

The Status of Legislation Relative to Guaranteed Mortgage Certificates

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THE STATUS OF LEGISLATION RELATIVE TO GUARANTEED MORTGAGE CERTIFICATES.—In spite of the passage of the Schackno Act¹ and the establishment of additional special terms of the Supreme Court in the First and Second Judicial Districts concerned solely with the problems of guaranteed mortgages,² the hue and cry that something be done for the relief of holders of guaranteed mortgage certificates continues unabated. It is the purpose of this note to survey in a general way the enactments of the legislature of the state of New York relative to the situation, without in any way attempting to exhaust the subject, in an effort to determine what the status of legislation on the subject now is and what course is being pursued to solve what seems to be an almost insoluble problem. In order to present a comprehensive picture of the situation, it will be necessary to refer briefly to some legislation already discussed in this Review; but these enactments will not be considered in detail.

For purposes of convenience, this legislation may be divided into two general classes: (1) what might be termed the major enactments, or backbone of the rehabilitation of guaranty companies and reorganization of mortgaged properties for the benefit of security holders; and (2) supplementary, or minor enactments, designed to remove obstacles from the path laid out by the major laws, and to perfect the working of those laws.

The rehabilitation of the guaranty companies (as of insurance companies in general) is provided for by Article XI of the Insurance Law.³ While not designed solely, or even primarily, for application to mortgage guaranty corporations, it is one of the basic provisions of the law affecting guaranteed mortgage certificates. Although rehabilitation, in the sense of conserving the assets and taking steps to prevent waste and spoliation, is not a new power granted under this article, until the past year or two the authorization was seldom resorted to, because in most cases the occasion for its use did not present itself.

The powers granted to the Superintendent of Insurance are very broad. It is not necessary that the company be insolvent to be taken over for rehabilitation.⁴ The purpose of the legislation is to enable

¹ Laws of 1933, c. 745; see *The Schackno Act and Reorganization* (1934) 8 ST. JOHN'S L. REV. 315; also (1933) 8 ST. JOHN'S L. REV. 204, at 208; and for a discussion of many related problems relative to the mortgage certificate situation, see *Present Problems in New York Guaranteed Mortgages* (1934) 34 COL. L. REV. 663.

² Additional Special Term, First Judicial District, Mr. Justice Frankenthaler presiding; Additional Special Term, Second Judicial District, Mr. Justice Brower presiding.

³ Added by Laws of 1932, c. 191, which also repealed §63 of the Insurance Law.

⁴ §401, subd. (e) of the Law provides for an order of rehabilitation if an insurance company "is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public." Rehabilitation is a distinctly different thing from liquidation. "Statutes relating to bankruptcy, liquidation and receiver-

the Superintendent, by a wise exercise of the authority granted him, to remove the conditions which brought about the necessity for rehabilitation.⁵ Since all the large guaranty companies are now in process of rehabilitation under this article,⁶ and since the Schackno Act⁷ provides that the Superintendent of Insurance may exercise any or all of the functions of those companies which are in rehabilitation with respect to any mortgage investment sold or guaranteed by such corporation,⁸ it can be seen that the provisions of Article XI are of the greatest interest to holders of guaranteed mortgage certificates.⁹ Of equally great importance is the fact that under Sections 409 and 410 of the article, it is customary for the courts in granting the order of rehabilitation to restrain the holders of the guaranteed certificates from prosecuting any action or special proceeding against the Superintendent or guaranty company, or from in any way interfering with the Superintendent in his conduct of said companies.¹⁰

ship are not applicable to rehabilitation, which is a separate and distinct attempt to conserve and administer the assets of a corporation in the hope of its eventual return from financial stress to solvency. In the event of failure of rehabilitation, then liquidation follows. (INSURANCE LAW, art. XI, §402, subd. 2.)” Matter of Title & Mortgage Guaranty Co. of Buffalo, 152 Misc. 428, 434, — N. Y. Supp. — (1934). In this connection, the Superintendent is empowered to conduct the business of the company in rehabilitation; or he may take only those steps necessary to conserve its assets. *Id.* at 432, 433.

⁵ As to the essentials for release from rehabilitation under §402, subd. 3 of the Insurance Law, see Matter of Globe, etc. Fire Insurance Co., 149 Misc. 18, 266 N. Y. Supp. 603 (1933).

⁶ The only corporation of outstanding importance in New York guaranteeing mortgages and mortgage certificates which is not under the jurisdiction of the Superintendent of Insurance is the Prudence Company, organized under the Banking Law, and taken over by the Superintendent of Banks on September 29, 1934. The federal courts took jurisdiction of the reorganization of its affiliate, Prudence-Bonds Corporation, on October 24, 1934. Matter of Prudence-Bonds Corp., 92 N. Y. L. J. 1455 (E. D. N. Y., Inch, J., Oct. 25, 1934).

⁷ *Supra* note 1.

⁸ §3. While the powers of the Superintendent in certain minor particulars may exceed the original powers of the companies, those must be regarded as provisions for safeguarding the interests of groups of holders of mortgage investments until a plan can be devised for permanent administration of these investments. These powers are no greater than those ordinarily exercised by a receiver appointed in equity to conserve the fund. Matter of People (Title & Mortgage Guaranty Co. of Buffalo), 264 N. Y. 69, 89, 90, 190 N. E. 153 (1934); and for his services so rendered in connection with carrying out the work of the guaranty companies in servicing these mortgages, he is entitled to reasonable compensation. Matter of People (Lawyers Title & Guaranty Co.), 265 N. Y. 287, — N. E. — (1934).

⁹ It should be noted that while it is not absolutely essential that the guaranty company be in rehabilitation for the Superintendent to exercise the powers granted by the Schackno Act, as he may take over the functions of the guaranty company in the case of any security on which there is a default (§3), it may be said that in practice rehabilitation universally precedes this function. I have been unable to find any instance where the Superintendent has intervened in the case of a company not in rehabilitation.

¹⁰ Matter of Nemerov, 149 Misc. 797, 268 N. Y. Supp. 588 (1933). The injunctive provision in the order of rehabilitation has been held to prevent a

It may seem paradoxical, in legislation designed to *protect* certificate holders, to *restrain* them from resorting to the courts to enforce their rights; but the legislation was designed to prevent the securing of preferences by creditors of the guaranty companies through the bringing of actions, and to grant a free hand to the Superintendent of Insurance in his endeavors to work out the situation.

The second major piece of legislation is the so-called Schackno Act,¹¹ providing for the reorganization of properties represented by guaranteed mortgage certificates, under plans of reorganization consented to by at least two-thirds of the certificate holders, and approved by the court. Since the Act has previously been discussed in this Review,¹² it is only necessary here to mention its amendments since it was originally enacted. The declaration of emergency was reiterated and a definite time limit (August 31, 1937) set thereon.¹³ The definition of "mortgage investments" to which the act was applicable, contained in Section 2, was amended to except from the operation of the Act such investments where all the evidences of indebtedness having the same security are held by one person, firm or corporation.¹⁴ This is of importance, as it puts the holder of such securities on a par with the owner of a single guaranteed bond and mortgage, who may, when there is a default in the obligation of the guaranty company, revoke its agency provided for in the contract of guaranty, withdraw his securities from the custody of the Superintendent, and manage the properties himself.¹⁵ The addition of a new

creditor of a guaranty company in rehabilitation from suing the directors of that corporation for dividends alleged to have been illegally declared and paid, the court holding that such a suit is the province of the Superintendent. *Gallin v. Burdwick*, 152 Misc. 468, — N. Y. Supp. —, *aff'd* without opinion, 241 App. Div. 888, — N. Y. Supp. — (2d Dept. 1934). But a defendant is not restrained from setting up as a counterclaim, in an action brought against him by the guarantor company or the Superintendent, moneys due the defendant by reason of defaults on the guaranty, although no action could be brought against the guarantor company by reason of such default. *New York Title & Mortgage Co. v. Irving Trust Co.*, 241 App. Div. 246, 271 N. Y. Supp. 775 (1st Dept. 1934).

¹¹ Laws of 1933, c. 745; *supra* note 1.

¹² See *supra* note 1.

¹³ §9-a, added by Laws of 1934, c. 909.

¹⁴ Laws of 1933, c. 780.

¹⁵ *Matter of People (Lawyers Title & Guaranty Co.)*, 265 N. Y. 20, 191 N. E. 720 (1934). In case the owner of a part interest (*i. e.*, a certificate holder) desires to revoke the exclusive agency of the guarantor, it has been said that a decree of the court authorizing such revocation is necessary (*Kline v. 275 Madison Ave. Corp.*, 149 Misc. 747, 268 N. Y. Supp. 582 [1933]), but whether or not this relief would be granted is doubtful, as it has been held that the remedies provided by the Schackno Act are exclusive. *Matter of New York Title & Mortgage Co.*, 241 App. Div. 351, 272 N. Y. Supp. 553 (1st Dept. 1934). Since, when the agency is revoked, the guarantor company remains liable on its guaranty unless expressly released (*Matter of People [Lawyers Title & Guaranty Co.] supra*), it was the policy of the Insurance Department to obtain releases whenever possible (Regulations of Superintendent of Insurance, March 17, 1933), and the Superintendent has been in some

subdivision (1-a) to Section 6 provides that on application to the court by any certificate holder desiring in good faith to promulgate a plan of reorganization, an order will be made directing the Superintendent of Insurance to furnish the applicant with a list of the other holders of certificates of the same series.¹⁶ Subdivisions 1 and 4 of Section 6 were amended so as to require 15% rather than 33⅓% of the certificate holders of any series to promulgate a plan of reorganization.¹⁷ The addition of Section 7-a relating to trustees will be referred to hereinafter.¹⁸

While it is by no means the province of this survey to go into the constitutional questions involved, it should be noted that both of the measures referred to have been upheld by the courts.¹⁹ The general purpose of the legislation, it is clear, is to invest the Superintendent of Insurance with all necessary power to rehabilitate the companies and to effect reorganizations of the mortgaged properties. While, as stated, the validity of this course has to date been upheld,

instances charged with duress in obtaining releases from the liability of the guarantor company when the agency is revoked. *Matter of New York Title & Mortgage Co.*, 150 Misc. 827, 271 N. Y. Supp. 433 (1934); *Matter of New York Title & Mortgage Co.*, 150 Misc. 239, 270 N. Y. Supp. 26 (1934). It seems, however, that these instances raise a somewhat academic problem, as it is likely that there will not be sufficient funds in the hands of the rehabilitator to meet claims of a trust nature, arising from the fact that, in prosperous days, moneys were collected by the guaranty companies as agents for the holders of mortgages and certificates, and instead of paying the moneys over to their rightful owners, co-mingled them with the general funds of the company and used them either to meet other obligations or to pay dividends. See *Matter of Lawyers Title & Guaranty Co.*, 150 Misc. 174, 268 N. Y. Supp. 554, *aff'd* without opinion, 241 App. Div. 808, — N. Y. Supp. — (1st Dept. 1934); *Matter of National Title Guaranty Co.*, 152 Misc. 523, — N. Y. Supp. — (1934).

¹⁶ Laws of 1934, c. 906. This amendment might be said to be superfluous, as a court of equity has the power to make such an order without statutory authority. *Matter of Nemerov*, *supra* note 10; *cf.* INSURANCE LAW §437, *supra* note 3.

¹⁷ Laws of 1934, c. 919. These last two changes seem to the writer to be contrary to the general trend of the legislation in vesting in the Superintendent of Insurance authority approaching that of a dictator, as they make it comparatively easy for an investor wishing to make a *bona fide* effort to reorganize the property represented by his certificate, in the event of inaction on the part of the Superintendent of Insurance.

¹⁸ *Infra* note 38.

¹⁹ Article XI of the Insurance Law was upheld in *Matter of National Surety Co.*, 239 App. Div. 490, 268 N. Y. Supp. 88 (1st Dept. 1933), *aff'd* without opinion, 264 N. Y. 473, — N. E. — (1934). The constitutionality of the Schackno Act was upheld by the Court of Appeals in *Matter of People (Title & Mortgage Guaranty Co. of Buffalo)*, *supra* note 8. An appeal from this decision is now pending in the United States Supreme Court. However, in view of the recent decisions of that Court in the Minnesota Mortgage Moratorium case (*Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 390, 54 Sup. Ct. 231 [1933]) and the New York Milk Control Board case (*Nebbia v. People*, 291 U. S. 502, 54 Sup. Ct. 505 [1933]), a prediction is ventured that the New York courts will be upheld.

the measures concededly interfere with the obligations of contracts,²⁰ and in its efforts to extend a free hand to the Superintendent, the legislature in 1933 went even further, empowering him to suspend any provision of the Insurance Law in whole or in part, and to make, rescind, alter and amend rules and regulations imposing any condition upon the conduct of business of any insurer.²¹ It is true that this measure was speedily modified²² by deleting therefrom the authority granted to the Superintendent to suspend the provisions of legislative enactments, so that the law is probably not now subject to attack on constitutional grounds,²³ and it is mentioned merely for the sake of pointing out the lengths to which we are going in this matter, and raising the question of whether it is worth while to infringe on what were once regarded as sacred constitutional safeguards in a situation which might be regarded by some as not of paramount importance.²⁴ It might be just as effective and more salutary to suspend some of the constitutional and legal omissions and provisions which are protecting those guaranty and title company officers and directors whose high-handed, if not technically illegal, practices were a major contributing factor in bringing about the present situation.²⁵ However, if the measures are regarded as an integral part of the "New Deal" legislation, state and federal, a different question is presented.

Coming now to what I have termed the less important and supplementary legislation regarding guaranteed mortgage certificates, a year after the enactment of Article XI, another article was added to the Insurance Law²⁶ which has been previously considered in this Review,²⁷ providing for the formation of non-profit-making corporations to represent holders of guaranteed mortgage participation certificates and to effect reorganization, through foreclosure or otherwise, of the properties represented thereby. It is by means of

²⁰ Matter of People (Title & Mortgage Co. of Buffalo), *supra* note 8.

²¹ Laws of 1933, c. 40.

²² Laws of 1934, c. 10. A similar enactment, granting similar powers to the Governor with reference to both the Insurance and Banking Laws, had a like history. Laws of 1933, c. 42, amended by Laws of 1934, c. 12.

²³ Matter of People (Title & Mortgage Co. of Buffalo), *supra* note 8.

²⁴ After all, less than \$1,000,000,000 of investments is involved (Laws of 1934, c. 745, §1), which is a small sum compared with the total wealth of the state of New York.

²⁵ See Report of George W. Alger, Moreland Act Commissioner, to Governor Lehman, October 7, 1934, for an intimation of what these practices consisted of. See also Matter of Lawyers Title & Guaranty Co., 150 Misc. 174, 268 N. Y. Supp. 554, *aff'd* without opinion, 241 App. Div. 808, — N. Y. Supp. — (1st Dept. 1934); Matter of National Title Guaranty Co., 152 Misc. 523, — N. Y. Supp. — (1934); Gallin v. Burdick, 152 Misc. 468, — N. Y. Supp. —, *aff'd* without opinion, 241 App. Div. 888 (2d Dept. 1934); Van Schaick v. Stevens, 152 Misc. 163, — N. Y. Supp. — (1934).

²⁶ Art. 12, Laws of 1933, c. 453. Another Article XII was added by Laws of 1933, c. 524, creating the Insurance Board. The former is designated by Arabic and the latter by Roman numerals.

²⁷ (1933) 8 ST. JOHN'S L. REV. 204, at 209.

corporations organized under this article that many of the reorganization plans promulgated under the Schackno Act are carried out.

Since in New York the only express trusts are those specifically provided for by statute,²⁸ in order to facilitate the reorganization of mortgaged properties under the Schackno Law,²⁹ the Real Property Law was amended by adding a new subdivision 5 to Section 96,³⁰ providing that an express trust may be created to effect and carry out that purpose. The same chapter amended Section 103, subdivision 1 of the Real Property Law and Section 15, subdivision 1 of the Personal Property Law to permit the beneficiary of such a trust to transfer his right and interest therein, and Sections 166 and 174 of the Real Property Law to permit the execution of the trust, if vested in more than one person, by one or more of the trustees.

One of the major problems confronting any attempt to reorganize mortgaged properties was the large number of securities held by savings banks, insurance companies and trustees, whose investments have been strictly regulated by statute.³¹ It is common knowledge that guaranteed mortgages and certificates, for years being almost universally regarded as the safest sort of legal investment, having as security not only improved real property, but also the guaranty of what were formerly thought to be reliable corporations, were purchased in tremendous numbers by this type of investor.³² If these were to participate to any helpful extent in the design contemplated by the legislature, it was necessary that authority be granted them to do so. The laws relating to legal investments were accordingly changed by a series of amendments in two important aspects, the first primarily to ease the burdens of owners of real property, and designed for the protection of the mortgagor rather than the mortgagee;³³ and the second empowering corporations and individuals

²⁸ N. Y. REAL PROPERTY LAW (1909) §96.

²⁹ Many of the plans promulgated for the reorganization of the mortgaged properties provide for the appointment of trustees, either by agreement of the parties in interest, or appointment by the court, who operate the trust under a declaration of trust. See *Matter of People (Westchester Title & Trust Co.)*, 92 N. Y. L. J. 1458 (Westchester County, Bleakley, J., October 25, 1934).

³⁰ Laws of 1934, c. 920.

³¹ N. Y. BANKING LAW (1914) §239; N. Y. INSURANCE LAW (1900) §100; N. Y. DECEDENT ESTATE LAW (1880) §111.

³² See *Matter of Luckenbach*, 90 N. Y. L. J. 88 (Kings County, Strong, J., July 8, 1933).

³³ To be sure, the theory (and it is probably sound) is that whatever is for the benefit of the mortgagor is bound also to enure in the last analysis to the benefit of the mortgagee. General foreclosure of mortgages today might so demoralize the real estate market that the value of all mortgages would be diminished and both mortgagor and mortgagee prove the losers thereby. In this connection, reference may be made to other recent legislation designed for the protection and aid of mortgagors, which, while not directly relating to the problems of guaranteed mortgage certificate holders, is of importance to them in its effect in limiting their remedies and on the security of their investment. In this class are the so-called Mortgage Moratorium Laws (§§1077-a to 1077-g of the CIVIL PRACTICE ACT, Laws of 1933, c. 793, as amended) and the laws

limited to legal investments to participate in the reorganization plans formulated under the legislation already discussed.

Of the first type was the addition of a new section (§277) to the Real Property Law,³⁴ granting to corporations and persons holding trust funds power to waive or modify any provision of mortgages or participations therein held by them, and to extend the same or reduce the interest rate, without regard as to whether or not the value of the property had so depreciated as no longer to constitute the security a legal investment.³⁵ A similar amendment to the Banking Law, Section 239, subdivision 6,³⁶ granted substantially similar powers to savings banks with regard to their mortgage investments.³⁷

With regard to the second aspect of this legislation, concerning powers of trustees to enter into plans of reorganization of mortgaged properties, the Schackno Act was amended by the insertion of a new section (§7-a)³⁸ authorizing all fiduciaries to consent to and

relating to limitation of deficiency judgments in mortgage foreclosures (CIVIL PRACTICE ACT §§1083-a and 1083-b, Laws of 1933, c. 794, as amended). Both of these measures were discussed in (1933) 8 ST. JOHN'S L. REV. 185. Section 1079-a of the Civil Practice Act, added by Laws of 1934, c. 921, authorizes the holder of a junior participating interest in a mortgage to foreclose the same under certain conditions. Of interest to certificate holders also are recent provisions easing the tax burdens of owners of real property. See TAX LAW §252, as amended by Laws of 1933, c. 785 and Laws of 1934, c. 455; GREATER NEW YORK CHARTER §914, as amended by Laws of 1934, c. 312. Also affecting the investments under consideration are two federal enactments, Home Owners' Loan Act of 1933, Public No. 43—73d Congress, amended by Public No. 178—73d Congress; and National Housing Act, Public No. 479—73d Congress. In connection with the former, §278 of the Real Property Law was amended by Laws of 1933, c. 792, so as to authorize all fiduciaries, banks, insurance companies, etc. to exchange their mortgage investments for bonds of the Home Owners' Loan Corporation; and §§1389, 1391 and 1394 of the Civil Practice Act were amended and §§1395-a and 1395-b added, to simplify the procedure and expedite the obtaining of these loans on behalf of the estates of infants and incompetents. Laws of 1934, c. 891. The court, however, has been held without authority by virtue of this amendment to direct such an exchange upon the application of the owner of the equity, as the question is one for the discretion of the Superintendent of Insurance or holder of the certificate. Matter of New York Title & Mortgage Co., 151 Misc. 698, — N. Y. Supp. — (1934). If the Superintendent desires to make the exchange, no authority of the court is necessary. Matter of People (N. Y. Title & Mortgage Co.), 151 Misc. 742, — N. Y. Supp. — (1934). In this latter case, the court raises, without deciding, the question of whether the amendment authorizes the exchange of the mortgage for bonds of the Home Owners' Loan Corporation in a smaller face amount than the original investment.

³⁴ Laws of 1933, c. 319.

³⁵ This legislation was dealt with in (1933) 8 ST. JOHN'S L. REV. 204, at 208.

³⁶ Laws of 1933, c. 322.

³⁷ In connection with the extension of bonds and mortgages and reduction of the rate of interest thereon, the addition of §279 to the Real Property Law by Laws of 1934, c. 143, and amendment of §33 of the Personal Property Law by Laws of 1934, c. 142, provides that no consideration should be necessary for such extension or reduction of interest, provided the agreement is in writing.

³⁸ Laws of 1934, c. 92.

enter into plans of reorganization promulgated and approved pursuant to the Act. Changes in three chapters of the Consolidated Laws³⁹ strengthened and added to this authority by providing in substance that if an insurance company or person holding trust funds held a participation in a bond and mortgage, that, in the event of foreclosure and purchase at the foreclosure sale on behalf of the certificate holders, the property might be conveyed to a corporation organized for the purpose, and the stock, bonds or other securities of the corporation accepted and held by the trustee as a legal investment.

These modifications with reference to trust funds are a radical departure from the past conservative attitude of New York State in safeguarding in every possible way the nature and security of investments held by fiduciaries.⁴⁰ Under normal conditions, such a policy would be distinctly unwise. But we are not faced with normal or permanent conditions, says the legislature in the declarations of emergency prefacing much of this legislation; and since the state has taken the course that the surest way to salvage the investments of millions is to be as lenient as possible with owners of mortgaged real property and to grant to the Insurance Department, under supervision of the courts, unprecedented powers to effect reorganization of the properties, perhaps it is well to relax the stringency of laws relating to investments so as to remove that obstacle from the path of rehabilitation.

While the foregoing has not considered all the recent amendments bearing on the guaranteed mortgage situation, I think enough has been pointed out to show what the policy of the legislature has been in its efforts to alleviate the conditions resulting from the decline in real property values and collapse of the bond and mortgage guaranty companies.⁴¹ Whether or not the measures adopted will

³⁹ N. Y. PERSONAL PROPERTY LAW §21, as amended by Laws of 1933, c. 320, Laws of 1933, c. 784, and Laws of 1934, c. 838; N. Y. DECEDENT ESTATE LAW §111, amended by Laws of 1933, c. 321, Laws of 1933, c. 779, and Laws of 1933, c. 838; N. Y. INSURANCE LAW §100, amended by Laws of 1933, c. 791.

⁴⁰ See *supra* note 31.

⁴¹ Legislation not considered includes that designed for the direct relief of distressed certificate holders. There has been for some time past a demand on the part of many of these and their more or less sincere and well-meaning champions that the government either reimburse them for all losses sustained, or, at least, arrange to make loans on the security of the certificates. While measures as sweeping as these have not been adopted, there have been enactments for the financial relief of those holders of certificates who are in need. The provisions of the Banking Law relating to investment companies now provide that companies organized for the purpose of aiding owners of mortgage certificates are required to have a capitalization of only \$1,000. N. Y. BANKING LAW §505, subd. 3, as amended by Laws of 1934, c. 912. Except for an annual tax of \$25, these companies are subject to no state taxation whatever. N. Y. BANKING LAW §525-a, added by Laws of 1934, c. 912. Savings banks and insurance companies are authorized to invest in the stocks, bonds and other securities of any such corporation (Laws of 1934, c. 913) and they may loan money to the owners of any guaranteed bond and mortgage or certificate

meet the requirements, of course only the future will tell. Apparently an attempt has been made to steer a middle course between those advocated by persons urging distinctly socialistic measures, and the attitude of the trusting conservatives who contend that if the guaranty companies had been left alone they would have been able to work out their own salvation with a minimum of loss to investors. In any event, the measures taken are both comprehensive and detailed.⁴² Whether the creation of a mortgage authority or commission, as advocated during the past year, would prove more efficacious is now a dead issue, such measures having been defeated by the legislature.⁴³ Instead, it has seen fit to place the power and responsibility in the hands of the Superintendent of Insurance, subject to the supervision of the courts, and on his ability and integrity in the last analysis the final outcome of the situation depends.⁴⁴

WESLEY DAVIS.

TESTIMONY OF ATTORNEY IN PROBATE OF WILL.—Exclusion of an attorney's testimony as to the circumstances surrounding the execution of his client's will proceeded from the intention of the courts to promote freedom of consultation for those who sought legal advice.¹ The conditions in which the rule had its genesis were discussed by the court in *Rochester City Bank v. Suydam*.² It was

without regard to the restrictions as to whether or not the security constitutes a legal investment. Laws of 1934, c. 914. In addition, the Civil Practice Act now provides that the court may direct a receiver of rents appointed in a foreclosure action to apply the net rental received by him towards the payment of accrued interest on the mortgage. N. Y. CIVIL PRACTICE ACT §977-a, added by Laws of 1934, c. 911.

⁴² Not mentioned hereinbefore, and typical of the details which have been considered and enacted into law, are the tax exemptions granted relative to the reorganization of the properties. Mortgages made by corporations formed pursuant to Real Property Law §121 or Insurance Law, art 12, as well as mortgages made to the Home Owners Loan Corporation, are exempt from the taxes imposed by art. 11 of the Tax Law. N. Y. TAX LAW §252-a, added by Laws of 1933, c. 311, as amended by Laws of 1934, c. 910; N. Y. TAX LAW §252, as amended by Laws of 1933, c. 785 and Laws of 1934, c. 455. Corporations formed for reorganization purposes under the Schackno Act are exempted from corporate taxes imposed by Tax Law §180. N. Y. TAX LAW §180, subd. 1-a, added by Laws of 1934, c. 454.

⁴³ Second Extraordinary Session, Senate Bill No. 11, Introductory No. 9; July 13, 1934; Second Extraordinary Session, Senate Bill Nos. 81, 120, 149, Introductory No. 70, Aug. 1, 1934.

⁴⁴ It is, of course, entirely possible that the next session of the Legislature will see a complete revamping of these laws and perhaps wholesale substitution of new measures. Most of the legislators-elect stated during the campaign that they favored "relief for mortgage certificate holders," whatever that may mean. Citizens Union Voters Directory, Vol. XXIV, No. 2, Oct., 1934.

¹ 2 GREENLEAF, EVIDENCE (16th ed. 1899) §243.

² 5 How. Pr. 254 (N. Y. 1851).