

The alternative of refusing to accept the fiduciary type of deposit would work to the great disadvantage of principals, cestuis, estates, and fiduciaries generally. Thus, the Act, by exonerating the bank except when it is guilty of bad faith or actual knowledge²⁴ of the fiduciary's actual or intended misappropriation, removes the oppressive and unreasonable burden heretofore imposed by some of our courts.

The case of *New Amsterdam &c. Co. v. Nat. Newark &c. Co.*,²⁵ in expressly discarding the artificial and discriminatory standards of due care and constructive notice and in adopting without reservation the standards of the Fiduciaries Act, has done much in clearing up the ambiguous situation in New Jersey. It is hoped that in the future the provisions of the Act will be applied with equal force, irrespective of whether the fiduciary is a trustee type or an agent type, as such is the intent of the Act.

MORTGAGE DEFICIENCIES DURING THE ECONOMIC EMERGENCY.—The purpose of this note is to bring down to date the recent article on "Mortgage Deficiencies in New Jersey".¹

The case of *Federal Title & Mortgage Co. v. Lowenstein*² laid down the rule that equity may compel a mortgagee to credit the fair market value of the mortgaged premises on the decree in a suit on a deficiency after foreclosure. In order to qualify for the relief granted in the above case the mortgagor must show, first, that the property was knocked down at the sale at an unconscionable figure, second, the existence of an economic emergency which prevented competitive bidding, and third, his own inability to protect himself by refinancing or by bidding at the sale.³ The necessity for financial irresponsibility on the part of the mortgagor was set out fully in *Maher v. Usbe B. & L. Ass'n*.⁴ In that case the court declared that a wealthy mortgagor may not take advantage of the Lowenstein doctrine to unload unwanted property on

²⁴ There should be little doubt as to what the act means by the words "actual knowledge." A want of diligence to ascertain inculpatory facts is not actual knowledge of such facts. However, the meaning of "bad faith" is rather troublesome. Although the Act does not define "bad faith" it defines "good faith" in respect to a thing done "when it is in fact done honestly." It should follow that a thing done in "bad faith" is one done dishonestly. In *Browning v. Fidelity Trust Co.*, 250 Fed. 321 (1918) the court says: "bad faith * * * differs from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. It contains an element of intent to do wrong in some degree, actually or necessarily inferable."

²⁵ *Supra* note 9.

¹ Eisenberg & Spicer, *MERCER BEASLEY LAW REVIEW*, Jan. 1933, p. 27.

² 113 N. J. Eq. 200 (Ch. 1933).

³ *Young v. Weber*, 117 N. J. Eq. 242 (Ch. 1934).

⁴ 116 N. J. Eq. 399 (Ch. 1934).

the mortgagee. If he attempts to do so he will not be allowed a credit of the fair value and will be held for the entire deficiency. Some criticism might be leveled at this result since the mortgagee gets the same double satisfaction which is considered inequitable in the case of an indigent mortgagor. On the other hand, the economic emergency does not place a wealthy mortgagor at the mercy of the mortgagee, and if he fails to protect himself there is no reason why equity should safeguard his interests.

In *Fifth Avenue Bank v. Compson*⁵ it was held improper to anticipate a sale at an inadequate price in foreclosure proceedings by seeking an injunction against such sale until economic conditions should improve. The mortgagor must wait until after the sale has proved that a fair price cannot be obtained to seek his relief against it.

No credit on the decree is allowed as against a second mortgagee who sues on the bond for a deficiency, as was pointed out in *Hillside Bank v. Silverman*.⁶ The second mortgagee, where the first mortgagee has bought in the property at the sale, has no security for his debt. To allow a set-off of the fair value would deprive him of the payment of his debt as well as of his security. Since no double satisfaction can arise under these circumstances it is not inequitable to permit a second mortgagee to recover the entire deficiency.

While the rule as to set-off itself seems well settled, considerable confusion has arisen as to the proper method of enforcing it. In the Lowenstein case it was decreed that confirmation of the sale be withheld until the mortgagee credited the fair value of the premises upon his deficiency claim. In subsequent cases this procedure was greatly varied. In *Better Plan B. & L. v. Holden*,⁷ an action in equity for the deficiency on a bond, the defendant answered that the fair value should be allowed as a credit. A motion to strike the answer on the ground that the foreclosure sale was conclusive as to value and that defendant's only remedy was to apply to set aside confirmation was denied. In *Maher v. Usbe B. & L.*,⁸ an action at law on the bond was restrained until credit of fair value was given. In *Meranus v. Lawyers and Homemakers B. & L.*⁹ execution on a judgment at law on the bond was restrained subject to the same condition. In *Fidelity Realty Co. v. Fidelity Corp.*¹⁰ a decree on the bond in equity was made subject to a credit of the fair value. It will be noted that in all of the above cases the remedy was given without setting aside the confirmation and sale. The Court of Errors and Appeals criticised such a proceeding in *Fruzynski v. Jablon-*

⁵ 113 N. J. Eq. 152 (Ch. 1933). See also on this point *United B. & L. v. Neuman*, 113 N. J. Eq. 356 (Ch. 1933) and *Kolter v. Insurance Co.*, 113 N. J. Eq. 544 (Ch. 1933).

⁶ 116 N. J. Eq. (Ch. 1934).

⁷ 114 N. J. Eq. 537 (Ch. 1933).

⁸ *Supra* note 4.

⁹ 116 N. J. Eq. 402 (Ch. 1934).

¹⁰ 113 N. J. Eq. 356 (Ch. 1933).

ski.¹¹ It declared that a judicial sale is the only legal means of determining the value of mortgaged premises, and that while confirmation of the sale stands equity is powerless to ignore its own decree, which is conclusive as to value. To proceed in spite of the decree is destructive of the contract rights of the mortgagee. The Mortgage Act of 1880, providing for a sale to determine value, is a part of his contract.¹² The only proper procedure is said to be to set aside the sale before confirmation, or after confirmation if the circumstances justify it, and effect a resale.

A 1933 amendment to the Mortgage Act¹³ allowed the fair value to be set up as a defense to a suit at law on the bond. This was held unconstitutional.¹⁴ Yet in the cases noted above the Court of Chancery seems to be doing exactly what the legislature has been declared powerless to do. The 1933 act was declared to be an impairment of the mortgagee's contract, and it is submitted that the remedy allowed by the Court of Chancery in these cases is similarly invidious. In *Fruzynski v. Jablonski*¹⁵ the petitioner sought an injunction against proceedings at law on his bond until the fair value of the mortgaged premises could be assessed and petitioner credited with that amount. This was done without setting aside confirmation and ordering a new sale. Upon these facts the Court of Errors found an impairment of the contract and reversed the decree of Chancery. Upon the granting of confirmation equity may impose conditions in its discretion, under its inherent power to regulate matters of this kind,¹⁶ but while its decree of confirmation stands the court would seem powerless to give a complaining mortgagor any relief.

The Court of Chancery's answer to the *Fruzynski* case is found in *Young v. Weber*.¹⁷ In that case all of the Vice-Chancellors concurred in an opinion which read in part:

¹¹ 117 N. J. Eq. 117 (E. & A. 1934).

¹² 3 Comp Stat. 3422. "That in all foreclosure proceedings hereafter commenced, the sheriff or other officer who may be directed to sell any mortgaged premises shall, after making such sale, report the same within five days thereafter to the court out of which an execution or order to sell is issued, stating the name of the purchaser or purchasers and the price obtained, and if the said Court, or a Judge thereof, shall approve of such sale, they shall confirm the same as valid, effectual in law, and shall, by rule of Court allowed in open Court, or by a Judge thereof at Chambers, direct the said Sheriff or other officer to execute good and sufficient conveyance at law to the purchaser or purchasers for the mortgaged premises so sold; provided, that no sale of mortgaged premises shall be confirmed by the Court or further proceedings had until the Court, or such Judge, is satisfied by evidence that the property has been sold at the highest and best price the same would then bring in cash, and such evidence may be in the form of affidavits."

¹³ P. L. 1933, Chap. 82.

¹⁴ *Vanderbilt v. Brunton Piano Co.*, 111 N.J.L. 596 (E. & A. 1933).

¹⁵ *Supra* note 11.

¹⁶ *Federal Title & Mortgage v. Lowenstein*, *supra*, note 2.

¹⁷ *Supra* note 3.

“The criticism of the Court of Chancery was first, because of the failure of this court, on the face of the appeal record in that case (the Fruzynski case), to accord to the mortgagee purchaser the right to choose whether he would keep the property and credit the fair value thereof against the mortgage debt or would give up the property and submit to a resale; and, second, because of the method adopted here to reach an equitable conclusion. In the final analysis the same result would be reached though by a longer route through the medium of successive sales followed by successive refusals of the Court of Chancery to confirm. . . . And while the desire of the appellate court for meticulous care in proceedings of this character is shared by us, this court has never been a slave to form. If possible to accomplish by direct action that which is just if attained indirectly, it has always been the policy of this court to do so because equity regards the substance rather than the form, and the result rather than the method by which it is attained.”

It is all very well to avoid circuity of action and multiplicity of suits so long as no substantial rights are violated in the process. But the argument of the Court of Chancery completely ignores the major point of the Fruzynski case, the impairment of the contract involved in crediting the fair value of the mortgaged premises on the debt while a prior adjudication of value, made according to the contract, is on the record. In view of this it seems that *Young v. Weber* is merely sidestepping the issue.