of all shareholders whose *"rights in or against the association shall be deemed modified accordingly."*

ILLINOIS: 1933, p. 304—Limited in life until July 1st, 1935, permits partial withdrawals regardless of priority or order of notice.

1933 Smith & Hard Revised Statutes, p. 786-7, Sec. 225—Payment of withdrawals in order in which notices are filed out of one-half of funds in the treasury, unless the board of directors consents to the use of additional funds; in the event of unusual demands against the treasury of an association caused by the maturing of shares and the filing of withdrawals out of it, directors by resolution approved by Auditor of Public Accounts may declare the association to be on a pro rata basis, in which event, when the funds in the treasury applicable to the payment of withdrawals on matured shares, equals one-tenth of the amount of the shares noticed for withdrawal and all matured shares due for payment, directors shall declare a cash dividend of not less than 10% of such amount payable pro rata to the holders of such shares; the directors of any association on a pro rata basis may by written permis-

sion of the auditor, declare the association of such pro rata basis, in which case payment shall be made of withdrawals in the order of filing of notices; *all moneys paid into an association by shareholders after such association is on a pro rata basis whether paid upon shares already issued or upon new shares issued shall have a prior right of withdrawal as against all moneys paid in by shareholders prior to the placing of the association on a pro rata basis, and that in the event of liquidation or dissolution of an association operating on a pro rata basis, all sums paid into such association on its shares after it has gone on a pro rata basis shall be repaid in full before any payment shall be made to other stockholders.*

IOWA: 1933, C. 165. Articles of incorporation, by laws or resolution of board may provide order in which withdrawals shall be paid and when dividends shall cease on shares on which withdrawal demands have been made and what portion of the association's funds or receipts shall be used for payment of withdrawals and matured shares.

KENTUCKY: 1934, C. 18. Withdraw thirty days' notice. After thirty days apply one-half net weekly receipts to payment in numerical order. *Shareholders filing application for withdrawal shall remain shareholders until paid and shall not become creditors.* Association may pay applicant $500 in order, then renumbered and placed at end of list and in like manner until paid. May pay members holding investment of less than $100 in dire distress out of turn.

LOUISIANA: L. 1932, Act. 140, p. 454—New Code—changes in withdrawal privileges set forth in opinion in *Treigle* v. *Acme Homestead Association* filed herewith.

MAINE: L. 1933, C. 30, not more than one-half funds in treasury applicable to payment of matured shares without consent of directors.

MARYLAND: L. 1933, C. 47, p. 99—Emergency Act—Until Jan. 1, 1935, withdrawals shall be paid pro rata out of dues received * * * from borrowing members in the ratio which the total paid in value of the shares demanded for redemption bears to the total paid in value of unredeemed shares then outstanding.

MASSACHUSETTS: G. L. 1932, C. 170, Sec. 16, p. 2240. Withdrawals on thirty days' notice; not more than one-half funds in treasury applicable without consent of directors; paid in order of notice.

L. 1932, C. 45. Established the Co-Operative Central Bank, a reserve institution for building and loan associations, to provide mutual credit for the payment of maturities and withdrawals, compelling all associations to become members, and aid it financially. (Held constitutional—in Re Opinion of the Justices, 181 N. E. 833, 836.)

1933, C. 144, Sec. 17, p. 178—Shareholder, on thirty days' notice, may withdraw unmatured or paid up shares * * * withdrawals paid in order of notices * * * directors may order that not more than one-half of cash on hand, in banks and one-half of funds received until order is rescinded, be applicable to demands * * * whenever there is unusual demand; board with approval of Commissioner or he, in his discre-

tion may order that the right of withdrawing or maturing shareholder be limited to not in excess of 20% of the value of said shares or $400 at any one time; sums * * * paid in order of notice and in rotation * * * meantime no dividends to be paid to matured or paid up shares on which notice has been filed.

Sec. 21—When no payment has been made on withdrawal for six months all receipts, after payment of expenses * * * shall be applied to withdrawals * * * commissioner shall didect the method of disbursing.

1934, C. 73, p. 61—Sets up in the Co-Operative Central Bank, a fund for the mutual insurance of building and loan shares against loss, all associations being compelled to contribute to the fund. (Held constitutional, *Lowell Co-Operative Bank* v. *Co-Operative Central Bank,* 191 N. E. 921.)

NEW MEXICO: L. 1931, C. 147. At no time shall more than one-half of the funds in the treasury be applicable to the demands of withdrawing stockholders without the consent of the board of directors.

1931, C. 147. Withdrawing stockholder must give notice at stated meeting of board and shall be entitled at next meeting to withdrawal value as fixed by by-laws; not more than one-half of funds in Treasury applicable to demands without consent of board.

1933, C. 78. Amends Sec. 3 of 1931 statutes (above) adds "No association shall be deemed insolvent unless the aggregate of its assets shall be insufficient to pay all legal claims against the association other than to its own shareholders, *who shall not be considered creditors in their membership relation to the association.*"

MICHIGAN: L. 1931, Act 135—withdrawals on thirty days' notice; not more than one-half of funds received in any one month shall be applicable to payment of withdrawals unless ordered by board; withdrawals paid in order notice is filed.

L. 1932, Act 20, p. 35, Sec. 6. Withdrawal on thirty days' notice; one-half monthly receipts applicable to payment in order notices are filed. Certificate to be presented within ten days after notice, otherwise waived; if unpaid withdrawals exceed 5% of unpledged stock liabilities, funds available each month for payment upon withdrawal shall be paid to withdrawing shareholders pro rata instead of in the order of the filing of notices of withdrawal; at discretion of directors * * * to meet necessities of its shareholders, may pay to shareholders without application for withdrawal not in excess of $100 * * * in any one month.

L. 1933, Act 120, p. 164, further amends Sec. 6 by adding provision that with approval, board may provide that all funds available be apportioned and paid pro rata without regard to notices.

L. 1933, extra session, Act 14, p. 40 further amends Section 6, as to payment of withdrawals. After thirty days paid in part or in full; apply not more than ¼ net receipts unless a greater proportion is ordered by board; payment in numerical order; if application for more than $1,000, $1,000 paid when reached, application renumbered and placed at end of list and when reached again, paid like amount, renumbered and replaced at the end; shareholder not paid more that 50% of total holdings except when below $100 application paid in full when reached; not

more than one application to withdraw from one member at one time. *Shareholders filing withdrawals remain shareholders until paid and shall not become creditors;* present certificate for payment within ten days after notice or right to withdraw waived. When aggregate withdrawals exceed 5% of unpledged stock liabilities, board, with approval, may pay sums available for withdrawal pro rata instead of in order of applications; to meet necessities of shareholders, board may pay to shareholders without application on file, $100 in any one month but such payments shall not be charged against said ¼ of net receipts; with approval board may provide funds available, be apportioned and paid pro rata to holders of shares not pledged for mortgage loans, without regard to application; available sums distributed at least twice a year. (Approved Jan. 2, 1934.)

MISSOURI: 1931 Revised St. C. 35, p. 141—New Code—revised its building and loan laws—withdrawals paid out of one-half of the receipts of each month but if the association is indebted on matured shares of an earlier series, only one-third of said receipts shall be applicable to withdrawal demands, and when withdrawal demands exceed money available for their payment, the funds applicable to the payment of withdrawals shall be pro-rated among the withdrawing members who have filed notices. *The act provides that notice of withdrawals shall not make a withdrawing shareholder a creditor, but his status shall be and remain that of a shareholder.*

L. 1933, p. 182, at 184, Sec. 5593—Any association shall have the power to provide in its by-laws for the creation and establishment from time to time of a "Participating Reserve Fund"

in which may be placed any or all real estate owned by the association and any loans and/or other assets of doubtful value, selected by board; the book value of the assets in said reserve fund to be apportioned pro rata in reduction of the book value of the stock of the association then outstanding, subject to the approval of the Supervisor; such fund to be separate from other assets and represented by "Participating Reserve Shares"; losses to reserve fund borne by holders of such shares. Association may convey assets in reserve to three trustees under trust agreement; trustees may issue trust certificates instead of participating reserve shares. On surrender of certificates, new stock certificates, at reduced value may be issued. (New Jersey P. L. 1932, C. 160 and P. L. 1935, C. 59 amending Sec. 18 permits asset segregation and share scaling.)

MONTANA: 1933, C. 11. Thirty days' notice or withdrawal. Applications registered in order received; one-half of cash collections not necessary for outstanding contracts, must be used for payment of matured stock and withdrawals; other one-half of such collections each month, may be used for payment of withdrawals other than in order registered but not more than $100 a day one month other than in order registered.

NEVADA: L. 1931, C. 51; New Code—Section 12 prohibits the association without the written consent of the State Bank Examiner from applying in one month to the payment of withdrawals and maturities more than one-half of the monthly receipts during the preceding calendar month; withdrawals must be paid in the order of their filing.

1933, C. 68. At no time without consent of examiner shall association apply in any one month to payment of withdrawals or maturities more than one-half of its receipts during month. Withdrawals paid in order of filing and no loans or investments made except with permission when withdrawal request on file for thirty days. Whenever payments are inexpedient, money available may be pro-rated irrespective of order of filing.

NEW JERSEY: P. L. 1932, C. 102, Sec. 52—see also C. 57, amending Sec. 23, permitting merger agreement to bar withdrawals and C. 160, permitting segregation of assets, scaling of shares and reduction of withdrawal value. Has been applied with approval of Commissioner of Banking and Insurance to shares for which applications for withdrawal had been made.

P. L. 1935, C. 59, Sec. 52. Maturities paid in order due out of 1/3 net monthly receipts; withdrawals paid in order notices filed out of 1/3 net monthly receipts; but if insufficient, withdrawals paid on rotary basis in installments of $50; suits for matured shares and withdrawals barred if funds disbursed as required; board may make additional funds available for matured shares and withdrawals but not more than 1/3 net receipts and borrowed money shall not be used for withdrawals while maturities unpaid.

NEW YORK: L. 1933, C. 325—dividends on shares withdrawn until paid at half rate paid on unwithdrawn shares of same class; not more than one half receipts (not borrowed money) to pay matured shares and withdrawals without consent of directors (exception below); if one half receipts insufficient to pay all matured

shares and withdrawals, receipts applied ¼ of receipts to pay matured shares, ¼ to pay withdrawals or directors or superintendent of banks may direct all withdrawals paid in proportionate installments, or directors may limit withdrawal payments to $100 per month and if proportional payment less than $25 such withdrawing member may withdraw not more than $25 monthly; if no payment made on any matured shares or withdrawal in 6 months after demand, all net receipts applied on pro rata basis.

L. 1935, C. 301—permits associations to create agency for insurance of shares of participating associations against loss up to $7,500 to any one shareholder of any such association.

NORTH CAROLINA: L. 1933, C. 122, p. 93—Whenever * * * shareholder whose stock has matured or whose right to withdraw * * * has accrued has not been paid because of insufficiency of funds, Secretary shall under instruction from directors, create fund * * * known as "withdrawal or maturity fund" out of net monthly receipts. From time to time, as board * * * may direct, the secretary shall make an equitable and ratable distribution of funds in "withdrawal or maturity fund" to shareholders whose right has accrued; no shareholder shall have right to demand any funds in excess of the amount equitably and ratably distributed except on approval of board and/or Insurance Commissioner.

NORTH DAKOTA: L. 1931, C. 94, New Code. Sec. 8 provides for withdrawals and *that withdrawing shareholders shall remain shareholders and are "in no way to be deemed creditors of the association."* Withdrawals are

to be registered and paid in the order in which the notices are received out of at least one-half of the collections of the association; if withdrawals are unpaid for six months all collections less operating expenses and amounts due on matured shares must be used for payment.

1933, C. 78, p. 109. Amends 1931 statute, provides that board shall classify and make uniform payments as to each classification; eliminates procedure on application six months' old.

OHIO: Until 1934, the payment of withdrawals was regulated by the by-laws of each association. By S. 1., 3d, s. ses. Baldwin's 1934 Revision of Trockmorton's Annotated Code of Ohio, Sec. 9651, p. 1098, the state assumed such regulation. Association must pay application in 30 days or apply one-third of net cash receipts thereafter, excluding borrowed money and proceeds from sale of assets, to payment in numerical order; directors may pay any applicant not exceeding $100 in any month out of said one-third of receipts or other funds, in any order; if application for more than $1,000 not more than $1,000 shall be paid upon it in order when reached and shall then drop to bottom of list and thus be paid on rotary basis; "*stockholders filing written application for the repurchase* (withdrawal) *of their stock shall remain stockholders until paid, and shall not become creditors.*" (Declaratory, see *Frederick* v. *Mutual B. & Inv. Co. & Mutual B. & I. Co.,* brief *supra.*)

OKLAHOMA: St. 1931, C. 46, Art. 8, Sec. 9800—Withdrawal on 30 days' notice, not more than one-half funds in treasury applicable to payment without consent of directors. Sec. 9823, not more than one-half funds in treasury ap-

plicable to payment of matured shares without consent of directors. Sec. 9834, on maturity of notice "entitled to receive * * * withdrawal value *at once.*"

L. 1933, C. 54, amends Sec. 9800. If aggregate withdrawals exceed 5% of unpledged stock directors may, with approval of Bank Commissioner, direct funds available each month for payment of withdrawals "to withdrawing shareholders in proportion to their stockholdings to be withdrawn, instead of in the order of the filing of notices of withdrawal."

OREGON: L. 1931, C. 373, increased the amount of earnings required to be paid on withdrawals from three-quarters to full earnings credited and required that even stock held for one year or less would be entitled to full dividends credited, whereas theretofore it was not entitled to any earnings; withdrawals on sixty days' notice; not more than one-half of net monthly receipts applied to withdrawals in any month without consent of board, but when the demands of withdrawing shareholders, holders of matured certificates or investors exceed the anticipated funds applicable to their payment in sixty days, the pending and subsequent notices of intention to withdraw must be registered, in the order received, and their number and amount, together with an estimate of the funds available for their payment, reported to supervisor each week. Thereafter, until one-half the applicable net receipts in a month exceed the withdrawal notices, then due or past due, directors shall discontinue the granting of new mortgage loans or loans to other associations and may authorize the payment from such one-half of the net receipts, the full or proportionate

amount of notices up to a limit per individual to be fixed by the board of directors and the pro-rated payment of the remainder of such one-half the net receipts on all remaining notices either due or past due.

1931, C. 373, p. 741, Sec. 45. Shareholder must give 60 days' notice, on expiration, certificate must be presented within ten days; not more than one-half monthly receipts be applied to withdrawals for that month without consent of board. Whenever demands exceed anticipated funds applicable, notice must be registered in order and number and amount, together with estimate of funds available and reported to supervisor. Thereafter no new loans; may authorize payment from one-half of net * * * the full or proportionate amount of notices; to limit by board and * * * pro-rated payment of remainder of one-half net receipts on remaining notices, either due or past due, unpaid portion added to notices of following month.

1933, C. 328. Not more than one-half receipts from principal of loans repaid and the principal received from the sale of other assets, less sums disbursed in payment of its indebtedness and protecting investments need be applied to withdrawals for that month; eliminates report to supervisor when demands exceed funds applicable; gives permission to make new mortgage loans; eliminate pro-rating and permits carrying over to next month of unfulfilled demands; matured shares have prior withdrawal privilege over withdrawal notices which have not matured.

PENNSYLVANIA: L. 1933, C. 108—New Code—Matured or withdrawn shares shall be paid in order of maturity of shares or notice, but directors may pay on pro rata basis or with consent of Department of Banking may fix maximum amount to be paid periodically; *action of directors providing either method of payment shall apply to shares withdrawn or matured prior thereto;* at least two-thirds of funds in treasury to pay shares withdrawn or matured and if insufficient, one-third of such funds to pay matured, and one-third to pay withdrawn shares, and excess of either one-third not needed for purpose to be added to other one-third, if any matured or withdrawn share unpaid for six months, all funds in treasury (except creditor obligations, expenses, etc.) shall be used to pay matured and withdrawn shares, one-half for each purpose, any unneeded part of either one-half to be added to other one-half; *bars suits by holders of shares matured or withdrawn until such time as they should have been paid as required by the code;* defines "shareholder" as the registered owner of shares. Approved May 5, 1933, effective July 3, 1933.

L. 1933, C. 114, approved May 15, 1933, immediately effective—as to shares withdrawn or matured prior to July 3, 1933, Directors may authorize payment on pro rata basis, or, with consent of Department of Banking, fix maximum to be paid periodically *whether such shares were withdrawn or matured prior to, or after, effective date of act;* Directors action as to pro ration or maximum periodical payment, *shall apply to shares withdrawn or matured prior to or still unpaid on date of Directors action.* Recites act emergency measure under police power.

RHODE ISLAND: L. 1931, C. 1796. A complete revision; provides *that if by reason of extraordinary losses the association is compelled to charge such losses against its capital all withdrawing shares shall be subject to a pro rata charge of such losses with those remaining undrawn and in such case, the withdrawing member shall only be entitled to such sums as may be found due him after the adjustment of such losses among all shareholders;* not more than one-half of the amount received in payment on stock by such association in any month shall be used to pay withdrawals, without the consent of the board of directors.

1931, C. 1796, p. 282, Sec. 18. Terms of withdrawals shall be set forth in by-laws, stock certificate or back thereof; if *extraordinary losses, withdrawing shares shall be subject to a pro rata charge* * * * and entitled to sums as found due after adjustment; no more than one-half of amount received in payment of stock * * * in any one month shall be used for withdrawal without consent of board.

SOUTH CAROLINA: L. 1933, Act. 622, p. 1176—Emergency Act—Sec. 3—The Governor is authorized to make rules and regulations and instructions to building and loan associations. And it shall be the duty of associations to comply fully with such rules established and promulgated by the Governor; and such orders, rules and regulations shall have the same force and effect as rules under present banking act.

Sec. 4—p. 1177. The state bank examiner is prohibited during Act from taking possession of association. *And all persons, firms or corporations are prohibited while Governor is in control from instituting any legal proceedings against*

association or stockholder without approval of the Governor. (Held constitutional as applied to banks, *State, ex rel, Zimmerman* vs. *Gibbs*, 172 S. E. 130; affirmed 290 U. S. 326.)

TENNESSEE: 1933, C. 19, Sec. 7—Thirty days' notice of withdrawal; not more than two-thirds of monthly receipts from dues in prior month applicable without consent of board; by-laws may provide for monthly payment of $100 and prefer such over applications for amounts exceeding $100 regardless of order.

TEXAS: L. 1932, C. 18, 42nd Legislature, 3d called Session, p. 41, amends Section 47. No member to withdraw in excess of $100 in any month without thirty days' written notice, except when idle funds on hand. Payments may be made when and as may be determined by directors and provided by-laws approved by Banking Commissioner; withdrawals in excess of $100 shall be paid in order of filing except as otherwise provided. Not more than one-half of net receipts in any month shall be used to pay withdrawals or maturities without the consent of Directors. Whenever net receipts so made applicable to pay withdrawals and maturities are not sufficient to pay all, directors may from time to time fix maximum amounts to be paid upon each application during any one month, provided that full payment may be made to any member whose entire interest in association amounts to not more than $100 and provided that directors may order all withdrawals paid on a pro rata basis, or, with the approval of the Commissioner, may provide that all funds available for withdrawal shall be apportioned and paid pro rata to all shareholders of the association irrespective of

the order of filing. *"Membership in the association shall remain unimpaired so long as any accumulation remains to his (withdrawing member) credit."*

UTAH: 1933, C. 7. Not more than one-half of the net receipts except borrowed money in any one month applied to withdrawals for such month without the consent of board; withdrawals to be paid in order; withdrawal embraces matured stock as well as unmatured stock.

VIRGINIA: L. 1932, C. 102, p. 94—a Revision —Sec. 13. *In event of emergency preventing the payment of withdrawals of shares in the usual course, the shareholder, as to such shares, shall not be privileged to claim and establish a debtor-creditor relation in lieu of the usual privileges and responsibilities of a shareholder.*

WASHINGTON: 1933, C. 183, p. 711—Shares not to be withdrawn for three months from *issue;* notice may be waived; after filing, member not entitled to receive dividends; member may cancel notice by writing filed with association; payment in order of filing as funds available; if unpaid six months association shall apply three-quarter receipts from principal of loans repaid and received from other investments, less operating expenses, etc.; allows payment of withdrawals, regardless of filing to extent of $25 each month with report to supervisor; association may disregard notices and priority and pay on ratable basis and power in supervisor to order same.

WEST VIRGINIA: L. 1932, C. 58, p. 130—Sec. 12 * * * At no time shall more than one-half of the net monthly receipts be applicable to payment of matured shares and withdrawals * * * without the consent of directors. Sec. 13—*Withdrawing shareholder* shall be paid such part of withdrawal value of his shares as may be determined by board and *remain a shareholder until full payment to him be made.*

WISCONSIN: L. 1931, C. 70—*all members whose shares mature or who give notice of withdrawal shall remain a member or shareholder until the withdrawal value of their shares shall be paid to them.*

L. 1933, C. 372—Withdrawal value of installment shares may be applied in payment of paid up shares, but no cash shall be paid on such withdrawal if there are unpaid matured shares or withdrawals.

APPENDIX "B."

Statutory Changes Affecting Building and Loan Associations in the Twenty-two Years Between 1903 and 1925.

An Act concerning building and loan associations P. L. 1903, p. 457, 1 Compiled Statues, 334.

Sections Amended	*Amendatory Acts*
4	P. L. 1914, p. 545; P. L. 1918, p. 198
	P. L. 1919, p. 102
8	P. L. 1908, p. 111; P. L. 1909, p. 206
	P. L. 1919, C. 79
9	P. L. 1919, C. 57
11	P. L. 1919, C. 58
15	P. L. 1918, C. 127
19	P. L. 1919, C. 38
24	P. L. 1906, p. 79; P. L. 1918, C. 251
27	P. L. 1918, C. 98; P. L. 1919, C. 100
40	P. L. 1904, p. 415
50	P. L. 1919, C. 42
51	P. L. 1904, p. 415
55	P. L. 1919, C. 55

In addition to the foregoing amendments of the 1903 Revision, the following supplements and acts affecting building and loan associations, were passed:

P. L. 1911, C. 65, given the arbitrary Section No. 39a, 1 Cum. Supp., Comp. St., p. 229.

P. L. 1921, C. 301, given the arbitrary Sections Nos. 39b, 39c and 39d, 1 Cum. Supp., Comp. St., p. 229. This statute for the first time, required certain building and loan associations to set up reserves.

P. L. 1919, C. 40, 1 Cum. Supp. Comp. St., p. 457. This limits membership fees.

P. L. 1910, p. 278, given arbitrary Section No. 5a, 1 Cum. Supp. Comp. St., p. 336.

P. L. 1915, p. 506, concerning foreclosure of building and loan mortgages.

P. L. 1919, C. 41, regulates the cancellation of building and loan mortgages.

P. L. 1904, p. 44, given the arbitrary Section No. 27a, 1 Comp. St., 342-344.

The above changes in statute total 25.

APPENDIX "C."

Statutory Changes Affecting Building and Loan Associations in the Ten Years Between 1925 and 1935.

An Act concerning building and loan associations (Revision of 1925), P. L. 1925, Chapter 65.

Sections Amended	*Amendatory Acts*
1	P. L. 1935, C. 59
2	P. L. 1935, C. 59
4	P. L. 1932, C. 99
5	P. L. 1932, C. 90; P. L. 1935, C. 59
6	P. L. 1935, C. 59
7	P. L. 1929, C. 250; P. L. 1930, C. 11 P. L. 1935, C. 59
8	P. L. 1929, C. 276
9	P. L. 1930, C. 11; P. L. 1932, C. 100
10	P. L. 1929, C. 660; P. L. 1932, C. 95
11	P. L. 1930, C. 11
13	P. L. 1929, C. 277
17	P. L. 1932, C. 94
18	P. L. 1929, C. 275; P. L. 1932, C. 160 P. L. 1935, C. 59
20	P. L. 1929, C. 274; P. L. 1932, C. 16 P. L. 1932, C. 96; P. L. 1933, C. 54
23	P. L. 1929, C. 273; P. L. 1932, C. 57 P. L. 1933, C. 35; P. L. 1933, C. 248
26	P. L. 1930, C. 46; P. L. 1933, C. 55 P. L. 1935, C. 59
27	P. L. 1935, C. 59
28	P. L. 1930, C. 57
29	P. L. 1928, C. 96
30	P. L. 1930, C. 12
49	P. L. 1932, C. 92; P. L. 1935, C. 59
52	P. L. 1932, C. 102; P. L. 1935, C. 59
53	P. L. 1929, C. 279
54	P. L. 1930, C. 11
55	P. L. 1935, C. 59
56	P. L. 1933, C. 56

Sections Amended	*Amendatory Acts*
59	P. L. 1930, C. 8; P. L. 1931, C. 254 P. L. 1933, C. 36
66	P. L. 1926, C. 191
67	P. L. 1933, C. 56; P. L. 1935, C. 59 P. L. 1935, C. 59
69	P. L. 1929, C. 236; P. L. 1930, C. 9 P. L. 1932, C. 93; P. L. 1935, C. 59
73	P. L. 1932, C. 91; P. L. 1935, C. 59
74	P. L. 1932, C. 97; P. L. 1935, C. 59
75	P. L. 1935, C. 59

In addition to the foregoing amendments of the 1925 Revision, the following acts supplementary to the said Revision or affecting building and loan associations were passed:

P. L. 1930, C. 78, permitting building and loan associations to loan on leasehold titles of camp meeting associations.

P. L. 1932, C. 84, permits Commissioner of Banking and Insurance or liquidating agents, to borrow and pledge assets of failing associations as security.

P. L. 1932, C. 136, permits membership in the Federal Home Loan Bank and investment in its stock.

P. L. 1933, Special Session, C. 1, permitting investments of building and loan associations in bonds of the Home Owners' Loan Corporation.

P. L. 1934, C. 164, exempts certain building and loan assets from taxation.

P. L. 1933, C. 48, the Emergency Act. This was amended three times by P. L. 1933, Chapters 166, 258 and 381.

P. L. 1933, C. 257, pertaining to investments in bonds of Home Owners' Loan Corporation.

P. L. 1933, C. 34, permits extensions of mortgages held by building and loan associations upon liquidation of the association.

P. L. 1934, C. 186, permits associations incorporated under the laws of this state, to convert into Federal Savings and Loan Associations.

P. L. 1933, C. 344, relates to foreign building and loan associations.

The above listed amendatory acts amend 34 sections of the 1925 Revision 59 times and the supplements and other acts affecting building and loan associations number 13, or a total of 72 statutory changes in ten years, affecting building and loan associations.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IDA ROCKER, *Plaintiff-Cross-Appellee,* *vs.* CARDINAL BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, *Defendant-Cross-Appellant.*	*Action at Law.* *Cross Appeal from Order Amending Judgment of Voluntary Non-suit.*

BRIEF OF CROSS-APPELLANT.

(Italics mine except where otherwise indicated.)

(1)

Statement Under the Rules.

By this cross-appeal, the defendant, Cardinal Building and Loan Association of the City of Newark (hereinafter referred to as appellant), brings before this Court for review, an order of the Supreme Court (Justice Case), procured by Ida Rocker, plaintiff-cross-appellee (hereinafter referred to as appellee), amending a judgment of voluntary non-suit and dismissal, by adding thereto, "judgment final against the plaintiff and in favor of the defendant on the first, fourth and fifth counts of the complaint, which were stricken out by the Honorable Frank L. Cleary, Judge of the Union County Circuit Court sitting as Supreme Court Commissioner, by his order dated May 16, 1935" (C. p. 104). The circumstances surrounding the entry of said order are as follows:

The appellee commenced suit in the New Jersey Supreme Court, Union Circuit, and her com-

plaint contained five separate and distinct counts (C. p. 2). Appellant filed an answer to these counts (C. p. 30). Appellee moved to strike the answer to the first, fourth and fifth counts, and the motion was heard by Circuit Court Judge Cleary, sitting as a Supreme Court Commissioner. The Court held that the motion was in the nature of a general demurrer, and opened all of the pleadings for review. Thereupon, reviewing the pleadings from their inception, Judge Cleary ordered the first, fourth and fifth counts of the complaint be stricken as not stating a legal cause of action, and ordered the case to proceed to trial on the second and third counts of the complaint (C. p. 97).

Thereupon appellee submitted to a *voluntary non-suit* on the second and third counts of the complaint (C. p. 99), the effect of which was to extinguish the then pending cause. The judgment of voluntary non-suit was entered on May 29, 1935 (C. p. 100). Thereafter, appellee attempted to appeal from the interlocutory order of Judge Cleary, striking the first, fourth and fifth counts of the complaint, but was met with the fact that the sole judgment in the cause was a voluntary non-suit from which no appeal could lie. Attempting to create a right of appeal, the appellee served notice of an application to amend the voluntary judgment of non-suit, by adding to it a judgment for the appellant on the first, fourth and fifth counts of the complaint (C. p. 101).

No fraud, mistake or other good or sufficient cause was offered in support of the application when the matter came on for hearing before Justice Case of the Supreme Court. The proposed amendment was objected to by the appellant herein, but over said objection an order was

entered amending said judgment of non-suit to include "judgment final against the plaintiff and in favor of the defendant, on the first, fourth and fifth counts of the complaint, which were stricken out by the Honorable Frank L. Cleary, Judge of the Union County Circuit Court, sitting as a Supreme Court Commissioner, by his order dated May 16, 1935" (C. p. 104).

The Court allowed an exception to appellant upon the entry of said order (C. p. 104). Appellee has appealed from the alleged judgment against her on the first, fourth and fifth counts of the complaint. Thereupon appellant filed its cross-appeal to review the action of Justice Case in ordering the amendment to the voluntary judgment of non-suit (C. p. 109). Appellant has also moved to dismiss the appellee's appeal. By stipulation, the State of the Case has been consolidated.

(2)

Grounds of Appeal.

The grounds of this cross-appeal are the following:

(1) That the Court was without jurisdiction to amend the judgment of voluntary non-suit entered in the above entitled matter.

(2) Because the Court in the absence of any proof of fraud, mistake, and error in form in the entry of the voluntary judgment of non-suit heretofore entered in this cause amended said judgment of voluntary non-suit over the objection of the defendant so as to vary the rights of the parties as fixed by the judgment of voluntary non-suit.

(3) Because the Court amended the judgment of non-suit entered in the above matter to include a judgment for the defendant on the first, fourth and fifth counts over the

objection of the defendant, whereas, no judgment on said counts had ever been ordered by the Judge who entered the order striking the first, fourth and fifth counts of the complaint.

(4) Because of the judgment of voluntary non-suit dated May 16, 1935, was a complete withdrawal of said cause from the Court and left no cause which was subject to amendment as entered by this court, under date of August 31, 1935.

(5) That the sole legal judgment entered in this cause was the judgment of voluntary non-suit entered May 16, 1935 from which the plaintiff had no right of appeal.

(3)

ARGUMENT.

POINT I.

The judgment of voluntary non-suit, entered May 16, 1935, completely extinguished the pending cause of action, and left no cause which was subject to amendment as ordered by the Supreme Court under date of August 31, 1935.

On April 30, 1935, Judge Cleary filed his opinion (C. p. 74), and ordered the first, fourth and fifth counts of the complaint stricken. At the same time, he ordered the case to proceed to trial on the second and third counts of the complaint (C. p. 97). Appellee was in no position to appeal from this order striking the first, fourth and fifth counts, as that was a mere interlocutory order.

Denholtz vs. *Donner*, 96 N. J. Law 545, 115 Atl. 351.

After Judge Cleary had decided to strike the first, fourth and fifth counts, the pending cause embraced the second and third counts of the com-

plaint. In this posture of the record, appellee should have proceeded to trial on the second and third counts, and abided whatever judgment was entered in the cause. In the event of an adverse judgment, she would have a right to review the entire record and assign error on any part thereof, particularly the action of Judge Cleary in striking the first, fourth and fifth counts of her complaint. Instead, she elected to enter a voluntary non-suit, and upon her insistment, a judgment of voluntary non-suit and dismissal was entered which extinguished the pending suit. By this judgment she is bound. *Commonwealth Investment Co.* vs. *Guarantee Trust Co.,* (Sup. Ct. Aug. 30, 1935), N. J. Misc. . By thus voluntarily extinguishing the suit, she precluded herself from an appeal upon the judgment or any part of the record.

> *Central Railroad* vs. *Moore,* (E. & A.) 24 N. J. Law 824, 836.
>
> "The legality of a bill of exceptions, taken by the plaintiff, when he has submitted to the non-suit, may be well doubted. If he wishes to obtain the decision of the higher court, the proper course for him to take is to appear when he is called, and require the judge to direct the jury upon the point of law, and take his bill of exceptions to the charge. If he acquiesces in the non-suit, he is voluntarily out of court, and it is simply absurd to allow him to complain of what he has formerly consented to. If the judge takes it upon himself to rule that he is bound to submit to a non-suit, that is an error to which he may except; (Strother *vs.* Hutchinson, 4 Bing. N. C. 83); but that he cannot except, if he voluntarily submits, is settled in England; (Corsar *v.* Reed, 8 En. L. & E. R. 380); and by many cases in the courts of the United States, referred to by counsel."

Compare

Dunkle vs. *Rotholz,* 19 Atl. 260 (not off. rep.);

Pemberton vs. *Pemberton,* 41 N. J. Equity 349, 7 Atl. 642.

Thereafter, if it was her desire to continue the litigation, she was required to institute a new suit. By her voluntary dismissal, she ousted the Court of its jurisdiction with respect to the action thus dismissed. The rule in that regard is laid down in 18 C. J., page 1171, sec. 63, as follows:

> "The dismissal of an action ousts the Court of its jurisdiction of the action dismissed * * *. No further proceedings can be had or judgment rendered by the Court except such order or judgment as may be necessary to close the litigation properly."

An amendment pre-supposes an existing cause of action. In this case the action had been effectively extinguished at the request of the appellee, and there was nothing before the Court to amend.

POINT II.

In the absence of proof of fraud, mistake, and error in the form and entry of the voluntary judgment of non-suit heretofore entered in said cause, or other sufficient cause, the Court was without power to amend the judgment of voluntary non-suit over the objection of appellant, so as to vary the rights of the parties as fixed by the original judgment.

Upon her application for the amendment, appellee offered no proof of mistake, error, fraud, or any other good and sufficient cause in support of her application. She did not ground her application upon the theory that the record con-

tained a clerical mistake or misprision. Her application was made in the mistaken belief and for the sole reason that thereby she would regain the right of appeal which she had already lost.

It is submitted that the appellee was under no duty and could not be compelled to enter a judgment in its favor after the trial court had decided to strike three of the five counts of the complaint. Said determination of the trial court was not dispositive of the whole issue, and therefore, it was without power to enter a final judgment upon the pleadings.

A judgment is the judicial act of the Court; it is a solemn record which cannot be lightly disturbed. I have found no case where the Court has disturbed a judgment in the absence of sufficient cause shown for such action. The law recognizes a clear limitation upon the power of a Court to alter or amend the judgment which has been entered. A statement of the limitation thus recognized is found in 34 C. J. 240, sec. 464, as follows:

> "But there is no power to amend by correcting a judicial mistake or error of law, *or by giving relief other than, in addition to, or in lieu of that originally contemplated and intended to be given,* * * * or so as to vary the rights of the parties as fixed by the original decision * * *."

The rule is stated in 15 Ruling Case Law 673, sec. 124, as follows:

> "In the exercise of the power to make amendments a court is not authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. *The power to amend should not be confounded with the power to create. It pre-supposes*

*an existing record, which is defective by reason of some clerical error or mistake, or by the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. * * * An amendment of a judgment can be allowed only for the purpose of making the record speak the truth, and not for the purpose of revising or changing the judgment, or for the purpose or correcting an error at law therein contained. Nor can a judgment be amended so as to include provisions or directions not proper to have been made at the date of its original entry upon the allegations of the pleadings."*

The subject is carefully reviewed in a very exhaustive annotation upon the power of the Court to correct by amendment its judgment, found in 10 A. L. R., page 526, *et seq.*

In this case it is clear that the amendment included provisions not proper to have been made at the time of the entry of the original judgment of non-suit. It is further manifest that there was added to said judgment, relief other than in addition to that originally contemplated and intended to be given. Thus the rights of the parties as fixed by the original judgment voluntarily entered by the appellee, were varied. The entire object of the proceedings was to create an adverse judgment in order to afford a legal basis for an appeal.

It is respectfully submitted that over the objection of the appellant, and in the absence of any sufficient cause therefor shown, the Court was without power to order such an amendment.

For the divers reasons herein urged, it is respectfully submitted the order amending said judgment of non-suit should be reversed.

HAROLD SIMANDL,
Attorney for Defendant Cross-Appellant.