New Jersey Court of Errors and Appeals

Between GEORGE M. LA MONTE, AS COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY, SUING IN BEHALF OF AND IN THE NAME OF ROSEVILLE TRUST COMPANY, *Respondent,* *and* CHARLES C. LURICH, GEORGE E. KRUG AND WILLIAM T. BENJAMIN, *Appellants.*	*On Bill.* *On Appeal from Chancery.*

BRIEF OF APPELLANT, WILLIAM T. BENJAMIN.

STATEMENT OF CASE.

This is an appeal from so much of an order of the Court of Chancery as denied the motion of the appellants to strike out the bill of complaint on the ground that the release of certain of these defendants' co-directors set up in the 32nd paragraph of the bill of complaint released the claim of the complainant against the appellants, and on the further ground that the directors so released were necessary parties for a final determination of the matter in controversy.

POINT ONE.

The effect of the release mentioned was to extinguish the claim on which this cause of action is based.

The complainant's bill states that a settlement has been made with certain of the directors.

This is described in the bill as having been made

"pursuant to the express provisions of statute but without prejudice to the causes of action against the other directors."

In the brief of the complainant in the Court below, he stated:

> "The statute is Section 15 of the Act, known as 'Obligations and Joint Debtors' found at page 3781 of the Compiled Statutes (P. L. 1885, p. 219)."

As this statement, supplemental to the matter, set out in the bill, was before the Court below, it should be considered by this Court in reviewing the opinion of the Court below.

The contention of the appellants was that the release given was, notwithstanding the reservation, a release and discharge of those directors who were not parties to the settlement. The Court below held that the release must be construed to be a covenant not to sue (citing *Bowne* vs. *Mount Holly Bank*, 45 N. J. L., 360).

In construing this contract the Court cannot make a new contract between the parties, but must interpret it according to the intention of the parties.

This interpretation must be made in view of the terms of the contract itself and in view of the legal effect given to such terms before the time of making the same, that is, it must be presumed that the parties knew the law and that the contract was made by them with full knowledge of the legal effect of the terms used.

Under the common law from very early times the effect of a release to one joint tort-feasor was to release all. See *Rogers* vs. *Cox*, 66 N. J. L., 432.

There is no variation from this rule nor dispute as to its being the rule. The technical reason for the rule is that a release wipes out or extinguishes the claim and it cannot thereafter be the basis of a cause of action against anyone, for it does not exist any longer.

But where a covenant not to sue is given, the debt is not extinguished and the person having the demand may proceed against the other persons liable.

Such a covenant was before the Supreme Court in the case of *Crane, Administrator,* vs. *Alling,* 3 Green, 423, and the distinction between a release and a covenant not to sue is dwelt on by the Court and a certain right which goes to the fundamental equity of the situation is pointed out. The Court says, in reference to the covenant not to sue (p. 426):

> "So the executors do not covenant not to sue Pruden Alling. If they recover of Pruden Alling the balance of the bond, suppose it be $3,000.00, will he not sue John Alling for half the money paid on their joint bond and recover it."

The difference, so far as the person not released is concerned, is that in the case of a release, he has no recourse to his joint-obligor or joint-tort-feasor, while in the covenant not to sue he has such recourse.

The Court below in this case has determined that in all cases where a reservation of the right to sue another of the joint debtors is contained in the instrument of settlement with the one, the instrument becomes, because of that reservation, a covenant not to sue. There is no weight of authority for such a holding.

The Court below bases its decision on the case of *Bowne* vs. *Mount Holly Bank, supra,* stating that the question has been settled by this Court in that case. But we submit that the learned Vice-Chancellor below, has given to that case a much broader import than this Court gave to it.

The instrument set up as a defense in that case was a covenant not to sue. It was not so by construction but by express terms (so far as the case shows see p. 361) but it contained a covenant that if suit should be brought on the claim, then it should operate as an absolute release (see p. 362) and the Court held that

it was a covenant not to sue and not a release, citing *Crane, Adm.* vs. *Alling, supra.*

Now, an examination of the Crane case shows an instrument of apparently the same nature as in the Bowne case, but the instrument is more explicitly described and its nature discussed. It is described as follows (3 Green, p. 424):

> "And by a certain writing under their seals, in consideration thereof promised and agreed, that they would cause the said action against him to be discontinued, that they would prosecute no kind of action thereafter on the bond against him, and, that if they did, that this agreement should *then* become a good bar to such action, and operate as an absolute release and acquittance of the bond to him."

The construction of this instrument is that it is a deed of covenants (see page 427):

> "The third and last, which is the only one even alleged to be a release, is still a covenant, that if they should sue him again that this agreement not to sue shall be a bar and shall operate as a release. It contains no present words that they do release the bond to him as pleaded in the plea; but only a simple promise that the agreement shall, at some future day, operate as a release, not absolutely; but on mere contingency; that of suing him *again* which contingency has never happened, nor can it be a release until that event happens."

On page 428 the Court further says:

> "In point of fact it is not a release; nothing can make it such, but construction."

It clearly appears from this that neither the Supreme Court in the Crane case, nor this Court in the Bowne case, established the law to be that every release containing a reservation of the right to sue

others, became as a matter of law, because of such reservation, a covenant not to sue. In both cases the Court passed on the instrument before them, which, in each case, was, by its terms, a deed of covenants and not a release.

Nor is there any other case in this State in which a release is construed to be a covenant not to sue, because of such a reservation.

In other jurisdictions the Courts have had such instruments before them and have held in some cases that it was a release and in some not.

The cases on each side are collected in *Divy* vs. *Connecticut Company*, 92 Atl. Rep., 883.

But in no case has any court undertaken, nor could it make, a new contract between the parties, but has endeavored to give effect to the intent of the parties, as that appears from the legal effect of the words used, and that method of construction should be applied to the instrument under consideration.

Now the parties have effected a settlement "pursuant to the express provisions of the statute and the statute is as follows:

Page 3781 Comp. Stat., section 15.

> "That in any case where several trustees, managers or directors of any insolvent banking or other corporation, now are or shall be liable to action at law or in equity for unlawfully making any dividend or dividing, withdrawing or reducing capital, or for any default, negligence or malfeasance in the discharge of their duties, and in any case where several sureties on any bond for the performance of any duty or employment now are or shall be liable as aforesaid for any default, negligence or malfeasance of their principal, the receiver or trustees of such person, corporation or officer as may be empowered to bring such action on such bond, may settle and compromise with, release and discharge any one or

> more of the parties so liable, and such settlement, compromise, release or discharge shall not affect or constitute any defense to any such action or right of action at law or in equity against the other parties so liable; but in such case the recovery against those not so settled with and discharged, or any of them, shall not exceed the proportion to which they or he would have been bound according to the rules of equity if no such settlement and discharge had been made."

It makes no difference whether this act applies to the Commissioner of Banking and Insurance or not, so far as the legal effect of the terms used is concerned. The parties have by their voluntary act adopted its provisions as the basis of their agreement and have bound themselves by its terms, or it is nugatory. It provides that the

> "officers * * * may settle and compromise with, release and discharge anyone or more of the parties so liable."

It is a release and discharge that the statute contemplates and such being its effect it, nevertheless, provides that it shall not constitute a defense by other parties so liable, but in case such other party is sued, the recovery cannot exceed the proportion of the liability which, according to the rules of equity, he would have been bound to pay if no such settlement had been made.

If this statutory settlement is a covenant not to sue, of what use was the proviso giving the person, having the claim, a right to sue the other joint-debtor. That right would exist in any case of a covenant not to sue. It had been so determined by the Supreme Court in 1838 in the Crane case and by this Court in the Bowne case in 1883, two years before the act in question was adopted.

The only effect of the act, if it was dealing with

covenants not to sue, was to limit the right of recovery against those not settled with to the proportion to which they would be held if no settlement had been made and if the Court adopts that construction, then the pleadings, proofs and parties must be such as to determine the amount for which each defendant in this suit would have been liable according to the rules of equity if no settlement had been made. This involves the determination of primary and secondary liability and the rights of contribution and indemnity, not only between these defendants but between them and those directors who were parties to the settlement.

But is it not obvious that the statute was not intended to have such an effect. The covenant not to sue originally gave the person who did not settle and who was later sued the right of recourse against those settled with. He suffered no wrong which the Legislature must remedy.

On the other hand the common law rule as to releases, left the person having the demand without remedy against the person not settled with. He could not absolutely release one without extinguishing the whole claim and it was to remedy this situation, so disadvantageous to those having claims such as these, that the act was passed.

The statute was intended to modify the common law rule as to releases and deals with releases and discharges wherein the claim is extinguished, but it has limited the extinguishment to the party who settles and gives the right still to recover from those who have not settled, but not to recover the balance of the claim. That would be a manifest injustice. It might result in the recovery from the party who had not settled of all the liability for which the party settling might be primarily liable, and without any act on his part and without any recourse to his co-debtor.

The right of recovery, reserved, is limited to that

amount, which in view of all the equities between the co-debtors themselves, the party sued would have to pay eventually.

That is the scope of the agreement pleaded. It was intended by the parties to it to be an absolute release and the Court cannot give it any other effect, nor put on the party released an obligation to account to his co-debtor when they have bargained for and paid for an absolute release. They are absolutely released by this instrument.

Now I have said that so far as the construction of the instrument goes, as between the parties to it, it does not make any difference whether the act applies to the commissioner or not, because the parties to it made it the basis of their bargain, nevertheless, insofar as it effects persons not parties to it, it makes a vast difference whether it applies to the case of the Commissioner of Banking and Insurance making a settlement. It is an absolute release in any case, or it is nugatory, but the right reserved arises out of the statute and not out of the bargain.

In the absence of the statute an absolute release extinguishes the debt. That has been the law from early times and no two parties can bargain away the legal rights of another. But the statute changes the law insofar as such a settlement is approved by the Court out of which the receiver or trustee (making the settlement) is appointed. See sec. 17, Comp. Stat., page 3781, P. L. 1885, page 219, sec. 3).

This is an act in derrogation of the common law. It must be strictly construed. (*Sinnickson* vs. *Johnsons*, 17 N. J. L., 144.) Its effect will not be extended by implication beyond its terms. (*Tinsman* vs. *Belvidere, etc., R. Co.*, 26 N. J. L., 148; 166-167.)

The statute, therefore, has no effect on the reservation and the release has extinguished the claim and it cannot now be made the basis of a cause of action against those who have not settled.

To recapitulate these points.

(1) The instrument cannot be construed as a covenant not to sue because that was not the bargain made by the parties.

(2) It absolutely releases the parties who have settled. That was the bargain and such bargain was within the power of the commissioner, (see sec. 22, chap. 171, Laws 1913, page 282), and they consequently extinguished the claim.

(3) The statute of 1885 does not have any effect because it does not apply to such a settlement, nor save the right of the commissioner to sue these appellants, because by its terms it applies only to settlements made with the approval of the Court out of which the officer was appointed, and the commissioner was not appointed by any Court.

The bill, therefore, should have been stricken out by the Court below.

POINT TWO.

THE PROPER CONSTRUCTION OF THE AGREEMENT IS OF VITAL IMPORTANCE TO THE APPELLANTS AT THIS STAGE OF THE PROCEEDINGS, BECAUSE ON THAT CONSTRUCTION DEPENDS THE BRINGING IN OR NOT OF THE DIRECTORS WHO HAVE SETTLED.

If this instrument of settlement is a covenant not to sue, they should be brought in, so that the controversy may be finally settled.

If the instrument is an absolute release, but unaffected by the statute of 1885, then they cannot be brought in and the action must cease against the appellants or they will by the act of other parties in settling be deprived of their rights of recourse to their co-debtors.

If the statute is broad enough to be applied to this settlement made by the Commissioner of Banking and Insurance, then they cannot be brought in but the Court must determine the amount for which these appellants are each liable as if the directors were all in and the primary liabilities and rights of indemnity and contribution were to be determined as between all the directors who were liable, and such is the prayer of the bill, in effect.

The right of contribution or indemnification or both exists in favor of the one forced to pay, against his co-tort-feasors, where the party claiming contribution or indemnity has not been guilty of any fault except technically or constructively (see *Ocean Steam Nav. Co.* vs. *Companies, etc.* (N. Y.) 31 N. E., 987, *Churchill* vs. *Holt,* 127 Mass., 165, as where one of two masters is compelled to pay for the negligence of a servant of both, because he has removed a burden common to both, or where both parties have been in fault but not in the same fault toward the party injured, and the party from whom indemnity is claimed was the primary and efficient cause of the injury.

An illustration is found in the case of *Necker* vs. *Wheeler,* 118 Mass., 295, which presents a close ananolgy to our own case. There the officers of a corporation neglected certain statutory duties and all consequently became liable for debts of the corporation, and it was there held that the general rule *against* contribution did not apply (see also 38 Cyc., 493, 22 Cyc., 99, 10 Cyc., 897).

The principle of primary and secondary liability is recognized in our state in cases involving the identical grounds for liability alleged against the defendant here. In the case of *Williams* vs. *McKay,* 46 N. J. Eq. (39), this Court said, on final hearing "Where a loss has resulted from dishonesty, disregard of the charter's requirements, or culpable negligence, all of the defendants who were chargeable with such faults

must be held alike responsible, so far as the receiver is concerned, without reference to the degree of dereliction, but as between themselves there may be grades of liability, according to the degree of culpability," and quoted in Lewin on Trusts, 909, as follows:

> "Though as respects the remedy of the cestuique trust, each trustee is individually responsible for the whole amount of the loss, whether he was principal in the breach of trust or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom as the recipient of the money or otherwise, it ought in equity to fall, or if he be dead on his estate."

The Chancellor then outlines five grades of culpability. This text was cited and approved in *Campbell* vs. *Watson,* 62 Eq. (447).

The failure to bring in the other directors may not, under the rules be sufficient to require the court to strike out the bill of complaint, but a construction of the instrument evidencing the settlement is essential so that if they are not released they may be brought in and Point II is intended to show the necessity of having the nature of the instrument settled by this Court rather than as an argument for the dismissal of the bill.

Respectfully submitted,

ABRAM W. CORNISH,

Of Counsel with Appellant, William T. Benjamin.

New Jersey Court of Errors and Appeals.

Between

GEORGE M. LA MONTE, as Commissioner of Banking and Insurance of the State of New Jersey, suing in behalf of and in the name of ROSEVILLE TRUST COMPANY,

Respondent,

AND

CHARLES C. LURICH, GEORGE E. KRUG and WILLIAM T. BENJAMIN,

Appellants.

BRIEF OF RESPONDENT.

Three of the defendants moved in the Court of Chancery for an order striking out the bill of complaint as a whole, upon the ground that, because certain of their co-directors have been released, the claim against the moving parties had also been released; upon the further ground that the act under which the Commissioner was bringing suit was unconstitutional, and upon the ground that the directors with whom settlement had been made by the complainant were necessary parties. The motion also sought to have many of the paragraphs of the bill

struck out or amended. The Vice-Chancellor, in a carefully considered opinion, denied the motions of these defendants. Upon the appeal to this Court these defendants have abandoned all efforts to have portions of the bill stricken out or amended, and have also abandoned the effort to have the bill stricken out as a whole because of the claim that the act under which the complainant has proceeded is unconstitutional. The appellants are before this Court on only two questions: (*a*) whether the settlement with certain of the directors has operated to release the present defendants; and (*b*) whether, if this be not so, the directors with whom settlement has been made are necessary parties.

The bill of complaint is too extensive to attempt to summarize its provisions in this brief. The bill is in its essence one demanding an accounting against directors of a failed trust company which had been in business slightly over five years at the time of the failure, and sets up that the amount of the losses sustained by the institution, by reason of the gross neglect of the directors, was upwards of $640,000. There are annexed to the bill of complaint various exhibits showing in detail and in the form of documents facts which abundantly support the allegations of the bill. The appellants have deemed it unnecessary to print for the information of this Court any of the said exhibits, except the brief Exhibit J, although counsel for the respondent has orally and in writing insisted that such exhibits are necessary in order that from the entire bill of complaint this Court may properly determine the quality of the acts charged.

POINT I.

The settlement with certain directors as alleged in the bill did not relieve any of the others, because (*a*) there is no right of contribution between directors guilty of the acts and neglect charged in the bill; (*b*) because complainant has received only partial satisfaction and has reserved all rights against the other defendants; and (*c*) because the liability of the defendants is several as well as joint.

(*a*) There is no right of contribution between directors guilty of the acts and neglect charged in the bill.

Admittedly, appellants' sole basis for their contention that they have been released by the settlement with other directors is that they have been deprived of the right and opportunity to recover over against the directors settled with, in the event that it is desirable for them to seek recovery from such directors. If there be no contribution possible or permissible between directors under the circumstances set forth in this case, then the release, even if absolute and unqualified, and without any reservation against directors with whom settlement has not been made, has not damaged the defendants and has not operated to relieve them from liability. The present case affords a complete example of one in which contribution between directors or trustees is not allowed.

Cook on Corporations, 7th ed., Vol. 3, Section 749, states the rule as follows:

> "No contribution can be enforced between directors guilty of a breach of trust for which a part are held liable."

Morawetz on Private Corporations, 2nd ed., Vol. 2, § 911, discusses the question of contribution between co directors, and reaches the following conclusion:

> "Directors can recover compensation for the amounts which they have been compelled to pay to the company's creditors only if their liability was intended to be similar to that of sureties of the corporation, and it is only where their liability is of this character that they can recover contribution from their co-directors. Directors who have been charged with liability for a joint wrong cannot as a rule recover contribution from their co-wrongdoers."

This entire subject is very carefully considered in the case of *Wilkinson* v. *Dodd*, 40 N. J. Eq., 123, affirmed 41 N. J. Eq., 566, in which Pitney, *V. C.*, says, after an examination and citation of the authorities bearing upon the point:

> "In cases of this kind where the liability arises from the wrongful acts of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the acts complained of * * *" (p. 132).

To precisely the same effect see *Stockton, Recr.*, v. *Anderson*, 40 N. J. Eq. 486.

Later, in the course of the *Wilkinson* v. *Dodd* opinion, it is said:

> "Again, it is claimed that this agreement shows a release of Fiske & Hatch by the receiver which takes away the right to compel contribution by the managers in case they should be obliged to pay. If I am correct in my conclusions that the managers were wantonly and wilfully guilty of an illegal and fraudulent act the doctrine of contribution cannot be invoked, and consequently the agreement to settle and adjust all differences works

> no injury to anyone. I think in such cases there is no contribution (citing authorities). But again it is said that the agreement, operating as a release, took away the right of the managers to bring an action against Fiske & Hatch; this, it will be perceived, is but a statement in a different form of the doctrine of contribution last considered."

The conclusion of Vice-Chancellor Pitney that the acts of the managers were "illegal and fraudulent" is shown to be based upon conduct which is not one particle less deserving of condemnation than that charged in the bill of complaint at bar against these defendants. If in *Wilkinson* v. *Dodd* the Court could characterize the acts of negligence as "wrongful" and as "illegal and fraudulent" the same characterization is abundantly supported by the facts set out in the bill in the instant case.

See also *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 506, in which it is said, at page 508,

> "But besides, equity does not recognize any right of contribution between joint tort-feasors, the reason being that such contribution must be sought, if at all, by action brought by one against the other, and the actor therein is barred by the maxim *in pari delicto.*"

To like effect is *Newman* v. *Fowler*, 37 N. J. L. 89.

It will be noted that counsel for the appellants have been unable, after diligent search, to find in this state a single instance of a trustee being released by reason of settling with a co-trustee and releasing him. On the other hand we have the positive, unequivocal language of the cases above referred to, which have not been in the slightest degree distinguished, altered or reversed, and stand to-day as the settled rule in New Jersey. For this reason it is unnecessary to cite to the court decisions from other States which show that release of a co-trustee or director does not under circum-

stances similar to those alleged in the bill of complaint operate to release or relieve the remaining trustees or directors.

(*b*) Complainant has received only partial satisfaction and has reserved all rights against the other defendants.

The complainant, by settlement with certain of the directors, did not receive satisfaction of the claim, and therefore such settlement cannot operate to relieve or release the remaining defendants. It appears from the bill that the loss is upwards of $640,000, and that the amounts which have been received in settlement aggregate not over $140,000.

> "* * * the payment of a less sum in satisfaction of a larger is *no* satisfaction."
>
> *Roberts* v. *Banse*, 78 N. J. L. 57, 58.

The bill describes the payments as having been received in *partial* restitution and in settlement of the complainant's claims against the persons named severally and without prejudice to the rights against the other directors. The Court will bear in mind the distinction which exists between a release of such a claim as is here presented and the release of one or two persons jointly answerable for a tort such as that arising out of personal injury, where the amount is unliquidated and not capable of being ascertained except by the subsequent verdict of the jury. In such cases the courts have held that the injured party, having accepted from one a payment, is deemed to have received it in satisfaction of his claim. What other method of determining the amount of such a plaintiff's claim could be employed? But in the case at bar there are specific losses of money chargeable against all of these directors. The amount is a large one. Out of a total of twenty-one directors the complainant has been able to obtain satisfactory partial restitution from only nine, the amount received being approximately 25 per cent. of the total loss. Can there be

any reasonable claim made under these circumstances that the partial payment which has been received has been in fact a satisfaction of complainant's claim?

The facts in *Murphy* v. *Penniman*, 105 Md. 452, 66 Atl. 282, are singularly like the facts at bar. A bank had become insolvent through the directors' negligence in permitting improper loans, and in not discovering and preventing embezzlements by the treasurer, and through their non-feasance in other directions. With the approval of the Court, the bank's receiver had settled with and released five of the directors. The others claimed that they also were thereby discharged. But the Court of Appeals said (p. 473):

> "This is not like a case of several joint *tort-feasors* being sued for an injury done by them, such as a suit for assault and battery, slander, injury to the person, etc. In such case * * * it would oftentimes be difficult * * * to show * * * that the settlement did not include all the damages sustained. *But in a case such as this the losses, if any, can be accurately ascertained.*" (Italics ours.)

See also

Gilbert v. *Timms*, 28 Ohio Cir. 107.

A further distinction which will hereafter be referred to more at length is that here the liability is several as well as joint. Both these distinguishing factors are together considered by one of the text-writers as follows:

> "It follows from the nature of the liability being several as well as joint that until the plaintiffs have received twenty shillings on the pound they are entitled to claim the whole debt from any one trustee in respect of his several liability, notwithstanding they have accepted a sum from another trustee in satisfaction of *his* liability".

Underhill on Trusts and Trustees (7th ed.), p. 469.

Mr. Underhill has adopted the above language almost verbatim from the opinion in *Edwards* v. *Hood-Barrs* (1905), 1 Ch. 20, at page 23, where the Court also says that it matters not whether the trustee who made a payment for a release of his liability has done so "*in* or *towards* satisfaction of that liability".

See also

City v. *Moffitt*, 12 Ind. App. 250;
Sloan v. *Herrick*, 49 Vt. 327;
Louisville & E. M. Co. v. *Barnes*, 64 L. R. A. 574;
Lovejoy v. *Murray*, 70 U. S. 1;
Miller v. *Fenton*, 11 Paige (N. Y.) 18.

In the case of *Dwy* v. *Connecticut Co.*, 92 Atl. 883, the Supreme Court of Errors of Connecticut has recently considered fully, and with elaborate analysis of all the important authorities, the effect that is to be given to a release given to a joint tort-feasor with reservation of rights against the co-wrongdoers. We may be perhaps pardoned for rather extended quotation, which we offer in lieu of our own observations.

There plaintiff had been employed by Fred. T. Ley & Co. in work upon the premises of the defendant Connecticut Company. He had executed and delivered to Ley & Co. an instrument under seal in the form of a technical release, except that it contained at the end the following words: "I hereby reserving my right to sue any other party or parties."

Prentice, *C. J.*, said (p. 884):

> "It is an ancient and familiar legal proposition that a release or discharge of one or more joint tort-feasors given for a consideration is a release of all. * * * The reason most commonly assigned, especially in modern cases, and that which is most satisfactory in that it does not rest upon pure techniques but upon broad principles of justice and equity, is that the releasor is entitled to one satisfaction and one only, and that an unqualified release or dis-

charge implies the receipt of such satisfaction. (Citing cases.) * * * We have adopted this last as the underlying reason for our rule, which, it should be borne in mind, expressly extends its statement to include all cases where satisfaction has been received. * * * (p. 885). The plaintiff's sole claim rests upon the writings as written, and is to the effect that, when interpreted, as they should be, they are not absolute, but qualified or limited releases, and that therefore they do not come within our rule making them a bar to an action against the present defendants.

"Our question is thus narrowed to one as to the operation of the accepted formula where the release given is not absolute in its terms, but embodies in it a reservation of a right to pursue others than the releasee * * * (p. 886). They (the courts) have adopted as the true rule of construction the reasonable one that the entire writing should be examined to discover the intent and meaning of the parties, and have held that, when that intent was thus discovered, effect should be given to it. They have held that when it appeared that the intent was not to give an absolute release, but only a qualified one, reserving the right to proceed to obtain full satisfaction by a resort to other parties, the effect of an absolute release should not be given to the writing. Applying these principles to situations where the instrument used words of release, but accompanied them with an express reservation of the right to pursue others than the releasee, they have held that there was no presumption of receipt of full satisfaction, but rather the contrary, that the intent not to cut off the right if action against others was apparent, and that a reasonable construction of the instrument required that it be regarded as one whose purpose was to render the releasee immune from further claim, and that therefore it be treated as a covenant not to sue, or as having the legal effect of such covenant. *Matheson* v. *O'Kane*, 211 Mass. 91, 95, 97 N. E. 638, 39, L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267; *Edens* v. *Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *Musolf* v. *Duluth*

Edison Elec. Co., 108 Minn. 369, 375, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *McAllester* v. *Sprague*, 34 Me. 296, 298; *Carey* v. *Bilby*, 129 Fed. 203, 206, 63 C. C. A. 361 * * * (p. 888). Turning now to the other side of the question, we find several tort cases, and carefully reasoned ones, presenting substantially the same conditions as here; that is, sealed releases containing express reservations of the right to pursue other parties, wherein it has been held that the terms of the so-called release were examinable to discover the intent of the parties, and to give effect to that intent. Specifically it was held in these cases that the reservation indicated that the release was not given in return for full satisfaction, and that the intent of the parties to be gathered therefrom was to give a qualified one, which, while rendering the releasee exempt from further demand, would permit the pursuit of others to obtain the satisfaction not already received, and that effect would be given to this intent by construing the so-called release as a covenant not to sue, or as having the same legal effect as such a covenant * * * (p. 889). It has been suggested as an objection to the conclusion we have reached that the result of it is to permit the injured party to obtain more than full satisfaction. *McBride* v. *Scott*, 132 Mich. 176, 182; 93 N. W. 243; 67 L. R. A., 445; 102 Am. St. Rep. 416; 1 Ann. Cas. 61; *Chapin* v. *Railroad Co.*, 18 Ill. App. 47, 50. Under our theory of the law and the rule as we interpret it, this result is impossible of attainment. Full satisfaction is in itself a bar to further recovery. *Ayer* v. *Ashmead*, 31 Conn. 447, 452, 83 Ann. Dec. 154. When the right of action is once satisfied it ceases to exist. If part satisfaction has already been obtained, further recovery can only be had of a sufficient sum to accomplish satisfaction. Anything received on account of the injury inures to the benefit of all, and operates as payment *pro tanto*. This is the familiar rule where consideration has been received in return for covenants not to sue or in part payment, and it is the logical and reasonable one. *Snow* v. *Chandler*, 10 N. H. 92, 95, 34 Ann. Dec. 140; *Chamberlain* v. *Murphy*, 41 Vt. 110,

119; *Bloss* v. *Plymale*, 3 W. Va. 393, 409; 100 Am. Dec. 752; *Ellis* v. *Esson*, 50 Wisc. 138, 154, 6 N. W. 518, 36 Am. Rep. 830; *Musolf* v. *Duluth, etc., R. R. Co.*, 108 Min. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451. * * * Notwithstanding these instruments, the plaintiff remains free to prosecute his action against these defendants for the recovery of such sum as, together with that already received by him from the Ley Company, will afford him full satisfaction, and no more, for his injuries."

In *Line & Nelson* v. *Nelson* v. *Smalley*, 38 N. J. Law, 358, the Court, after citing several cases, said:

"An examination of these cases will show a marked tendency to construe covenants as agreements not to sue, so as not to frustrate the intentions of the parties by giving these contracts a wider effect than was intended by them. * * * Courts will not so construe an agreement as to give it the effect to bar a claim when such a result is inconsistent with the declared intent of the parties."

See also

Robertson v. *Trammell*, 37 Tex. Civil Appeal, 53.

Miller v. *Beck*, 108 Iowa, 575, at p. 582.

McCrillis v. *Hawes*, 38 Me. 566.

Bohn v. *Crosby*, 49 N. Y. 183.

Cooley on Torts (3rd ed.) Vol. 1, pp. 234, 235, says:

"It is to be observed where the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceedings assume, but from the fact that the injured party has actually received satisfaction or what, in law, is deemed the equivalent."

(c) The liability of the defendants is several as well as joint.

This is an additional reason why the rule sought to be applied by the appellants is not applicable in

the case at bar. The complainant is entitled to obtain a judgment against each of the directors for the full amount of the loss, and could enforce the same against any one of the directors so answerable.

Stockton v. *Anderson* (*supra*);
Wilkinson v. *Dodd* (*supra*).

The Court said in *Stockton* v. *Anderson* (*supra*):

> "Notwithstanding the bill clearly shows a plot in which many were concerned and, if the defendant is liable, are equally so with him, yet he alone is made defendant, for which the bill is demurred to * * *. "Equity does not require the victim of a fraudulent conspiracy to subject himself to the expense, delay and embarrassment of bringing into court all the fraud-doers * * *. It is therefore not necessary to make all persons parties who may have more or less joined in the act complained of, nor would anyone derive any advantage from their being all made defendants, because, as the decree would be general against all found guilty of the charges, it might be executed against any of them."

> "Each trustee is in general liable for the whole loss when caused by the joint default of all the trustees, even although all may not have been equally blameworthy; and a decree against all may be enforced against one or more only."
>
> *Underhill on Trusts, etc.* (Amer. Ed.), p. 453; 7th Ed., p. 468.

As has been pointed out in several New Jersey cases, for instance, *Wilkinson* v. *Dodd* (cited above), the courts have reached the conclusion that gross negligence and willful violation of their duties as directors is equivalent in effect to an affirmative fraud. The language of the case just cited is therefore peculiarly appropriate.

As a matter of fact the New Jersey cases are uniform in holding that under circumstances similar to those in the case at bar each director is responsible

severally as well as jointly; but the courts, for the purpose of simplifying the administration of justice, and not because of any right of such defendants, do, upon the final hearing, apportion the responsibility for the losses among the persons then before the court in the proportion which is just and equitable in the light of the entire proof. The history of the cases upon this general subject in this State shows that the rights of the defendants will be amply protected and that they will be made to answer for only such portion of the losses as are justly and properly attributable to their own dereliction. We have, therefore, as a matter of practice in the courts of this State, all of the protection to which the defendants would have been entitled, even if no settlement had been made with other directors, and even if all the directors had been and are before the Court. The application of the appellants at this time for an apportionment of responsibility is premature and entirely without warrant. As was said by the Court of Errors and Appeals, in the case of *Williams* v. *McKay*, 40 N. J. Eq. 189, Chief Justice Beasley speaking for the Court (pp. 203-204):

> "It is only after answers and evidence, and on the final hearing, that the connection of the several defendants with the transactions in question, and the measure of the responsibility of each, can be ascertained and established."

One of the most recent expressions on the subject in this state is found in *Windmuller* v. *Distributing Co.*, 83 N. J. Eq. 6, where it is held "that each trustee is *severally* liable for a loss resulting from a joint breach of trust" and that even in cases where contribution is proper (unlike the case at bar) it is not necessary to join all the trustees as parties. It is a matter of convenience merely—not of necessity.

POINT II.

Even if the directors with whom settlement was made had been absolutely released without reservation of rights against the other directors, the cause of action would have continued unimpaired against the remaining directors.

As is well known to the Court, many jurisdictions have by express statute provided that a release of one joint debtor may be made without releasing the other. New Jersey passed legislation to this effect in 1884 (P. L. 1884, pp. 298 to 300). As we have pointed out in the early part of this brief, the rule that the release of one joint *tort feasor* releases another, has in any event no application to this case. But even if it had, such release would not affect or impair the right of action against the other directors, because of the provisions of Section 15 of the Act known as "Obligations and Joint Debtors" found at page 3781 of the compiled statutes (P. L. 1885, p. 219). It is plain from an examination of the statute, including the heading and title, that the object was by a remedial statute to relieve parties of any doubts or uncertainties with regard to their rights respecting the making of compromise settlements. For instance, it permits the settlement and compromise with one of several sureties on a bond, all of whom except for the Act, would have been released by any release or compromise with one of the said sureties. While the scope of the statute is intended to be broad, its language is rather simple and informal. Certainly the statute clearly applies and authorizes a settlement such as has been made by the complainant herein. The objection of counsel for the appellants Lurich and

Krug, that the statute is limited to "cases where a bond has been given to answer for the malfeasance or misfeasance of an officer of a banking or other corporation," is not worthy of serious consideration. The meagre portion of the statute printed under this observation in his brief on page 17 is, of course, insufficient to afford any real idea of the meaning of the statute.

The objection raised by counsel for the appellant Benjamin, that the statute is not applicable because it is intended to be limited to a settlement by a Court-appointed receiver, and because the Commissioner was not appointed by any Court, is one which is more apparent than real. The word "receiver" of course applies to liquidating officers of administrative appointment as well as to those appointed by courts.

High on Receivers, §§ 39, 343.
Carey v. *Giles*, 9 Ga. 253, 256.
Jeffries v. *Bacastow*, 90 Kan. 495, 498.

It is admitted that in this proceeding the Commissioner is acting with all the powers of a receiver. Counsel for the appellant, Benjamin, in his brief before the Vice-Chancellor, upon his objection to the suit based upon the unconstitutionalty of the statute under which the Commissioner was acting, stated that "he (referring to the Commissioner) may collect debts and may upon the order of this Court sell or compound bad or doubtful debts * * * in fact do everything that a receiver duly appointed by this Court after notice and hearing and judicial determination of the jurisdictional facts might do".

We believe that the Court will have no difficulty in deciding that the provision in § 3 of said statute requiring the approval of the Court out of which the receiver or trustee was appointed before any such settlement is concluded, was intended to be merely regulatory of procedure, and does not affect or limit the substantial rights and privileges granted by the main statute.

However, we must conclude that the Legislature of New Jersey either deemed the statute applicable to releases to be made by the Commissioner of Banking, or considered that it was amending the said statute by implication to accomplish the same purpose when it adopted the amendatory legislation of 1913, under which the Commissioner of Banking is acting in liquidating the Roseville Trust Company (Chapter 171 of the Laws of 1913).

An examination of the statutes prior to 1913 will show that there were certain acts or conditions outlined in § 24 of the Trust Company Law (Laws of 1899, Chap. 174) which were the basis for the appointment of a receiver for a trust company. The amendment of 1913 removed nearly all of these provisions from § 24, and these are now contained in § 22 of the Act and constitute grounds for the Commissioner to take possession of, and, if necessary, liquidate the insolvent trust company. The Act of 1913 very plainly gives to the Commissioner of Banking all of the rights and powers which formerly were exercised by a receiver appointed by the Court of Chancery. It also requires the Commissioner of Banking and Insurance *to submit to the same restrictions* as the Receiver, so far as he is required first to obtain the approval of the Court of Chancery for all of his important acts. In particular he is obliged first to obtain the consent of the Court of Chancery before compounding any debts or liabilities. That very procedure was followed in connection with the settlements which have been made with certain of the directors herein. These settlements were expressly approved by the Court of Chancery prior to being consummated. Unless it be held that the Legislature intended that the Commissioner of Banking and Insurance should have the powers granted under the 1885 law referred to, to compromise and release claims against directors without releasing the others, the conclusion is necessary that the Legislature intended to give to the Commis-

sioner all of the powers and obligations exercised previously by a Receiver, except that it intended to deprive him of one of the most important aids in the proper administration of his trust, that of freely making proper settlements and compromises with those who might in some joint capacity be obligated with others to the insolvent institution.

Compromises are favored by the Courts. No one knows better than experienced members of a court how essential it is in the administration of the affairs of an insolvent institution that settlements be encouraged. The history of litigation concerning failed banking institutions in New Jersey abundantly shows that one of the important and necessary duties in connection with the administration and liquidation of such an institution may very probably be an action against directors for an accounting. Clearly the Legislature did not intend to hinder failed banking institutions and their injured depositors in the important right of proceeding against their derelict directors, by intentionally withholding from them one of the most essential parts of their equipment, namely, the right to make settlements with some without affecting claims against the others. Although such a statute was not needed as a matter of law because such a release would not affect the causes of actions against the other directors, as we have shown above, still it was needed as a *matter of business.* So long as there is enough doubt to permit of lawyers disputing a rule, so long is there disinclination to give releases on the part of those interested if by doing so they run the risk of being held to have released all of the others charged with liability.

This is the true explanation of the origin of the statute. Counsel for the appellants cite the passage of the Act as proof that the law as it existed at that time was as they claim it now to be; but such a conclusion is not by any means warranted. True, the statute provided for releases without prejudice in cases where clearly a release of one would have re-

leased others, such as joint obligors on a bond. But, while such a statute was in process of preparation, what was more natural than to settle by positive enactment what had perhaps given rise to discussion among attorneys at that time, but has since been established by authorities against the contention of the appellants, namely, that the release of one does not release the others.

The attitude which the Courts of this State will give towards its statutes is set forth in *Jersey Company* v. *Davidson*, 29 N. J. L. 415, in which the Court of Errors and Appeals says:

> "When the intention is doubtful the Court will interpret the law consonant with equity and what is most convenient" (citing cases).

In *McGregor* v. *Home Insurance Co. of Newark*, 33 N. J. Eq., at page 187, the Court said:

> "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." (Citing *Oakes* v. *National Bank*, 100 U. S. 239.)

The proper construction of a statute is such construction "as may best answer the intention which the makers had in view."

Thompson v. *Egbert*, 17 N. J. L. 459.

The literal import of its language will be controlled by the objects which it was intended to accomplish.

State v. *Clark*, 29 N. J. L. 96.

POINT III.

The settlement made with certain of the directors as alleged in the bill amounted in law not to a release, but to a covenant not to sue.

The bill of complaint alleges in paragraph 32, page 67, that certain directors (naming them) have

made partial restitution of the losses, which were accepted from them respectively in settlement of the complainant's claims against them severally, and sets up specifically that this was "without prejudice to the causes of action against the other directors as herein alleged".

Counsel for the appellants admit upon their brief that the question is a new one in this jurisdiction. This means that they have been unable to find any case holding that a reservation of right against persons jointly liable is not sufficient to constitute the instrument a covenant not to sue as distinguished from an absolute release.

We respectfully submit, however, that this Court in the case of *Bowne* v. *Mount Holly National Bank*, 16 Vroom, 360, has already decided the point in favor of the respondents' position. The law in other jurisdictions is almost unanimous in favor of the proposition that any such reservation reserves the rights against the other defendants and constitutes the instrument a covenant not to sue.

> *Dwy* v. *Conn. Co.*, 92 Atl. 883 (*supra*), collating the authorities.

The appellants must establish affirmatively two propositions: (1) That under all the circumstances an absolute release of certain of the directors released all of the other directors, and (2) that the instrument which has been given in this particular case was such an instrument. We believe that we have sufficiently shown that the law is otherwise than that contended for by the appellants and that therefore they have not sustained the burden under (1), and with reference to (2), that they failed to cite a single authority binding upon this Court for the contention that a settlement such as is described in the bill of complaint, made with reservations against the other parties, etc., is to be regarded as such an absolute release as they contend for.

Certainly there is no sanctity about a release any more than about any other formal instrument, and

when it is alleged as in this bill of complaint that such settlement with the directors was made with reservations of rights against the other directors, that allegation is not to be dismissed, nor to be disregarded, but it is to be presumed that the parties intended that the transaction, whatever its apparent form, should have the effect, and only the effect, of preserving all rights against the other defendants.

The contentions of the appellants are not such as to appeal to a court of equity. The bill of complaint charges them with a course of conduct negligent in the extreme. Their conduct has resulted in a very serious loss of funds of the depositors entrusted to their care. As men of some standing in their community they have by the lure of their name induced the public to entrust to them their savings, with the result that over one-half of the amount entrusted to them has been lost. This situation having been discovered and the bank having been closed, certain of the directors have come forward and paid substantial sums of money in partial restitution of the losses. This money has, to the extent of the amount received, aided in restoring to the depositors something of their losses. The Court, with its general business experience and knowledge, knows that a payment made at an early date may frequently be of the greatest value, and such payments as were received from the directors referred to in the bill may fairly be presumed to have had that result. These defendants, however, have paid nothing; they have resisted and are resisting the attempt to hold them responsible for the loss of the funds entrusted to their care. They are here in this court asking that they be turned from the court free of liability, not because they are not guilty, not because they have discharged their liability—but because certain other directors did not have to be driven to judgment, but voluntarily came forward and paid over to the Commissioner a substantial sum of money for the benefit

of the depositors. Certainly in order to entitle the Court to hear their contention with any patience, the appellants must present to the Court the most overwhelming authorities, requiring and compelling the Court to award to them their strict legal rights. But such is not the case. The appellants have produced no authorities whatever calling upon this Court to hold them harmless. Counsel for one of the defendants insists that they are entitled to be discharged because, in order to be logical, the Court must reach that conclusion.

In conclusion counsel for the complainant desire to emphasize that the settled policy of the State of New Jersey as found in its reported decisions is that negligent directors of a failed banking institution shall be compelled to account for its losses. One pretext after another has, in the various cases which have come up in the Courts of this State, been urged upon the Courts, some of them with the greatest ingenuity by conspicuous counsel of great learning, and yet the result has been invariably and inflexibly to hold such directors strictly to an accounting. Many of the points which have been in the earlier cases relied on to relieve directors have been matters of much more serious difficulty to the complainant than any point involved on this appeal, and yet the uniform holding of the Court has been such that none of such directors have been permitted to escape from the accounting desired. In State of New Jersey there is not that liability of stockholders in banking institutions to depositors which is a feature of the banking laws of the State of New York and other states, and of the national banking law; but it is the proud boast of bankers in New Jersey, and properly so in the light of the decisions of the Court upon this subject, that the State of New Jersey has adopted a fixed policy of accountability on the part of directors, and that a statute creating a cause of action against stockholders perhaps unable to respond in damages, is no more effective than such a judicial policy.

POINT IV.

The order appealed from should be in all respects affirmed.

Respectfully submitted,

ROGER HINDS,
Solicitor of and of Counsel with
Respondent.

EDWARD F. CLARK (of the New York Bar),
Of Counsel.

New Jersey Court of Errors and Appeals

Between GEORGE M. LA MONTE, as Commissioner of Banking and Insurance of the State of New Jersey, suing in behalf of and in the name of Roseville Trust Company, Respondent, and CHARLES C. LURICH, GEORGE E. KRUG and WILLIAM T. BENJAMIN, Appellants.	On Bill. On Appeal from the Court of Chancery.

BRIEF OF APPELLANTS, GEORGE E. KRUG AND CHARLES C. LURICH

This involves an appeal from so much of an order of the Court of Chancery as denies the motion of the appellants to strike out the bill of complaint; which motion was urged on the ground—broadly stated—that the appellants, if liable at all by reason of any of the matters and things charged in the bill of complaint, are liable as *joint actors* with certain other parties named in the bill of complaint, who,

as the bill of complaint discloses, have been released of liability in the premises, and against whom no relief is therefore prayed and who have not been brought in as parties to the suit.

This brief is intended to supplement the able brief prepared by Mr. Abram H. Cornish, filed on this appeal on behalf of the appellant, William T. Benjamin, and we take the liberty to suggest to the Court that a perusal of the brief of Mr. Cornish first, might be advantageous—in view of the fact that this brief was prepared with that of Mr. Cornish's in mind.

The bill of complaint charges the appellants and all the directors of the Roseville Trust Company, (whose failure about two years ago created such a sensation), with gross negligence in the performance of their duties; and attributes a loss of about one half a million dollars to such directors; in the thirty-second paragraph of the bill of complaint occurs this phraseology:

> "That William P. Odell, William Fairlie, John S. Bell, Fred Kilgus, William J. Banister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton, certain of said directors, have made partial restitution of said losses, which your orator has accepted from them respectively in settlement of his claims against them severally in behalf of said Roseville Trust Company, pursuant to an agreement duly made with said directors on December 10, 1913, and pursuant to an order of this Court made December 30, 1913, and pursuant to the express provisions of statute, but without prejudice to the causes of action against the other directors as herein alleged."

The appellants moved the Court below to strike out the bill of complaint on the ground that the just quoted recital in the bill of complaint disclosed that *the directors who had settled had been released by the complainant, and that the appellants being jointly liable with the parties released had also been discharged, by operation of law,* on the theory that the release of one or more of several or many joint tort feasors released all.

This contention was made despite the fact that the quoted portion of the bill alleges that the settlements with discharged directors were made "without prejudice to the causes of action against the other directors as herein alleged"; the contention under this head being, that such reservation under settled rules of law was null and void; and generally inoperative, because upon an agreement between A and B, A can not contract away the legal result of that contract as far as the rights of a third person are concerned.

For example: Partners by a partnership agreement can limit their liability *inter sese* but such limitation, though expressed in the most formal manner, can not at common law affect the rights of creditors of the partnership or other third parties.

The learned Vice Chancellor whose opinion is the foundation of the order dismissing the motion to strike out the bill, held that the decision of our Court of Errors in *Bowne vs. Mount Holly,* 45 N. J. L., 360, establishes the law of this state to be that where there is a release under seal, with reservation of right against other parties jointly and severally liable, the release does not exonerate those against whom the reservation runs.

We do not believe that the decision of this Court in *Bowne vs. Mount Holly,* is to be so interpreted;

we also contend that this Court upon examination of the principles applicable should declare the law to be that in case of a release of one or more joint tort feasors with a reservation of right against the others jointly liable, the reservation is inoperative and all are discharged.

Had the Court below not placed itself upon the grounds indicated and had the Court instead stated that the bill of complaint did not disclose sufficient facts to enable a decision of the mooted question, we would not have prosecuted this appeal; but unless we challenge the decision of the Court below, by this appeal, such decision will stare us in the face as *res adjudicata* during the further progress of the suit.

At this point we desire to call the attention of this Court, as we called the attention of the Court below, to the fact that Rule 32 of the Chancery Act (1915) permitted the Court to order a more specific and detailed statement of the written agreement by which the settlements aforesaid were effected, in order to insure a full satisfactory and complete determination of the issue of law raised by the motion, upon full disclosure of all the facts.

Rule 32 reads as follows:

> "The Court may, in its discretion, order further and better particulars to be given of any matter stated in any pleading, or may order a bill of particulars to be given, in any case in which it may be justly required."

However, the Court below having set forth what it considers to be the law of the case, it would seem highly desirable that this Court by its determination should either affirm that the de-

termination of the Court below is correct or restate the law in accordance with its own conclusion. The question of law is fundamental and should be determined as early as possible in this cause by our Court of last resort.

In coming to its conclusion, the Court below undoubtedly was moved by the fact that in the complainant's brief is contained an admission that the statute referred to in the thirty-second paragraph of the bill of complaint, as the statute pursuant to whose express permission the settlements were made, is a statute which deals with releases of such character that, but for a saving clause in such statute, such releases would extinguish the liability of the parties not released; such statute has been quoted at the bottom of page 5 and at the top of page 6 of Mr. Cornish's brief.

We shall therefore press two points upon our argument:

First, that the bill of complaint discloses that releases were given to certain of the parties involved.

Second, that the effect of such releases is to discharge the appellants.

POINT ONE

The Bill of Complaint discloses that the directors, William P. Odell, William Fairlie and others, were released of and from all liability with respect to acts for which they were jointly liable with these appellants.

We have already quoted paragraph thirty-two of the bill of complaint above; the allegations therein disclose that there was a *settlement* made with the directors specified, with respect to all

claims against them severally, upon payment of what is alleged to involve a partial restitution of losses suffered by the bank, through the joint acts of these appellants and of said directors with whom settlement was made; we understand the rule to be that upon demurrer (and our motion is equivalent to a demurrer), all legitimate inferences are to be drawn against the pleading demurred to; the allegations of the complainant make patent that he took a smaller sum than he alleges in his bill of complaint was due from the parties released; and that he effectively contracted in writing that such sum settle his claims against such parties severally; in short, that he took what he alleges to be a partial restitution in full discharge of his claim, as far as it affected the individuals involved, *who are charged to be liable for the whole loss,* and that such discharge was effected by means of a contract.

The only contract which will be effective to accomplish such discharge is a release.

It may occur to the Court that the complainant was initially under no obligation to show in his bill of complaint any facts whatsoever with regard to the settlement and release of certain of the directors of the Trust Company, but might have omitted altogether all reference to such release and settlements; that the complainant might have so framed his pleadings, is unquestionable; but having once touched upon the matter, and shown facts which exonerated certain of the possible defendants, it became complainant's duty to set forth the matter fully and with precision; in this respect the case is somewhat similar to *Colgate vs. Malvern Land Co.* (not reported) in which Vice Chancellor Emery sustained a demurrer filed under the following circumstances: the complainant

brought her bill to foreclose a mortgage which covered various tracts; in her bill of complaint, she alleged that certain portions of the mortgaged premises had been released from the lien of the mortgage *without specifying what tracts were so released;* the demurrer was founded upon the circumstance that the bill did not disclose what tracts were released and that it might well be that the tract which the demurrant held was involved and so was not subject to sale etc., in accordance with the relief apparently prayed for; the learned Vice Chancellor pointed out that for all the bill showed, it might be possible that the complainant was entitled to no relief as against the demurrant and so sustained the demurrer.

In the case *sub judice* it may well be that settlement with and releases given to certain directors may release all; it may also be true that the parties released or some of them may be *primarily* liable with respect to certain losses, and it is important for the appellants to know whether the exonerated directors can be brought in as parties to the bill or not; if fully and completely released of all liability, we have one state of facts; if not, we may have another state of facts.

If fully and absolutely released by the complainant the exonerated directors are released for all purposes and can probably under no circumstances be made parties to the bill, even if they are primarily liable and the appellants only secondarily liable. The bill fails to make them parties, *and explicitly seeks to justify their absence by an explanation which points to their absolute discharge from all liability.*

Bearing the foregoing considerations in mind is it not fair to say that the complainant is in no position to deny that the agreements into which he

entered with the released directors effectively released and discharged them of all liability in the premises, so they can not now upon any theory be made parties to the suit; in short, technically speaking, they were released; and that therefore what we have to deal with in this case is a technical release.

If our suggestions are not well founded, then the learned Vice Chancellor, we submit, should not have disposed of the matter as if technical releases were involved, but should have availed himself of the practice outlined in Rule 32 of the new Chancery Act.

The complainant knows the facts; it was he who gave the releases; they are certainly better known to him than to these appellants. Having chosen to exculpate certain parties, and to explain why he has not made them parties to the suit, should he not explain so fully that we may be assured that his act of exculpation has not discharged us? And if the complainant so fails to explain, should not all inferences run against him and his concealment?

POINT TWO

A release given to one of several tort feasors with reservation of right of action against the others, nevertheless operates to discharge the others and the reservation is void.

This question, we believe, has never been decided in this state and it will be necessary, we presume, in this Court to deal with the matter on principle, in the light of adjudications in other jurisdictions. *McBride vs. Scott,* 132 Mich., 176, 178; 93 N. W., 243; 61 L. R. A., is absolutely in point.

We will assume that this Court will not hesitate to inflexibly apply the rules of logic in its task of determining what is the law, no matter what the result may be; in certain jurisdictions the Courts have come to a conclusion unfavorable to our contention; but by what appears to us as an abandonment of logic—as Judge Wheeler of Connecticut in criticising the Supreme Court of his own state pointed out in a case on the very topic involved, (*Duy vs. Connecticut,* 92 Atl. at 890 bottom).

Indeed, as we shall endeavor to point out particularly, the conclusion of this Court must be based largely upon the *choice* which this Court may make, between inflexibly applying the fixed principles applicable to the topic, on the one hand, and on the other hand, refusing to adopt such inflexible course and submitting to the desire to reach a result more conformable to what the Courts of certain jurisdictions have deemed "ought to be."

The conflict between desire and reason is well put by Judge Wheeler in the case just cited, when he says:

> "I concur in the result, but not in the reasoning of the opinion. It has long been the settled principle of our law that the release for a consideration of one of several joint tort feasors is a release of all. This rule works injustice. Courts struggle to take a given case out of its grasp, as the majority opinion vividly portrays."

The Courts in those jurisdictions which have shown weakness in applying a severe logic to the question under discussion, have invariably reached a conclusion at variance with that arrived at in sterner jurisdictions, by determining that a

release with a reservation of right against strangers to the release should be construed as a "covenant not to sue;" but in *Bowne vs. Mount Holly,* (45 N. J. L., 362), our Court of Errors decided to recognize the distinction between a covenant not to sue and a release; in that case an attempt was made to convert a release into a covenant not to sue, but the Chancellor speaking for the Court of Errors said:

> "The instrument is a covenant not to sue; it is not a release."

The distinction between a covenant not to sue and a release is very ancient; we quote the following:

> "With respect to a covenant not to sue, it is observable, that the principle upon which a covenant of this kind is held to operate as a release, is to avoid circuity of action; but it goes no further. Therefore if two be jointly and severally bound and the obligee covenants with one of them not to sue him, he may nevertheless sue the other. *Lacy vs. Kinaston,* 12 Mod., 546, 552; s. c. 1 Ld. Raym., 688. *Dean vs. Newhall,* 8 T. R., 688. *Dean vs. Newhall,* 8 T. R., 168. So a covenant not to sue one of two joint debtors, does not operate as a release of the other. *Hutton vs. Eyre,* 6 Taunt., 289" (page 112, note vol. II, Edition in Prudential Law Library, Co. Litt., sec. 376, 232 a).

We respectfully suggest that the proper mental attitude is well indicated in *Kennedy vs. Kennedy,* 29 N. J. L., at page 188, where the Court said:

> "It is of the utmost importance to adhere to a settled rule of law easily applied and not to set every case afloat on the great sea of intention, from which no two pilots can find the same harbor."

We realize fully the great respect which should be paid to the opinions of the Courts of those jurisdictions which have converted releases into "covenants not to sue," in a desire to achieve what "ought to be," but in point of fact as Judge Wheeler (*supra*) points out, to pursue such a course involves an *abandonment of established principle;* Judge Wheeler frankly says that

> "time has proved that the rule we are considering is wrong in principle and in operation promotes injustice,"

and therefore frankly discards the rule, in contrast to his judicial brethern, who proclaim the rule but fail to adhere to it.

Such a course we respectfully submit while producing possibly desirable results in specific cases has a direct tendency to make the law "as long as the Chancellor's foot,"—to use the homely adage. To us it appears that Judge Wheeler's course is patent and almost fairly avowed *judicial legislation.*

A signal illustration of the courage that our judiciary have displayed in applying the law inflexibly to a case similar to the one in hand is that furnished by the decision of Chief Justice Beasley in *Munyon v. French,* 60 N. J. L., at page 12; the opinion in that case concludes as follows:

> "The question above decided that the release of one joint obligor is a bar to a suit on the bond;"

in that case the release resulted from the filing, by the plaintiff, of his proof of claim against a general assignor who had become insolvent, and who was a party to the bond sued upon subsequent to his insolvency; the Court held that the release of such general assignor—effected by filing with the general assignee the plaintiff's claim based upon said bond, *worked a discharge of the person who was jointly liable with him on the bond.*

In that case had the Court been willing to abandon logic, it might well have said that the act of the creditor in filing his proof of claim against the insolvent—which could in no wise be detrimental to the co-obligor, but could only act to his benefit—should not be permitted to so operate as to discharge the co-obligor absolutely from the payment of his unquestioned indebtedness; especially in the face of the fact that only a small fraction of such debt had in fact been realized from the estate of the insolvent; but instead the Court had the courage to inflexibly apply the rule according to the demands of logic.

The principles we invoke are well established in English and New Jersey Law.

In *Coke on Littleton,* Sects. 372, 232 a, is found the following:

> "Also if two men do a trespass to another, who releases to one of them by his deed all actions personal, and notwithstanding sueth an action of trespass against the other, the defendant may well shew that the trespass was done by him, and by another his fellow, and that the plaintiff by his deed (which he sheweth forth) released to his fellow all actions personal, and de-

mand the judgment, etc., and yet such deed belongeth to his fellow and not to him."

Also:

"If two are bound in an obligation, and the obligee releases to one of them proviso that the other shall not take advantage of it, the proviso is void. Lit. Rep., 190" (note 171, page 112, Co. Litt., Vol. II, Edition Prudential Law Library; the case referred to in Littleton's Reports is *Everard vs. Herne,* and the question was decided on demurrer, see *Lit. Rep.,* 190, Prudential Law Library).

In *Rogers vs. Cox,* (66 N. J. L., at 434), the Court of Errors decided:

"In case of joint tort feasance satisfaction by any one liable discharges the claim for damages. The injured person is legally entitled to but one satisfaction. This has been the law from very early times (Co. Littl. 232*a*, Sec. 376, *Cocke vs. Jennor Hob.,* 66), and is well established in this Court. *Spurr v. North Hudson County R. Co.,* 27 Vr., 346. If the defendant be considered merely as the instigator of Potiers tort, the case is not different. *Bird vs. Randall,* 31 Burr., 1345."

"A release under seal implies considerations. Hence the plea of release in this case is an absolute bar to the action."

A strong reason for believing that the rule in this State is as we contend, may be found upon examination of the statute shown in the *Comp. Stat.,* page 3781, Sec. 15; that act, which is undoubtedly the act referred to by the complainant in his bill of complaint (page 67, lines 29-34)

would indicate that the legislature found it *necessary* to pass a statute in the particular case specified in the statute; if the rule of this state were not as we contend it should be, there would have been little or no occasion for the enactment of the statute in question.

If the law of this state permitted upon release of one of several joint parties, a reservation by which the others might still be held liable, the legislature would not have found itself confronted with an evil in the common law which appeared necessary to remedy; while it is perfectly true that the act in question only applies in case where a bond has been given by a corporate official who has been guilty of a wrong and suit on the bond is brought, and requires the intervention of a Receiver appointed by a Court, that fact does not militate against our deduction; on the contrary, it proves that the legislature only desired to make a breach in the general rule under the specific circumstances set forth or outlined in the statute.

* * * * *

In the case of *Dwy vs. Connecticut Co.*, 92 Atl. Rep., 883, the Court considers the various reasons which have been laid down or suggested as the foundation of the rule which we invoke (see *92 Atl. Rep.*, 884, second column); five reasons are there considered, which have been garnered from the wealth of judicial expression on this topic; curiously, the Connecticut Court in that case, selects only one of the reasons for the rule which its examination of the many cases on the topic discloses; and argues out the matter thereafter on the basis of the single reason selected. Is this not an imperfect method of treatment. We now urge that all five reasons, having their foun-

dation deep in the roots of judicial decision should be considered and that no one of these five reasons can with propriety be discarded.

The first reason noted (and discarded) in *Dwy vs. Connecticut* finds its basis in the rule that one cannot by a proviso in an agreement make nugatory the effective contractual feature of the agreement; this rule has received recognition in this state, as will appear from the following:

In *Vickers v. Commercial Co.,* 67 N. J. L., pages 673 to 676, the Court had to deal with an attempt by a party to provide by stipulation in an agreement for a limitation upon his liability, which would have made nugatory the obligation which he entered into under such agreement; in dealing with the subject matter the Court quoted these significant words from various sources:

> "the defendants first enter into a clear personal covenant and then they endeavor, by the proviso to relieve themselves from all personal liability."
>
> "Therefore if the defendants have entered into a covenant which, to any extent binds them personally, this proviso is at variance with such covenant, and consequently must be rejected as repugnant according to the authorities cited. *1 Ad. Cont.* (Ed. 1888) 297 stated the principle thus: 'If a man covenants in his own name for the performance of some particular act or duty and then seeks, by proviso to relieve himself from all liability upon the covenant, the proviso will be rejected as being repugnant to the covenant.' "

The other four reasons dealt with in *Dwy vs.* Connecticut, we believe, will appeal to a New Jer-

sey Court upon mere inspection; we may add the following, however:

In the case of *Munyon vs. French* (*supra*), the plaintiff was not under any legal obligation to file his proof of claim with the general assignee, but having done so he could not complain of the result of his own act; similarly here; the law permitted the complainant to bring suit against one or all the directors; this is a very broad right and should not be stretched to such limits as may aid oppression; the complainant for reasons good and sufficient to him has chosen to discharge certain of the directors who were liable for all the damage which the complainant alleges; as to them, the complainant's claim is completely satisfied; he has accepted moneys from them in full settlement of all claims and demands against them severally; should he be permitted to have not only the advantages of the law but also advantages which the general rule of the law prohibits; he wishes both to eat his cake and have it, to have both the advantage of law and to contract away the disadvantages that are inseparably connected with that advantage; why should the law be so tender with respect to him as to ignore its own rules and permit him to contract away their efficacy.

This brings us to the leading modern case which supports our point of view, namely, the case of *McBride vs. Scott* (a Michigan case) 93 N. W. 243, which is also reported in 61 L. R. A. 445; in this *Michigan* case the two opposed lines of decision are thoroughly discussed and the Court not only applies the rules which Judge Wheeler points out that his colleagues had thrown into the discard in the *Connecticut* case, but also the Michigan Court points out the strong practical reasons which should commend the rule to us.

POINT THREE

The complainant may endeavor to support the releases by reference to that provision of our acts relating to joint debtors which is found in *Comp. Stats.* 3781, Sec. 15, referred to above; this statute, however, it is contended has no application for two reasons: first, by Sec. 17 it is provided that no "compromise or settlement shall be made as aforesaid without the approval first had and obtained from the Court out of which such receiver or trustee was appointed;" the Commissioner of Banking & Insurance was not appointed as receiver or trustee by any Court; secondly, said provision, we believe, only applies to cases where a bond has been given to answer for the malfeasance or misfeasance of an officer of a banking or other corporation; the act provides that

> "the receiver or trustees or such person, corporation or officer as may be empowered to bring such action on such bond may settle and compromise with, release and discharge anyone or more of the parties so liable, and such settlement, compromise, release or discharge shall not affect or constitute any defense to any such action or right of action at law or in equity against the other parties so liable."

POINT FOUR

The order of the Court of Chancery should be reversed and either the bill of complaint dismissed, or the complainant given leave to restate the facts with regard to his discharge of certain

directors, so that it shall fully appear from his bill of complaint whether or not the discharge of the directors who are not parties to the bill has exonerated the other directors or not.

Respectfully submitted,

OTTO A. STIEFEL,
Of Counsel with George E. Krug,
and Charles C. Lurich.

INDEX

New Jersey Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY

Between GEORGE M. LA MONTE, as Commissioner of Banking & Insurance etc., in behalf of and in the name of Roseville Trust Company, Complainant, and HARVEY MOTT, CHARLES C. LURICH, and others, Defendants.	On Bill.

Notice of Motion to Strike out Bill of Complaint

Take notice that I shall apply to his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on Tuesday the 17th day of August 1915, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the State House at Trenton.

FIRST

For an order striking out the bill of complaint in the above entitled cause, the grounds for said application being as follows:

Notice of Motion to Strike out Bill of Complaint

1. That the various causes of action suggested or set forth or in part indicated in said bill of complaint are not separated and distinguished in accordance with the 46th Rule of the General Rules under the Chancery Act (1915); that they are not numbered so that the defendant below named can clearly distinguish what are intended by the complainant to be the several and distinct causes of action intended to be set forth by the complainant and so that the defendant can frame full and satisfactory answers to the various causes of action which may be involved and cannot properly plead his defenses, and especially cannot plead them so that his several and separate defenses to each one of the causes of action involved can be separately and distinctly tested as to their sufficiency and validity before the proofs are taken in this cause.

2. That the Commissioner of Banking and Insurance the complainant in this suit is without right or title to bring the suit, that the act entitled "An Act to amend the Act entitled An Act Concerning Trust Companies (Revision of 1899)'" in said bill of complaint mentioned is unconstitutional and void in so far as said act provides that said Commissioner may forthwith take possession of the property of Trust Companies and retain such possession until such Trust Companies shall resume business or the affairs thereof be finally liquidated as in said act provided; and because said act is unconstitutional in that it involves an attempt by legislation to authorize the taking of property without due process of law.

3. That the pretended causes of action are causes of action if any belonging to the Roseville Trust Company, and that said action is not brought by the Roseville Trust Company or its lawful successors or its lawful assigns, or by any person or persons authorized by any valid law or act to bring said action.

4. That the defendants on whose behalf this notice is given are exonerated by reason of the acceptance from the directors named at the beginning of the thirty-second paragraph of said bill of complaint, of the sums of money therein referred to, in settlement of the claims against them, being the very same claims that are now sought to be enforced in this suit; that on this account the defendants Charles C. Lurich and George E. Krug are released and discharged of all liability on account of the alleged matters complained of, in this suit.

SECOND

In the event that the first noticed motion should not prevail, for an order striking out the following paragraphs of said bill of complaint on the respective grounds stated, unless the court sees fit to order appropriate amendments:

1. Tenth paragraph: On the grounds that the allegations therein are of such a general nature, so uncertain and obscure that the defendant is unable to answer the same or prepare any defenses thereto; that said tenth paragraph does not disclose a definite and coherent and intelligible cause of action; further that it recites that because of the failure of the defendants to

perform all and singular all the duties cast upon them as directors of Roseville Trust Company, some of the losses afterwards in said bill particularized were brought about and the insolvency of the Trust Company occasioned; that the defendants should only be required to answer separate and distinct charges, each one charging with full particularity a specific act or acts alleged, involving a specific breach of duty resulting in loss to the Roseville Trust Company, with a statefent of the loss as specific as the circumstances permit or require; that said paragraph is in violation of Rule 33 of Schedule A, Rules under the Chancery Act 1915; that said paragraph is impertinent and scandalous.

2. Eleventh paragraph: On the grounds that said paragraph is simply a pretended summary of practically all duties cast upon the defendants by law; that the last sentence thereof described all said duties in full and the greater part of said paragraph is vicious for prolixity and unnecessary repetition; that the averments in said paragraph simply involves an attempt to state the law relating to the duty of trust company directors and that the defendants cannot answer it nor join issue on it and the complainant cannot demand discovery with respect to it.

3. Twelfth paragraph: On the grounds that the allegations in said paragraph do not state a specific definite, coherent or intelligible cause of action; that defendants cannot answer said paragraph without answering almost the whole of the remainder of the bill of complaint; that said paragraph is uncertain and that in its reference to

the alleged allowance of reckless and criminal mismanagement said paragraph is impertinent and scandalous; that said paragraph is not susceptible of giving rise to a definite and determinable issue for the court's determination; that said paragraph is unnecessary.

4. Thirteenth paragraph: On the grounds that said paragraph does not state a cause of action; that the defendants cannot ascertain from said paragraph whether they are charged with knowing that Raymond E. Smith was not honest or whether the charge intended is that they ought to have known such alleged dishonesty; that the reasons and grounds for the allegation that they "ought to have known" his dishonesty when they employed him are not disclosed; that the employment of Jennings, Thompson and Mindnich is not alleged to have resulted in loss to the Trust Company; that it is again not certain whether said paragraph charges knowledge of the alleged character of these employes or whether the charge is limited to averment that the directors "ought to have known" of this in some way undisclosed by the complaint; that the averments in said paragraph are so loose, indefinite and uncertain that these defendants are unable to answer the same issuably and to determine whether they are expected to answer the same.

5. Fourteenth paragraph: On the grounds that said paragraph sets forth no cause of action; that the facts alleged in said paragraph as therein alleged do not constitute an averment of a breach of duty by these defendants as directors; that no knowledge is by said paragraph imputed to these

defendants so as to justify the conclusions reached at the end of the paragraph by the pleader; that these defendants cannot plead issuably thereto or defend themselves by an answer thereto of the character allowed by the proper rules of pleading; that averments of fact and conclusions of law, attempted to be drawn therefrom (in part beginning, "That the several acts and doings"), are combined in this paragraph, in such a manner that these defendants are unable to answer the same according to the practice of this court.

6. Fifteenth paragraph: On the grounds that said paragraph discloses no cause of action against these defendants; that each item of theft, there being no allegation or suggestion of conspiracy as to these defendants, would (if there were any ground of action at all) be a separate cause of action.

7. Sixteenth paragraph: On the grounds that this paragraph gives no dates, or other proper circumstances; that if all the alleged overdrafts were "permitted" as alleged, as part and parcel of one act, they might constitute one cause of action; if they were permitted on various and distinctly separate occasions, each would involve a separate and distinct cause of action chargeable to the specific defendants who might have participated therein; that this paragraph is so uncertain that these defendants cannot answer the same.

8. Seventeenth paragraph: On the grounds that these defendants are unable to determine from this paragraph whether they are simply by

operation of law chargeable with "notice of said unlawful payments and failures to charge, in the exercise of ordinary business judgment and care of said Directors," or whether these defendants are charged with "permitting" the payments alleged to be made "out of the funds of said trust company," that is to say are practically charged with crime; further, that each item making the aggregate amount ($117,173.06) of the alleged overdrafts involves a separate ground of action, with respect to which these defendants are entitled to be fully and separately advised, so that they can make their separate defense thereto; that in one aspect the liability alleged may be dischargeable under the laws of Congress relating to bankruptcy and in another aspect not, but that these defendants cannot tell in which aspect they are charged.

9. Eighteenth paragraph: On the ground that no cause of action is disclosed against these defendants.

10. Nineteenth paragraph: On the ground that no cause of action is disclosed against these defendants.

11. Twentieth paragraph: On the grounds that the averments in said paragraph are so indefinite and uncertain that these defendants are unable to prepare any defense thereto or to determine precisely what is alleged against them; that with regard to each and every particular promissory note in said paragraph referred to, it is impossible to determine whether the allegation is that the maker was irresponsible, or only the endorses, or only the "security," or whether the allegation

involves some combination of these elements; that in no instance in "Exhibit H" is the "security" mentioned or described; that the dates of purchase of the various notes are not set forth, so that it is impossible for these defendants to determine what share they had in the purchase of said notes; that except possibly in those cases, if any, in which certain of the notes in "Exhibit H" mentioned were purchased as part and parcel of one transaction, the purchase of each note complained of involves a separate cause of action, which should be specifically set forth with all dates and other circumstances, and the "*res*" in each case fully described, so that these defendants can plead issuably with respect thereto; that the price at which said notes were sold by the complainant is not set forth; that the complainant is not the owner and holder of the notes and has put it out of his power to turn over said notes to these defendants in the event that they should pay the amount due upon said notes; that confessedly only part of the alleged worthless loans are particularized in Exhibit H.

12. Twenty-first paragraph: On the grounds that said paragraph discloses no cause of action in the complaint; that the same is impertinent and scandalous.

13. Twenty-second paragraph: On the grounds that said paragraph discloses no cause of action; that in large part it is contradicted by the averments in the fourteenth paragraph to the effect that Raymond E. Smith's other activities were such that he "could not perform his duties as Secretary and Treasurer" of the Roseville Trust

Company; that it is also at variance with the facts alleged in the thirteenth paragraph regarding the employment of employees other than Smith; that it is also at variance with the correspondence attached as an exhibit to the bill of complaint; that it is so framed as to embarrass any attempt to answer the same, being vague, obscure and uncertain in its averments and especially obscure and uncertain in its intent.

14. Twenty-third paragraph: On the grounds that it sets forth no cause of action against these defendants and especially against the defendant Charles C. Lurich; that it so prolix, uncertain, obscure and vague that it is impossible to plead issuably thereto.

15. Twenty-fourth paragraph: On the grounds that it is impossible to determine whether the allegations in said paragraph involve an attempt to set forth a separate cause of action or various causes of action or not, or whether this paragraph is to be read in conjunction with other paragraphs to make up a cause or causes of action.

16. Twenty-fifth paragraph: On the grounds that at best it sets forth four causes of action, to wit, one against each of the examining committees and one against each of the directors concerned in accepting the reports of said committees; each of which should be separately stated; that the reports of the committees which on their face are said to indicate that proper care had not been employed in the making of said examination are not brought into Court so that any pleading with respect thereto may become possi-

ble; that said paragraph contains averments which in one view may be irrelevant with respect to the main body of the charges therein contained, (see page 28, lines 8 to 16) or which may be intended to involve a separate cause of action, and whether one or the other view is to be taken these defendants do not know.

17. Twenty-sixth paragraph: On the grounds that the allegations thereof set forth no cause of action; that said paragraph is so obscure and uncertain that these defendants cannot ascertain precisely what, if any charge is intended to be made against them and are unable to defend themselves with respect to any claim which may be hidden in said paragraph to which in equity and good conscience they are bound to answer; that this paragraph involves a blanket allegation covering a period of many years without any dates being set and not necessarily involving these defendants, for it speaks of "the Directors then and there present."

18. Twenty-seventh paragraph: On the grounds that it sets forth no cause of action; further that it does not allege that directors did not make "an investigation" of the character indicated as required by the circumstances alleged; that said paragraph is vague, obscure and uncertain.

19. Twenty-eighth paragraph: On the grounds that the same sets forth no cause of action against these defendants; and is so vague, uncertain and obscure that it is insusceptible of defense.

Notice of Motion to Strike out Bill of Complaint

20. Twenty-nine paragraph: On the grounds that the same sets forth no cause of action; and is so vague, uncertain and obscure that it is insusceptible of defense.

21. Thirtieth paragraph: On the ground that it is impossible to legally answer a prognostication; further that as far as the promissory notes are concerned these were sold as in said bill of complaint alleged for a consideration.

22. Thirty-first paragraph: On the grounds that this paragraph discloses no cause of action against these defendants; that the subject matter thereof, in any event, involves eleven distinct and separate causes of action, each of which should be separately stated so that there might be a separate answer to each; that said paragraph is so lacking in specification that these defendants cannot prepare their defense thereto; that substantially it is nothing but a blanket statement containing the pleader's conclusions with respect to facts in his possession and altogether undisclosed by the bill of complaint.

23. Thirty-second paragraph: On the grounds that the order and agreement in said paragraph mentioned have not been brought into Court; that the "statute" referred to is not specifically indicated; referring to line 40, page 33 to end of paragraph—on the ground that the allegations referred to constitute separate causes of action and are lacking in particularity; further on the ground that a mere conclusion of law of the pleader is involved; further that it is impossible to reconcile the figure "$640,000 and upwards"

with the prior averments of the bill of complaint; further that it is impossible to tell in calculating the alleged loss whether the restitution of the directors who have made restitution has been taken into consideration; further that it is utterly impossible for these defendants either to affirm or deny with respect to the allegation referred to, no data being furnished upon which such affirmance or denial could be predicated.

24. Thirty-third paragraph: On the grounds that certain of the directors of Roseville Trust Company have been exonerated and discharged by the complainant from all liability with respect to the acts complained of; that these defendants are alleged to be obliged to pay to the complainant on account of the malfeasance of others without any just cause; further that said bill of complaint does not disclose that these defendants are in justice and equity obliged to make the payment to the complainant alleged as equitable and just in said paragraph; that said paragraph is obscure and uncertain in that these defendants cannot ascertain whether they are expected to answer both for their alleged negligence and the malfeasance of others, or only for their own alleged negligence; that by reason of the sale of all claims and assets of Roseville Trust Company. (except those specified) as alleged in said bill of complaint, without notice to these defendants, it has become impossible to ascertain what losses, if any, were suffered by Roseville Trust Company on account of a large number of the matters alleged in said bill of complaint, and the conduct of the complainant has been so inequitable in

this regard as to deprive him of the right to any relief in this Court as against these defendants.

Dated, Newark, N. J., August 10th, 1915.

Yours respectfully,

OTTO A. STIEFEL,
Solictor for Defendants Charles C. Lurich and George E. Krug.

To:

Roger Hinds, Esq.,
Solicitor of Complainant.

Notice of Motion of William T. Benjamin to Strike out Portion of Bill of Complaint

(Filed, ,191.)

IN CHANCERY OF NEW JERSEY

GEORGE M. LAMONTE, as Commissioner of Banking and Insurance of the State of New Jersey in behalf of and in the name of the Roseville Trust Company of Newark, New Jersey. Complainant, vs. HARVEY MOTT, *et als.*, Defendants.	On Bill Notice of motion to strike out.

Take notice that I shall apply to his Honor, Edwin Robert Walker, Chancellor of the State of

Notice of Motion of William T. Benjamin to Strike out Portion of Bill of Complaint

New Jersey on the Seventeenth day of August, Nineteen Hundred and Fifteen at 10 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, at the State House in the City of Trenton, New Jersey, for an order striking out the following portion of the bill of complaint filed in this cause.

1. On page 10 in paragraph 9 the following words, "but which he prays may be ascertained by a proper accounting herein and be decreed to be paid in this suit," on the ground that there are no allegations in the bill which will support an action for an account against said defendant, and there are no allegations in the bill which will support a decree that the defendants be decreed to pay any loss when ascertained, except such as arose out of the defendant's negligence, nor to support anything but a money judgment.

2. All of paragraph 10, on the ground that the allegations are of such a general nature and so lacking in specifications that the defendant is unable to answer or prepare any defense thereto.

3. All of paragraph 11 on the ground that it is a statement or pretended statement of the law relating the duty of directors and it is not a proper subject of pleading, but is a matter of argument and citation, and the defendant cannot answer it, nor join issue on it.

4. All of paragraph 12 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to answer them nor to prepare a defense to them, nor does it appear what, if any, loss, resulted therefrom.

Notice of Motion of William T. Benjamin to Strike out Portion of Bill of Complaint

5. All of paragraph 13 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to answer them nor to prepare a defense to them, nor does it appear what, if any, loss resulted therefrom.

6. All of paragraph 14 on the ground that the allegations do not show that any right of action arose therefrom against this defendant; that it contains both matters of proof and matters for arguments and citation, and conclusions of law and fact, which are not properly the subject of pleading, that it does not appear that any loss resulted to the complainant therefrom, that the defendant cannot join issue thereon nor prepare a defense thereto.

7. All of paragraph 15 on the ground that the allegations do not show any cause of action against this defendant.

8. All of paragraph 16 on the ground that its allegations are so general and lacking in specifition that the defendant can answer and prepare his defense to only a part thereof.

9. All of paragraph 17 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

10. All of paragraph 18 on the ground that its allegations, if true, do not constitute a cause of action against the defendants.

Notice of Motion of William T. Benjamin to Strike out Portion of Bill of Complaint

11. All of paragraph 19 on the ground that its allegations, if true, do not constitute a cause of action against the defendants.

12. All of paragraph 20 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

13. All of paragraph 21 on the ground that its allegations, if true, do not constitute a cause of action against the defendants.

14. In paragraph 22 from 12th line of page 21 to end—on the ground that it consists of conclusions of law and fact, not properly the subject of pleading and that the allegations, if true, do not constitute a cause of action against the defendants.

15. All of paragraph 23 on the ground that its allegations do not show what losses, if any, resulted from any negligent act of this defendant, and he is not able to answer the same or prepare his defense thereto.

16. All of paragraph 24 on the ground that it contains allegations which, if true, constitute three separate causes of action and as to the first of which it appears from the bill of complaint that it is not a cause of action against this defendant.

17. All of paragraph 25 on the ground that its allegations contain two separate causes of action

for which this defendant may or may not be liable or for which he may be liable in different degrees.

18. All of paragraph 26 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

19. All of paragraph 26 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

20. All of paragraph 28 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

21. All of paragraph 29 on the ground that its allegations are so general and lacking in specifications that this defendant cannot make answer nor prepare his defense thereto and that the relief prayed for is not sustained by any of the allegations.

22. All of paragraph 30 on the ground that it shows no cause of action against the defendants.

Notice of Motion of William T. Benjamin to Strike out Portion of Bill of Complaint

23. All of paragraph 31 on the ground that the allegations are so general and so lacking in specifications that the defendant is not able to make answer thereto nor prepare his defense; that it contains matters of argument and conclusions of law and fact which are not properly the subject of pleading.

24. In paragraph 32 from the words in line 40 page 33 "that as a result of the foregoing acts" to the end of the paragraph, on the ground that the allegations are so general and lacking in specifications that this defendant cannot make answer nor prepare his defense thereto, that the allegations referred to constitute separate causes of action; that the allegations do not show any basis for the relief prayed.

25. All of paragraph 35 on the ground that the allegations of the bill do not show any basis for the relief prayed.

And further take notice that at the same time and place I shall apply to the said Chancellor for an order striking out the whole of the bill of complaint filed in this cause on the grounds, first that the bill does not conform to sections 45 and 46 of schedule A of the supplement to an act respecting the Court of Chancery, approved March 30th, 1915, second, that the act under and by virtue of which the Commissioner of Banking and Insurance purports to sue is unconstitutional and void and the said Commissioner has not the capacity to maintain the action, third, the 32nd paragraph shows that certain of this defendant's co-directors have reimbursed the complainant

for the losses sustained, if any, by the negligence of this defendant and have received from the complainant a full discharge therefore, which discharge operated in law as a discharge of the liability of this defendant; fourth, that certain of the co-directors of this defendant, namely, William P. Odell, William Fairlie, John S. Bell, Fred. Kilgus, William J. Bannister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton who are necessary parties to a final determination of this cause have not been joined therein.

ABRAM H. CORNISH,
Solicitor for the Defendant,
William T. Benjamin.

To:

Roger Hinds, Solicitor for Complainant, George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey on behalf of and in the name of the Roseville Trust Company, of Newark, N. J.

Opinion

(*Filed Dec. 20th, 1915*)

IN CHANCERY OF NEW JERSEY

Between
ROSEVILLE TRUST COMPANY,
Complainant,
and
HARVEY MOTT, *et al.*
Defendants.

Mr. Roger Hinds, Mr. Wm. A. Kirk and Mr. Edward F. Clark for Complainants.

Mr. Otto A. Stiefel and Mr. Abram H. Cornish for Defendants.

STEVENS, V. C. This is a bill filed by George M. LaMonte as Commissioner of Banking and Insurance on behalf of and in the name of the Roseville Trust Company. It charges that the Commissioner, as such, having concluded that it was unsafe and inexpedient for the Company to continue its business, took possession of its property and business pursuant to the provisions of an act entitled "An Act Concerning Trust Companies" (Revision of 1899) as amended by Chapter 171 of the Laws of 1913. It charges further that the Company was insolvent and that the insolvency was produced by the criminal negligence of its directors.

The application is to strike out the bill on the ground (1) that the Commissioner of Banking

is without right or title to bring this suit, the act of 1913, under which he is proceeding, being unconstitutional; (2) that the Commissioner has released certain of the directors and that his release has enured to the benefit of all; (3) that the allegations of the bill are not sufficiently specific and that they do not state a cause of action.

The first objection is grounded upon the idea that the act of 1913 is unconstitutional in that it authorizes the Commissioner to take possession of the property and business of the Company and to collect and distribute its assets on his own motion and without judicial warrant. The act (P. L. 1913, 282) provides *inter alia,* that whenever it shall appear to the commissioner that any Trust Company has violated its charter or is conducting its business in an unsafe or unauthorized manner, "the Commissioner may forthwith take possession of the property and business of such Trust Company and retain such possession until such Trust Company shall resume business or its affairs be finally liquidated as herein provided. Upon taking possession of the property and business of such Company, the Commissioner is authorized to collect monies due to such Trust Company and do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof as hereinafter provided. The Commissioner shall collect all debts due and claims belonging to it" and "may in the name of such Trust Company prosecute and defend any and all suits and other legal proceedings."

The act further provides that whenever the

Company, of whose property and business the Commissioner has taken possession deems itself aggrieved thereby, it may at any time within ten days after such taking possession apply to the Court of Chancery to enjoin further proceedings. This it has not done.

Assuming that the defendants are in a position to take the objection, it is a very narrow one. By the terms of section 22 of the act of 1899 (Comp. Statutes p. 5654) under which the Company was incorporated, the Commissioner was authorized to take the same possession for the same reasons. In the event that he found after investigation that a certain condition of things existed, possession of the Company's property and business was to pass from the directors to himself. This was part of the contract impliedly incorporated into the charter. The precise objection must therefore be that the Legislature had no right by amendment, after the Trust Company had been organized, to provide that to the possession and business so taken should be added the right to preserve it by reducing choses in action into possession, and by enforcing other claims. Such an insistment does not seem to me to be even plausible. The Company is not thereby deprived of its property without due process of law or at all. On the contrary the property is all the better secured when those who owe it debts or duties are made to pay or perform them. A similar act has been sustained by the New York Court of Appeals, Carnegie Trust Co. V. Kress 109 N. E. 1068.

But the defendants are in no position to raise

the objection. The property taken is the Company's not the defendants'. If any body is aggrieved, it is the Company and the Company does not complain. If it had felt itself aggrieved, it might according to the act itself, at any time within ten days after possession taken have appealed to this court, or if it questioned the right of the Commissioner on constitutional grounds, it could have applied to the Supreme Court.

The Trust Company sues the defendants for the losses resulting from their negligence. The defendants answer that the Company is being managed by one who has a legislative but not a constitutional warrant to do so. Whether he has or not is quite irrelevant to the question whether the directors have failed in their duty. The law is settled that it is only in cases where a statute affects the rights of the parties to the proceeding that courts will pass upon the question of its constitutionality. Lang v. Bayonne, 45 Vr., 455; State v. De Lorenzo, 51 Vr., 500. Here the statute does not in the remotest degree touch the question of the directors' liability. They are liable to the corporation in the same way and to the same extent whether those who are managing the Corporation have *de jure,* a right to manage it or not; whether the statute be or be not constitutional. Just as well might the defendants object that at the time the suit was instituted there were two boards, each claiming to be the rightful manager—one a *de facto* board, in actual control, and another a *de jure* board, entitled to control. This Court could not, even in a direct proceeding, determine which was the legal board, (Kean v.

Union Water Co., 7 Dick., 813), and much less, as it seems to me, can it, in this proceeding, pass upon the Commissioner's title.

It is next insisted that a release has been given to some of the directors and that this enures to the benefit of all and is a bar to the suit. The paragraph relied upon reads as follows:

> "32. That W. P. O., W. F. (and others named) have made partial restitution of said losses, which your orator has accepted from them respectively in settlement of his claims against them severally on behalf of said Roseville Trust Company, pursuant to an agreement duly made with said Directors on Dec. 10, 1913 and pursuant to the express provisions of the Statute, but without prejudice to the causes of action against the other directors as herein alleged."

In Crane v. Alling, 3 Gr., 423, it was held that a release to one of two joint and several obligors is a release to both, but that a covenant not to sue one of the several obligors does not have the effect of a release except to the one to whom it is given. In Brown v. Mt. Holly National Bank, 16 Vr., 360, the Court of Errors held that a technical release under seal given to one of several obligors, if it provide that it is not intended to release or discharge the others, will be construed as a covenant not to sue. There has been some conflict of decision on this question elsewhere. McBride v. Scott, 93 N. W., 243; Dwy v. Connecticut Co., 92 Atl., 883; but any discussion of it here is out of place; for the question is settled by our own Court of last Resort.

Opinion

The liability of the directors of the Roseville Trust Company is a joint and several liability. The agreement made with those who have settled is not, as far as appears, a technical release; but if it be, it contains a reservation of the right to sue and so would not operate as a discharge of those who are not parties to it: It would, because of the reservation, still be construed as a covenant not to sue.

The third objection is that the bill is not sufficiently specific. As to this, a careful persual of the bill shows that it is drawn according to approved precedents. *Halsey v. Ackerman,* 11 Stew., 501; *Wilkinson v. Dodd,* 15 Stew., 235, 647. Its allegations are "as circumstancial and definite as the rules of pleading require." It would answer no useful purpose to go over them, paragraph by paragraph. It is sufficient to say that, taken as a whole, a clear case of negligence is presented. If a bill of particulars "may be justly required," the Court may in its discretion order it. P. L. 1915, p. 192, Sec. 32.

I think the application should be denied.

A true copy.

Robert H. McAdams,
Clerk.

Order Denying Motion to Strike out Bill of Complaint

(Filed Jan. 8th, 1916.)

IN CHANCERY OF NEW JERSEY.

Between,
GEORGE M. LAMONTE as Commissioner of Banking and Insurance of the State of New Jersey, suing in behalf of and in the name of Roseville Trust Company,
Complainant,
against
HARVEY MOTT, EMILE E. BATAILLE, WILLIAM T. BENJAMIN, HARRY W. FOSTER, WORTHINGTON H. INGERSOLL, WILLIAM F. KLEIN, GEORGE E. KRUG, CHARLES C. LURICH, G. ROWLAND MONROE, JOHN B. SCARLETT, RAYMOND E. SMITH and EDWARD D. DUNN,
Defendants.

The defendants Charles C. Lurich and George E. Krug and William T. Benjamin, having moved this Court for an order striking out the Bill of Complaint herein or certain paragraphs thereof and said motion having been duly heard in the presence of Otto A. Stiefel Esq., solicitor for and of counsel with Charles C. Lurich, and George E.

Order Denying Motion to Strike out Bill of Complaint

Krug, moving defendants, and Abram H. Cornish, solicitor for and of counsel with William T. Benjamin, moving defendant, and Roger Hinds, Esq., solicitor for complainant, and William A. Kirk, Esq., and Edward F. Clark, Esq., (of the New York Bar) of counsel with complainant, and due deliberation having been had thereon, now upon reading the Bill of Complaint in this cause and the notice of motion of the said defendants Lurich and Krug dated August 10th, 1915, and the notice of motion of the defendant Benjamin dated August 10th, 1915.

It is on this fourth day of January, 1915, ordered that said motions be and the same and each of them are hereby in all respects denied, with costs of each motion.

And it is further ordered that the time of said defendants Lurich, Krug and Benjamin to file their respective answers to the Bill of Complaint herein shall expire on the 29th day of January, 1916.

E. R. WALKER,
C.

Respectfully advised,
FREDRIC W. STEVENS,
V. C.

Petition of Appeal

(Filed Feb. 4th, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between GEORGE M. LAMONTE, as Commissioner of Banking and Insurance of the state of New Jersey suing in behalf of and in the name of ROSEVILLE TRUST COMPANY, Respondent, and CHARLES C. LURICH, GEORGE E. KRUG and WILLIAM T. BENJAMIN, Appellants.	On Appeal.

To the Honorable the Court of Errors and Appeals, in the last resort in all causes:

The petition of Charles C. Lurich, George E. Krug and William T. Benjamin, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 4th day of January, in the year 1916, wherein the said George M. LaMonte as Commissioner of Banking and Insurance of the State of New Jersey, suing in behalf of and in the name of Roseville Trust Company,

was complainant and the said Charles C. Lurich and George E. Krug and William T. Benjamin (and others), were defendants, in this respect, to wit:

That the said order orders that the motions of your petitioners in the said cause in Chancery of New Jersey be denied with costs, namely, the motions of your petitioners for an order striking out the bill of complaint in said cause in Chancery of New Jersey.

And your petitioners humbly appeal from the said order of the Chancellor which orders as aforesaid, upon the ground that the same is erroneous, for that:

The Chancellor should have made an order striking out the bill of complaint in the above entitled cause, for the reason, first, that your petitioners are exonerated by reason of the acceptance by the said complainant from the directors named at the beginning of the thirty-second paragraph of said bill of complaint, in pursuance of the agreement in said paragraph mentioned, of the sums of money therein referred to, in settlement of the claims against them, being the very same claims that the complainant has sought to enforce in his aforesaid suit in Chancery against these appellants; that on this account your petitioners are released and discharged of all liability on account of the alleged matters complained of in said suit; second, that the said bill of complaint shows that certain of the defendants co-directors have reimbursed the complainant for the losses sustained, if any, by the negligence of the defendants, and have received from the complainant a full discharge therefor, which

discharge operated in law as a discharge of the defendants, your petitioners, and, therefore, no cause of action is shown by said bill of complaint; and, third, the said bill shows that certain of the co-directors of these defendants, namely, William P. Odell, William Fairlie, John S. Bell, Fred Kilgus, William J. Banister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton, who are necessary parties to a final determination of this cause, have not been joined therein.

Your petitioners therefore pray that the said order of the said Chancellor may be reversed, set aside and for nothing holden.

And that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

Of Counsel with Appellants
Charles C. Lurich and George E. Krug.

Of Counsel with Appellant
William T. Benjamin.

Answer to Petition of Appeal

(*Filed, Feb. 4th, 1916.*)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between GEORGE M. LAMONTE, as Commissioner of Banking and Insurance of the state of New Jersey suing in behalf of and in the name of ROSEVILLE TRUST COMPANY, Respondent. and CHARLES C. LURICH, GEORGE E. KRUG and WILLIAM T. BENJAMIN, Appellants.	On Appeal.

The answer of the above named respondent to the petition of appeal of the above named appellants:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that an order was on the fourth day of January last past made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form

thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity, and prays that the same may be affirmed with costs to be adjudged to this respondent, with respect to each of the motions denied by said order.

ROGER HINDS,
Solicitor of and of counsel
with the Respondent.

Bill of Complaint

(Filed July 10, 1915.)

IN CHANCERY OF NEW JERSEY

To the Hon. Edwin R. Walker, Chancellor of New Jersey:

Humbly complaining, showeth, upon information and belief, unto your Honor, your orator, George M. LaMonte as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of the Roseville Trust Company, of Newark, N. J.:

First. That at all the times hereinafter mentioned the Roseville Trust Company, of Newark, N. J. was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and particularly under and by virtue of "An Act Concerning Trust Companies (Revision of 1899);" that said cor-

poration was duly incorporated on or about the 29th day of July, 1908. That annexed hereto, as Exhibit "A" hereof, hereby made part of this bill of complaint, is a copy of the certificate of incorporation of said Roseville Trust Company, which certificate was duly acknowledged according to law and thereafter submitted to the Commissioner of Banking and Insurance of the State of New Jersey, who thereupon approved the form thereof and endorsed thereupon his approval according to law, and thereafter, on the 29th day of July, 1908, said certificate was duly recorded in the office of the Clerk of the County of Essex, which was then and at all the times hereinafter mentioned the County wherein the place of business of said Roseville Trust Company in this State was to be and was established, and thereafter, on or about the 29th day of July, 1908 said certificate was duly filed according to law in the Department of Banking and Insurance. That thereupon the subscribers, whose names appear more fully in said Exhibit "A," were, and constituted from the date of said filing, a body corporate by the name of Roseville Trust Company, of Newark, N. J." That the amount of capital stock of said Roseville Trust Company, of Newark, N. J., as provided in its said certificate of incorporation, was $100,000, consisting of 1,000 shares of the par value of $100 per share; that said capital stock was fully subscribed for and paid in on or before the 30th day of November, 1908, and payment thereof duly certified to the Commissioner of Banking and Insurance on or before the 30th day of November, 1908, accord-

ing to law; that thereafter, on the 30th day of November, 1908, and within thirty days after his receipt and filing of said certificate of payment of capital stock the Commissioner of Banking and Insurance duly issued and gave to said Roseville Trust Company, of Newark, N. J., a certificate under his hand and seal that said Roseville Trust Company, of Newark, N. J. was duly and legally organized under said Act as a trust company and authorized to transact business as such in this State, and said certificate was duly published according to law. A copy thereof is hereto annexed as Exhibit "B," and hereby made part of this bill of complaint.

Second. That on the 20th day of November, 1908, the corporate organization of said Roseville Trust Company was duly completed, in that its incorporators met according to law and duly adopted its by-laws, a copy of which is hereunto annexed as Exhibit "C" and hereby made part of this bill of complaint; and thereafter and on or about the 30th day of November, 1908, it commenced to do business as authorized by law at its banking office, Number 505 Orange Street in the City of Newark and State of New Jersey; that thereafter, by proceedings duly had according to law, its by-laws were, from time to time, amended, which amendments, in substance, stating the date of each of same, are hereunto annexed as Exhibit "D" and hereby, by this reference, are made part of this bill of complaint.

Third. That said Roseville Trust Company actively engaged in the conduct of its business as a trust company from on or about said 30th day

of November, 1908, until and including the thirteenth day of August, 1913.

Fourth. That on the 13th day of August, 1913, and prior thereto, said Roseville Trust Company was conducting its business in an unsafe and unauthorized manner and was in an unsound and unsafe condition to transact its business, and it was then insolvent, and it so appeared to your orator as Commissioner of Banking and Insurance of the State of New Jersey as aforesaid, and your orator of such Commissioner from and after an examination duly had according to law then had reason so to conclude, and to conclude that it was then unsafe and inexpedient for said Roseville Trust Company to continue business, and your orator did so conclude, and on the 14th day of August, 1913, your orator, acting pursuant to the provisions of the aforesaid act entitled "An Act Concerning Trust Companies (Revision of 1899)" as amended by Chapter 171 of the Laws of 1913 entitled "An Act to Amend the Act entitled 'An Act Concerning Trust Companies (Revision of 1899),'" as Commissioner of Banking and Insurance of the State of New Jersey as aforesaid, duly took possession of the property and business of said Roseville Trust and retained such possession and is still in possession of such property and business of said Roseville Trust Company except such portions thereof as your orator has liquidated or has, according to law and pursuant to certain orders of the Court of Chancery duly sold to divers persons, and is particularly now in possession of the claims, de-

mands and causes of action set forth in this bill of complaint, and your orator now prosecutes this suit in the name of and in behalf of said Roseville Trust Company as provided by the aforesaid statute.

Fifth. That, pursuant to said by-laws, various persons, including the defendants herein, were from time to time, duly elected and re-elected Directors of said Roseville Trust Company by the stockholders thereof, at meetings of said stockholders duly convened for said purpose, and that the following is a statement showing, as to each of such Directors, his name and the dates of his election and several re-elections. That each of said Directors duly qualified as such and duly made and filed the oath required by law diligently and honestly to administer the affairs of such trust company and not knowingly to violate or permit to be violated any of the provisions of the said act; and each of said Directors entered upon the discharge of his duties as such Director promptly after the date of his election and continued to serve as such Director throughout his initial term of one year, according to the by-laws, and throughout his succeeding terms of one year each as re-elected and continuously down to the 14th day of August, 1913, except as particularly stated to the contrary in the following statement:

Name.	Date of Election	Date of Re-election.	Date When Ceased to Act as Director.
William J. Banister,	Nov. 20, 1908	Jan. 12, 1909	Feb. 11, 1913
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Emile C. Bataille,	Nov. 20, 1908	Jan. 12, 1909	Jan. 9, 1912
		Jan. 11, 1910	
		Jan. 10, 1911	
James B. Banister,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William T. Benjamin,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
John S. Bell,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William Fairlie,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Worthington H. Ingersoll,	Nov. 20, 1908	Jan. 12, 1909	Between
		Jan. 11, 1910	May 8, 1912
		Jan. 10, 1911	and
		Jan. 9, 1912	Oct. 28, 1912
William F. Klein,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Frederick Kilgus,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
George E. Krug,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	

Name.	Date of Election	Date of Re-election.	Date When Ceased to Act as Director.
Charles C. Lurich,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Clinton F. McCord,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Harvey Mott,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
G. Rowland Munroe,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William P. Odell,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
John B. Scarlett,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Elmer K. Sexton,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Raymond E. Smith,	Nov. 20 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William W. Woodward,	Nov. 20, 1908	Jan. 12, 1909	
		Jan. 11, 1910	
		Jan. 10, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Edward D. Dunn,	Jan. 9, 1912	Jan. 14, 1913	

Sixth. That, from time to time, said Roseville Trust Company, pursuant to law and to its certificate of incorporation and by-laws, duly elected its President and its first and second Vice-Presidents, for terms of one year according to the by-laws, and duly re-elected said officers for like terms from year to year as hereinafter stated; that the following statement shows, as to each of said officers, his name, his title, the several dates of his election and re-election; that each of said officers, as shown in the following statement, duly qualified as such, promptly after the date of his election and continued to serve throughout his term as elected or re-elected and served as such continuously down to the 14th day of August, 1913.

Name.	Office.	Date of Election and Re-election.
William P. Odell,	President,	Nov. 20, 1908
		Jan. 20, 1909
		Jan. 18, 1910
		Jan. 11, 1911
		Jan. 9, 1912
		Jan. 14, 1913
William Fairlie,	First Vice-President	Nov. 20, 1908
		Jan. 20, 1909
		Jan. 18, 1910
		Jan. 11, 1911
		Jan. 9, 1912
		Jan. 14, 1913
Harry W. Foster,	Second Vive-President,	Jan. 20, 1909
		Jan. 18, 1910
		Jan. 11, 1911
		Jan. 9, 1912
		Jan, 14, 1913

Seventh. That, pursuant to its by-laws, the Board of Directors of said Roseville Trust Company, at a meeting thereof duly convened on or about November 20th, 1908, duly appointed one Raymond E. Smith as Secretary and Treasurer of said Roseville Trust Company, to serve as such Secretary and Treasurer, according to the by-laws, during the pleasure of said Board of Directors; and said Raymond E. Smith thereupon duly qualified and entered upon his duties as such Secretary and Treasurer and continued to act and serve as such as was the pleasure of said Board of Directors, down to the 14th day of August 1913. That on January 9th, 1909, the said Board of Directors, according to the by-laws, duly reaffirmed their said pleasure in having said Raymond E. Smith continue to serve as such Secretary and Treasurer, and duly confirmed his appointment as such at a meeting of said Board of Directors duly convened.

Eighth. That, pursuant to the by-laws, the Board of Directors of said Roseville Trust Company from time to time elected and re-elected an executive committee from their own number, for terms of one year each, according to the by-laws; that each member of said committee duly qualified as such and entered upon his duties as such promptly after his election and continued to serve during the several terms for which he was elected and re-elected, and continued to serve as such without interim down to the 14th day of August, 1913, except as hereinafter stated to the contrary; that the following statement shows, as to each of the members of said executive com-

mittee, his name, the several dates of his election and re-election, and the date when he ceased to act as such member of the executive committee:

Name.	Date of Election	Date of Re-election.	Date When Ceased to Act as Member of Executive Committee.
William P. Odell,	Nov. 20, 1908	Jan. 20, 1909	
		Jan. 18, 1910	
		Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William Fairlie,	Nov. 20, 1908	Jan. 20, 1909	
		Jan. 18, 1910	
		Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Harry W. Foster,	Nov. 20, 1908	Jan. 20, 1909	
		Jan. 18, 1910	
		Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
G. Rowland Munroe,	Nov. 20, 1908	Jan. 20, 1909	
		Jan. 18, 1910	
		Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
William J. Banister,	Nov. 20, 1908	Jan. 20, 1909	
		Jan. 18, 1910	
		Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Worthington H. Ingersoll,	Nov. 20, 1908	Jan. 20, 1909	Between
		Jan. 18, 1910	May 8, 1812
		Jan. 11, 1911	and
		Jan. 9, 1912	Oct. 28, 1912
William W. Woodward,	Nov. 20, 1908	Jan. 20, 1909	Jan. 9, 1912
		Jan. 18, 1910	
		Jan. 11, 1911	
John B. Scarlett,	Jan. 18, 1910	Jan. 11, 1911	
		Jan. 9, 1912	
		Jan. 14, 1913	
Charles C. Lurich,	Jan. 9, 1912	Jan. 14, 1913	
Harvey Mott,	Jan. 14, 1913		

That the by-laws of said Roseville Trust Company were duly amended on the 11th day of January, 1910, as hereinbefore alleged, so as to increase the number of said executive committee from 6 to 8.

Ninth. Your orator further alleges that promptly after taking possession of the property and business of said Roseville Trust Company as Commissioner of Banking and Insurance as aforesaid, your orator as such Commissioner forthwith gave notice of such facts to all banks, trust companies, associations and individuals to him known or appearing on the books of said Roseville Trust Company holding or in possession of any assets of such trust company; that your orator thereupon proceeded to liquidate the affairs of said trust company according to the said act as amended, and forthwith made careful examination of the affairs and management of said trust company, and has been and is diligently engaged in collecting its assets, and paying same to creditors under the direction of the Court of Chancery, except such creditors as have compromised with your orator with the approval of said Court of Chancery as hereinafter set forth; that your orator has realized upon all or nearly all of the good assets of said trust company, except such as are in litigation; that, as a result of the examination of your orator and of his transactions and proceedings in the liquidation of the affairs of said trust company, your orator alleges and charges that the said Roseville Trust Company suffered large losses in excess of $640,000, the precise extent of which is to

your orator unknown, but which he prays may be ascertained by a proper accounting herein and decreed to be paid in this suit; so that said trust company became insolvent and failed.

Tenth. Your orator further shows that said losses, some of which your orator has hereinafter particularized, were brought about, and the failure and insolvency of said Trust Company occasioned, by the neglect and failure of Directors of said Roseville Trust Company to perform faithfully and diligently the lawful duties as such Directors as hereinafter more particularly set forth, to wit:

Eleventh. It was the duty of the Directors as aforesaid by reason of the nature of their office and of their respective oaths of office, by reason of the principles of the common law applicable thereto, by reason of the aforesaid "Act Concerning Trust Companies" as amended as aforesaid, and the other statutes duly made and provided and applicable thereto, and by reason of the certificate of incorporation of said Trust Company and by reason of its by-laws as amended, as more fully set forth herein, diligently, carefully and honestly to administer the property and affairs of said Trust Company; to employ none but honest and competent officers, agents and employees of such Trust Company and to provide and maintain suitable and proper checks and safeguards upon the acts and conduct of such officers, agents and employees in and about the management and operation of said Trust Company; to keep correct books of account of their transactions as Directors, and to cause correct books of account

of the transactions of their subordinates and of the Trust Company generally to be kept and reviewed at proper intervals; to see that the business of the said Trust Company was prudently conducted; to see that the property of the said Trust Company was not wasted, stolen or squandered; and it was further their duty, for the reasons aforesaid, not to permit the accounts of the depositors of said Trust Company to become overdrawn; not to permit loans to, nor to purchase or invest in promissory notes made or endorsed by, persons of doubtful moral or financial responsibility or upon insufficient security; to see that said Trust Company, at all times, had on hand in available funds an amount equal to at least fifteen per centum of all its immediate demand liabilities, four-fifths of said available funds to consist of balances due from good solvent banks or trust companies, and one-fifth to be held as reserve in cash on hand; not to permit any loan to be made to any of its officers or Directors or clerks, tellers, bookkeepers, agents, servants or other persons in its employ until the proposition to make such loan in form according to law by the Board of Directors or executive committee thereof; not to permit its said Directors, officers or employees as aforesaid, or any of them, to become liable to said Trust Company by reason of overdrawn account; not to permit new loans to be made other than by purchasing bills of exchange payable at sight, nor to make and pay any dividends when the available funds of such company should be below fifteen per centum of its immediate liabilities; to make, in person or by committee, frequent examination as to the re-

sponsibility and continued responsibility, moral and financial, of each of the Trust Company's borrower's including makers and endorsers of its bills purchased, and as to the adequacy in amount and security of all collaterals; to appoint from time to time, from the Board of Directors of said Trust Company, an examining committee whose duty was and should be to examine the condition of said Trust Company at least once every six months and to report forthwith to the Board of Directors, giving in detail all items included in the assets of said Trust Company which they had reason to believe were not of the value at which they appeared on the books and records of the company and giving the value in their judgment, of each of such items; and to cause said report to be recorded in the minute book of the company; to ascertain, from time to time, whether the capital stock of said Trust Company has been impaired by reason of losses sustained through bad debts, defalcations, falsification of records, or otherwise; and generally to perform, faithfully and diligently, their duties as such Directors.

Twelfth. That the Directors of said Trust Company as aforesaid utterly failed to perform their aforesaid duties as such Directors, in that, during the period aforesaid, they paid little or no attention to the affairs of said Trust Company, and allowed the said Trust Company to be improvidently, recklessly and criminally mismanaged and its funds stolen and squandered and misapplied by the untrustworthy and incompetent persons whom they placed and retained in of-

fice and in the employ of said Trust Company, and particularly in that they failed to perform each and every one of the duties described in Paragraph 11th of this bill of complaint, the failure to perform each of which duties is hereby alleged by this reference as if each of said duties and failure to perform same were fully set forth in this twelfth paragraph of the bill of complaint; and your orator further shows that said Directors allowed said Trust Company to be managed by the Treasurer and other officers and employees without control, direction or supervision; that particulars of their failure as aforesaid, as to several of the duties above specified, are more particularly hereinafter set forth.

Thirteenth. Your orator further shows that the said Directors of said Trust Company utterly failed in their duty to employ none but honest and competent officers, agents and employees of said Trust Company, in that, during the period aforesaid, they employed or caused to be employed one Raymond E. Smith as Secretary and Treasurer of said Trust Company, in whom they placed and continued to place practically the entire responsibility for the management of its affairs; that the said Raymond E. Smith was not an honest or competent servant nor fitted to perform the duties and live up to the responsibilities entrusted to him; that the said defendants and other Directors knew or ought to have known such facts when they employed said Smith; and moreover they knew or ought to have known from his acts as such Treasurer and the record of said acts, of his incompetent and untrustwor-

thy character, which acts are hereinafter described more particularly. That during said period, said Directors employed and maintained in the employ of said Trust Company certain other persons who were neither reliable nor fitted for their duties as employees of said Trust Company, and who, at the direction of said Smith, made improper entries in its books and showed themselves to be untrustworthy, incompetent and wholly unfit in other respects, to wit: A. Randolph Jennings and William J. Thompson, tellers, and Charles Mindnich, a bookkeeper, who, together with said Smith, constituted practically the entire force employed by said Trust Company; all of which facts said Directors knew or should have known in the exercise of reasonable diligence.

Fourteenth. Your orator further shows that, during the period above mentioned, and prior to the 1st day of February, 1912, the said Raymond E. Smith, to the knowledge of all the Directors of said Roseville Trust Company, embarked upon and throughout the period referred to herein was engaged in a personal and individual business career and continuously from that date down to August 14, 1913, engaged openly and publicly in the automobile business under the trade name of "Oakland Motor Sales Company," which individual business enterprise, conducted as aforesaid throughout said period by the said Smith, involved the investment and handling of large sums of money and other capital and involved the devoting by said Smith of a large part of his time and energy for the exclu-

sive use of which he was being paid a salary of upwards of $2,700 per annum by the said Roseville Trust Company; that the said Directors well knew or should have known, and it was notorious, that the said Smith, at the time he entered the employ of said Roseville Trust Company, was a man of little or no means, and that, between that time and the aforesaid date upon which he entered into said private business, the said Smith could not honestly have come by funds sufficient to provide capital for his said individual enterprise. That said Smith, prior to the 12th day of February, 1912 became a large stockholder, a managing officer and a Director of the Home Ice and Products Company, a mercantile corporation and of the Dunnellen Coal and Supply Company and of the Intercity Land and Securities Company, other business corporations, to and in which enterprises and other speculations Smith thereafter, throughout the period of his connection with said Trust Company, continued openly and to the knowledge of said Directors to devote much time and to be largely interested in a financial way. That the several acts and doings of said Smith in his individual enterprises as aforesaid were plain and sufficient notice to said Directors of said Roseville Trust Company that said Smith was not performing and could not perform his duties as Secretary and Treasurer of said Roseville Trust Company in a faithful competent and honest manner and that he was not a fit person to whom to entrust the affairs and management of said Roseville Trust Company, and required said Directors, in the exercise of reasonable care and attention to their du-

ties, to examine into the true condition of said Trust Company's affairs under the almost exclusive management of said Smith.

Fifteenth. Your orator further shows that said Directors utterly failed in their duty to see that the business of said Trust Company was prudently conducted and its property not wasted, stolen or squandered, in that, during said period, said Raymond E. Smith, an employee of said Roseville Trust Company, on divers occasions and at frequent intervals, committed outright thefts of money and other property of said Roseville Trust Company, which thefts amounted, in the aggregate to upwards of $88,283.78, and which thefts are more particularly and fully described in Exhibit "E," hereunto annexed and hereby made part of this bill of complaint. Said Exhibit "E" sets forth the approximate date of each of said thefts, the property stolen and the value thereof in each instance.

Sixteenth. Your orator further shows that said Directors utterly failed in their duty not to permit the accounts of the depositors of said Trust Company to be overdrawn, in that, during said period, said Directors permitted certain depositors to overdraw their accounts in said Roseville Trust Company in large sums aggregating $10,867.70, no part of which overdrafts has been repaid; that, for example, said Directors permitted Intercity Land and Securities Company, a corporation of which the said Raymond E. Smith was a Director, and which was a depositor in said Roseville Trust Company, to overdraw its account to the extent of $687.58, without security,

no part of which overdrafts has been repaid; that, for example, said Directors permitted one Frank Bruno and one Antonio Miele, individually and as co-partners, depositors in said Roseville Trust Company, to overdraw their accounts in the sum of $6,147.85, without security, no part of which overdrafts has been repaid; that attached hereto, as Exhibit "F" hereof and hereby made part of this bill of complaint, is a statement describing several similar overdrafts permitted by said Directors, which Exhibit "F" describes, in each instance, the name of the depositor and the aggregate amount of his overdrafts; that the instances of overdrafts described in said Exhibit "F" are typical of all overdrafts as herein alleged.

Seventeenth. That at frequent intervals throughout said period, in addition to the instances of overdrafts above described, and not included in said Exhibit "F," said Directors permitted said Raymond E. Smith to pay or cause to be paid out of the funds of said trust company divers checks and drafts of certain depositors therein who then had on deposit to their credit therein little or no funds and who were financially irresponsible, and known by said Smith and said Directors to be such, to the aggregate extent of upwards of $117,173.06, and to fail to charge the amounts of said checks and drafts to the deposit accounts of said depositors. That the frequency of instances of the aforesaid, and the number of depositors concerned therewith, and the amounts of money so paid out, as compared with the total liabilities of said trust company, were

such as to put said Directors on notice of said unlawful payments and failures to charge, in the exercise of ordinary business judgment and care on the part of said Directors. That annexed hereto as Exhibit "G," and hereby made part hereof, is a statement describing instances of such uncharged checks and drafts, showing, as to the checks and drafts drawn by one John B. Scarlett, the several amounts thereof and dates thereof, and as to those of other depositors in each instance the name of the depositor and the aggregate of said checks and drafts. That no part of said uncharged checks and drafts, so paid as aforesaid, has been repaid, and said trust company received no value or consideration for any of said payments.

Eighteenth. That the Directors of said trust company utterly failed in their duty to keep or procure to be kept at all times on hand available funds amounting to at least 15 per centum of its immediate demand liabilities, which duty is more particularly set forth in Paragraph Eleventh aforesaid, in that, on and after January 1, 1913, and continuously down to August 14, 1913, the amount of available funds on hand was less than 15 per centum of immediate demand liabilities of said trust company, and in that the amount of cash on hand was less than one-fifth of 15 per centum of said demand liabilities.

Nineteenth. Your orator further shows that the said Directors utterly failed to perform their duty as described in said Paragraph Eleventh not to make or permit to be made new loans except

those expressly permitted as provided by law, whenever the available funds should be below 15 per centum of the immediate liabilities, in that, on January 1, 1912, and continuously thereafter, down to August 14, 1913, the said Directors permitted many new loans to be made, as will hereafter more fully appear, though throughout said period the available funds of said Roseville Trust Company were below 15 per centum of its immediate liabilities.

Twentieth. Your orator further shows that said Directors wrongfully and negligently made and approved large loans to and invested in and purchased promissory notes made by or made and endorsed by persons lacking in financial means and responsibility, and lacking in assets wherewith to repay the said loans or pay the said notes, and, in the instances where security was required, upon supposed security which was worthless and known to be such, or which said Directors should have known to be such; that moreover said Directors failed in their duty, as described in Paragraph Eleventh hereof, to make, in person or by committee, frequent examinations as to the responsibility and continued responsibility, moral and financial, of each of the trust company's borrowers and the makers and endorsers of its promissory notes and of each of them, and as to the adequacy in amount and security of its collaterals; that, for example, the said Directors approved loans to and purchased bills or note of International Tobacco Company, aggregating $11,429.87, although said company was then financially irresponsible and although the security by endorse-

ment or otherwise which it offered was worthless, as said Directors knew or ought to have known; and that said Directors approved loans to and purchased bills of Antonio Miele and Frank Bruno individually and as co-partners, aggregating $56,006.16, although said Miele and Bruno were then financially irresponsible and although the security by endorsement or otherwise which they offered was worthless, as the said Directors knew or ought to have known. That annexed hereto as Exhibit "H," and hereby made a part of this bill of complaint, is a statement describing numerous instances of such improper and worthless loans and purchases of worthless promissory notes made or authorized by said Directors, aggregating after deducting all partial payments that have been made the sum of $179,419.31, describing in each instance the details thereof.

Twenty-first. Your orator further shows that said Directors utterly failed in their duty to make, publish and issue true report to the Commissioner, in that, during the period above named, on divers occasions they prepared, issued and made public, as part of the official statements of said Roseville Trust Company, statements wherein the amount of is liabilities were grossly understated, so that the apparent condition of said Roseville Trust Company affairs was grossly different from its actual condition.

Twenty-second. Your orator further shows that, from the time of the organization of said Roseville Trust Company down to the date of the closing of its doors on August 14, 1914, and through-

out the intervening period, the said Directors had among them no officer and had no person in the employ of the Trust Company except the said Raymond E. Smith who was at all familiar with the business of banking and the business of conducting a trust company or who had had any prior experience therewith; that throughout said period the said Directors entrusted practically the entire management and responsibility of the business and affairs of said Trust Company to said Raymond E. Smith and that, according to the practice adopted by or permitted by said Directors, no person, either Director, officer or fellow-employee of said Smith, had any supervision or independent control of or review, scrutiny of or check upon any of his acts as Secretary and Treasurer and manager of said Roseville Trust Company; all of which was contrary to safe and usual banking practice and practice in the conduct of of trust companies, as said Directors knew or ought to have known upon reasonable inquiry and attention to their duties. That the records and entries of all the transactions of the Trust Company and is several books of account were collected together and summarized in the general ledger; that the entire control of said general ledger was left in the hands of said Smith; that no other officer or employee had charge of or to do therewith; that said practice afforded said Smith uninterrupted opportunity to conceal, by his manipulations of the accounts in said ledger, the irregular and unlawful transactions and stealings being carried on by said Smith, which opportunity said Smith took increasing advantage of as time went

on and it became apparent that he might do so with impunity. That the practice in all well regulated trust companies and banking institutions, as said Directors knew or ought to have known upon reasonable inquiry, is to provide that the keeping of the books and the making of entries therein is performed, not by the Treasurer or other managing officer of the institution, but by a bookkeeper or other subordinate at a smaller wage, in order that an independent check and scrutiny may be had upon and over the transactions and operations of the Treasurer or other managing officer, and also to the end that there may be greater economy of effort. That, contrary to said usual and proper practice, the said Raymond E. Smith, throughout said period, and more particularly from January 1, 1912, down to the 14th day of August, 1913, made a daily practice of spending hours in working upon and making entries in the books of said Trust Company; and this practice was repeatedly brought to the attention of the said Directors, which should have called to the attention of said Directors in the exercise of ordinary business care and judgment that not only was there a total lack of economy of effort as to the labors of the several employees of said Trust Company, but also that there existed certain persistent and continuing irregularities in the keeping of said books which should require so much of the attention of the managing officer of said Trust Company. That, by reason of the failure and neglect of the Directors to change the practice and policy and to institute inquiry to learn whether any irregularities had occurred

necessitating the frequent working upon and entries in said books by the said Treasurer, the stealings and other unlawful diversion of the Trust Company's funds continued and increased as herein elsewhere more fully set forth.

Twenty-third. That none of the officers or Directors devoted any time to the affairs of the bank, except periodic, infrequent visits to the bank made by the President or one of the Vice-Presidents, or occasional visits from members of the Board of Directors. That said Smith, knowing that none of said officers or Directors knew or made any effort to learn the details of the Trust Company's business, started, in the early period of the Trust Company's existence, improperly to divert and steal portions of the Trust Company's funds and to commit the unsafe practices hereinabove alleged, and that, being left undisturbed in the sole management and control of the Trust Company and in charge of its general books of account, he continued at frequent intervals and in increasing amounts to embezzle and misapply the funds of said Trust Company, to make improper loans, to pay improper overdrafts, all as in this bill of complaint more fully recited and set forth; that the amount of said embezzlements, misapplications and diversions of funds increased from and after November 1, 1912, steadily down to the date of the closing of the institution, resulting in the losses herein referred to and set forth; that throughout this period a proper examination by the Directors or by independent examiners selected or appointed by said Directors would have, at any time, resulted in a disclosure of the ir-

regularities and the diversion of funds on the part of said Smith and would have resulted in the installation of suitable and proper safeguards and checks which would have prevented subsequent losses of the Trust Company's funds, and would have effected the recovery of a large portion of the moneys so diverted and lost; that no such examination was at any time made, and no such safeguards or checks were installed or provided, and the free and uninterrupted handling of the Trust Company's funds and keeping of its records by said Smith were left undisturbed, resulting in the losses referred to and herein more fully set forth.

Twenty-fourth. That at the time of the organization of said Trust Company, which was the time that said Directors first took said Raymond E. Smith into the employ of said Trust Company, said Raymond E. Smith was a man of doubtful banking reputation and record, which fact said Directors knew or might have known upon reasonable inquiry or attention to their duties and which would have disclosed to them that said Smith was not a fit person to be entrusted with the duties of Secretary and Treasurer of said Roseville Trust Company. That on May 14th, 1909, one Vivian M. Lewis, then the Commissioner of Banking and Insurance of the State of New Jersey, wrote a letter to William P. Odell, one of said Directors, as President of said Roseville Trust Company, a copy of which letter is annexed as part of Exhibit "I" and hereby made part of this bill of complaint, which letter constituted a plain warning to the Directors that said Raymond E. Smith

was not a safe person to whom to entrust the management of the property and affairs of said Roseville Trust Company or, indeed, any duties or responsibilities whatsoever in said Roseville Trust Company. That the aforesaid letter of Vivian M. Lewis, dated May 14, 1909, was read and thoroughly discussed by the Directors of the said Trust Company; that thereafter and as a result of said letter said Smith offered his resignation as Treasurer and Secretary of the said Roseville Trust Company. That, at a meeting of said Directors held June 21, 1909, at which all of the then Directors, except G. Rowland Munroe, were present, said Directors, by appropriate action, unanimously refused to accept said resignation, and a motion that said Smith be retained as Secretary and Treasurer of said Trust Company was unanimously adopted. That shortly thereafter the said G. Rowland Munroe fully concurred in the aforesaid action. That thereafter the said Vivian M. Lewis as Commissioner of Banking and Insurance of the State of New Jersey, and his successors in office or their deputies, wrote numerous letters to the said Trust Company, calling attention to various instances of neglect, incompetence, laxness and irregularity in the conduct of its affairs; that each of said letters was read by the said Directors; that a copy of each of said letters and the replies of said Directors, if any, thereto, is annexed to this bill of complaint, hereby made part hereof and marked Exhibit "I." That said letters and each of them remained in the files of said Roseville Trust Company and were then accessible to such of the Directors as assumed office after the

receipt of said letters or any of them; that references to said letters were contained in the minutes of said Trust Company; that such Directors either read said letters or would have done so with reasonable attention to their duties as such Directors; that, in spite of the plain warnings contained in said letters, the said Directors continued in their course of inattention, laxness, neglect and incompetence as hereinabove described.

Twenty-fifth. That on or about the 16th day of December, 1912, the said Directors, through an examining committee of said Directors, chosen by them, consisting of Elmer K. Sexton, James B. Banister, William T. Benjamin, Clinton F. McCord and Edward D. Dunn, made, or pretended to make, as required by law, an examination of the books of the said Roseville Trust Company as of the 14th day of December, 1912; that, in order to make such examination, it was necessary to examine the general ledger and the two ledgers containing the individual demand deposit accounts known as Individual Demand Ledger No. 1 and Individual Demand Ledger No. 2 respectively; and without examining said books it was impossible to make any examination of the affairs of the Roseville Trust Company whatsoever; that, on the said occasion, said Examining Committee did examine said three books or pretended to do so. That on the date of said examination there existed upon the face of said general ledger the grossest and most palpable of false and fraudulent entries, including discrepancies in the daily trial balance for December 14, 1912, the day as of which said examination was made, amounting to $98,000,

which any person of ordinary intelligence would have discovered by a mere reading of the entries in said general ledger as of the date of said examination, or by a mere comparison of the entries in the daily trial balance of said date with the corresponding entries for the day previous, in the next adjoining columns, from which said entries were supposedly extended; that said Examining Committee did not on said occasion report to the Board giving in detail all items included in the assets of the Trust Company which they had reason to believe were not of the value at which they appeared on the books and records of the Trust Company, and giving the value, in their judgment, of each of said items; nor did said Directors cause said report to be recorded in the minute book of said company; that said examining committee did not ascertain whether the capital stock of said Trust Company had been impaired by reason of losses sustained through bad debts, defalcations, misapplication and diversion of its funds, falsifications of records or otherwise. That a reasonably careful and competent examination on said occasion would certainly have resulted in the discovery of all the shortages then apparent on the face of the general ledger of said Roseville Trust Company; that the amount thereof was then $98,000 in addition to other shortages which did not there appear; that said false entries were the work of said Raymond E. Smith and were made by him in an endeavor to conceal said shortages; that their discovery would have resulted in the removal of said Smith and would have effectually prevented any further embezzlements or other losses; that,

as a matter of fact, said Raymond E. Smith continued to embezzle from, missapply funds of, and defraud said Roseville Trust Company after said occasion resulting in an additional loss occurring after said occasion of upwards of $250,000 to said Roseville Trust Company, all of which would have been prevented by a reasonably careful or competent examination by said examining committee on said occasion. That the report of said examining committee on its face indicated that proper care had not been employed in the making of said examination; that said report was duly presented to and approved and accepted by said Directors at a meeting of the Board of Directors held on or about February 11, 1913. Said Raymond E. Smith thereafter continued to embezzle and improperly divert and misapply the funds of said Roseville Trust Company and to defraud it, and continued to falsify the books, so that the amount of the losses resultant thereon apparent on the face of the general ledger on May 22, 1913, was approximately $200,000. That on the 22nd day of May, 1913, an examining committee of said Directors, consisting of Elmer K. Sexton, James B. Banister, Clinton F. McCord and George E. Krug, made or pretended to make an examination of the books of said Roseville Trust Company as of the 21st day of May, 1913; that on the date of said examination there existed upon the face of the general ledger of said Roseville Trust Company and the individual demand ledgers the grossest and most palpable of false and fraudulent entries made by said Smith in a crude attempt to conceal the said short-

ages, for example: the footing of the column of daily trial balance as of said date was erroneous to the extent of $200,000. Moreover, other falsifications of the books existed on said date and would have been discovered by a reasonably competent examination; for example: three large debits to the Union National Bank of Newark, which appeared on the cash book of said Roseville Trust Company, were not posted in the general ledger, and one large debit, appearing on said cash book, to the Irving National Bank, New York, was not posted in the general ledger. Upwards of $50,000, reported to be in transit for deposit in correspondent banks, was wholly non-existent, as the said examining committee might easily have discovered upon later inquiry from said correspondent banks, which inquiry it was their natural and reasonable duty to make. That the discovery of these and other instances of falsification on or about said date would have resulted in the removal of said Smith, and would have effectually prevented any further losses, and would have led to the recovery of large portions of the losses already incurred; that, as a matter of fact, said Smith continued to embezzle, misapply, and improperly divert the funds of said Roseville Trust Company after said occasion, resulting in an additional loss of upwards of $100,000 to said Roseville Trust Company; that the said report of said examining committee indicated on its fact that proper care had not been employed in making said examination; that said report was duly presented to and approved and accepted by said Directors at a meeting of the Board of Directors held on or about

July 8, 1913; that said examining committee did not on said occasion report to the Board giving in detail all items included in the assets of the Trust Company which they had reason to believe were not of the value at which they appeared on the books and records of the Trust Company, and giving the value, in their judgment, of each of said items; nor did said Directors cause said report to be recorded in the minute book of said company; that said capital stock of said Trust Company had been impaired by reason of losses sustained through bad debts, defalcations, falsifications of records or otherwise.

Twenty-sixth. Your orator further shows that, throughout the period aforesaid, said Raymond E. Smith distributed, at the regular meetings of the Board of Directors and of the executive committee of said Roseville Trust Company, to the Directors then and there present, certain statements or supposed statements of the condition of the Roseville Trust Company on each of the dates of said meetings, purporting to show the amounts and general items of assets and liabilities, and, in particular, purporting to show the amount of funds of said Roseville Trust Company on deposit with other banks, that in many such instances, the amount of said bank balance so shown was fictitious and greatly in excess of the true amount and in excess of the amount required by law and good banking practice to be kept on hand for the operations of the said Roseville Trust Company; that the said identical statements also showed that, on the same dates, large sums of money were owed to other banks by said Roseville Trust Company upon its

notes, upon which five or six per cent interest was being paid; that, if the said Directors had performed their plan and clear duty as such Directors, they would have promptly made inquiry with a view to paying off or reducing such large loans with such portion of said alleged bank balance as were not required by law and good banking practice for the operations of said Trust Company; that, if they had made such inquiry, and moreover, if they had performed their plain duty to learn the amount of said bank balances from the original sources of information easily at hand, *i. e.*, from the banks with whom said Roseville Trust Company had or purported to have balances on deposit, they would have learned that the amounts of said bank balances, as so stated, were grossly inflated and fictitious, and would have recovered the losses already referred to and would have saved further loss to said Roseville Trust Company.

Twenty-seventh. That, during the early Spring of the year 1913 there was an unusual falling off in the amount of deposits in said Roseville Trust Company as reported by said Raymond E. Smith, which reports did not state the true facts as to the amounts of said deposits but were made by said Raymond E. Smith for the purpose of reducing the apparent amount of the liabilities of said Roseville Trust Company and thus concealing the losses as aforesaid; that the said apparent decrease of deposits was not only normally to be expected under the circumstances but incompatible with the fact, as reported by said Smith to said Directors, that the number of said deposit accounts

was steadily increasing; so that the said Directors should at once have made an investigation, which, if made, would have promptly resulted in a discovery of the true facts as aforesaid, and would have disclosed to them that during this period the true amount of deposits exceeded, by nearly $300-000, the amount of deposits reported by Smith.

Twenty-eighth. That all of the said thefts and other improper diversions of the funds of said Roseville Trust Company committed by Smith and other employees of said Roseville Trust Company as aforesaid, were accomplished in such a manner that they would have been promptly discovered by the Directors or any of them had any proper investigation been made at any time; and repetition of said acts as aforesaid could have been prevented, and recovery had of said losses or a large part thereof.

Twenty-ninth. That, in addition to the losses above set forth, the said Roseville Trust Company sustained other losses during said periods entirely as a result of the careless, reckless and illegal management of said Trust Company by your Directors, the particulars of which your orator is not able to set forth but which are well known to said Directors; and which your orator prays may be ascertained by a proper accounting herein and decreed to be paid in this suit.

Thirtieth. That said Smith, Jennings, Armstrong, Scarlett, Bruno, Miele, Home Ice and Products Company, Intercity Land and Securities Company, International Tobacco Company and the greater number of the several employees, de-

positors, note-makers, endorsers and other persons concerned with said losses described in this bill of complaint, are insolvent, and not more than $5,000 will be recovered in the aggregate from said insolvents or their estates on account of said losses.

Thirty-first. Your orator further shows that it was the lawful duty of the said Directors of said Roseville Trust Company not to declare or pay dividends upon its capital stock, except out of surplus or profits actually earned, over and above the amount of the liabilities and capital stock of said Roseville Trust Company; that the said Directors of said Roseville Trust Company utterly failed in their said duty in that, in violation of law, they declared dividends and caused dividends to be paid on several dates when no profits had been earned and when there was no surplus of assets over and above the amount of the liabilities and capital stock of said institution, but when, on the contrary, the total of the liabilities and capital stock of said Roseville Trust Company greatly exceeded in amount its assets at a reasonable valuation. The following statement shows the dates and amounts of the several dividends so declared, each of which dividends was duly authorized and declare at a meeting of the Board of Directors duly convened on the date shown in said statement, and thereafter paid. That a large part of said dividends was received by said Directors themselves as stockholders of said Roseville Trust Company.

Date Payable.	Amount of Dividend.
January 3, 1911	$1,500.00
April 1, 1911	1,500.00
July 1, 1911	3,500.00
October 2, 1911	1,500.00
January 2, 1912	3,500.00
April 1, 1912	1,500.00
July 1, 1912	3,500.00
October 1, 1912	1,500.00
January 1, 1913	3,500.00
April 1, 1913	1,500.00
July 1, 1913	3,500.00

Thirty-second. That William P. Odell, William Fairlie, John S. Bell, Fred Kilgus, William J. Banister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton, certain of said Directors, have made partial restitution of said losses, which your orator has accepted from them respectively, in settlement of his claims against them severally in behalf of said Roseville Trust Company, pursuant to an agreement duly made with said Directors on December 10, 1913, and pursuant to an order of this Court made December 30, 1913, and pursuant to the express provisions of statute, but without prejudice to the causes of action against the other Directors as herein alleged. That certain of said Directors paid the amounts of their said settlements in cash and others by the surrender of credits which existed in their favor on the books of said Trust Company That annexed hereto as Exhibit "J" is a statement showing, as to each of said settlements, the name of the Director, the amount of set-

tlement, and whether in cash or surrender of credit as aforesaid. That your orator, upon and after entering upon the discharge of his duties under the provisions of Chapter 171 of the Laws of 1913 aforesaid, duly made or caused to be made an examination of and a valuation of each and every item found among the assets of said Roseville Trust Company and collected and caused to be collected such of said assets as were reducible to cash; that on or about the 10th day of December, 1913, your orator as Commissioner of Banking and Insurance as aforesaid entered into an agreement for the sale of all of the assets and property of the said Roseville Trust Company except claims against Directors and officers growing out of negligence or improper conduct of such Directors or officers, and except claims for loss based upon bonds given to insure the fidelity of officers and employees, and except such concealed assets, if any, belonging to the said Roseville Trust Company, which your orator had not nor had any one in his behalf discovered but which might thereafter be found and reduced to possession. That the purchase price obtained by your said orator for all of the said assets as aforesaid was the sum of $531,434. 97 which was the best price obtainable there by your orator, and the said sale was made with the approval and consent of nearly all of the creditors of the said Roseville Trust Company and was in the manner provided by law, duly approved by the Court of Chancery. That, from the proceeds of said sale and from the moneys received from certain of the Directors who have compromised with your orator as referred to as hereinabove

your orator has paid and provided for the necessary expenses of taking possession of and liquidating the affairs of said Roseville Trust Company as provided for by the aforesaid statute, being Chapter 171 of the Laws of 1913, and has distributed and is distributing to creditors of said Roseville Trust Company the balance of said moneys; that as a result of the foregoing acts, omissions and neglect of the said Directors, the said Roseville Trust Company suffered losses during the times above mentioned, of upwards of $640,000 the precise extent of which is to your orator unknown, but which he prays may be ascertained by a proper accounting herein and decreed to be paid in this suit.

Thirty-third. That the said Directors Harvey Mott, Emile C. Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim, George E. Krug, Charles C. Lurich, G. Rowland Munroe, John B. Scarlett, Raymond E. Smith, and Edward D. Dunn are, in justice and equity, obliged to pay your orator as Commissioner of Banking and Insurance of the State of New Jersey the several sums of money lost by said Roseville Trust Company as aforesaid, occasioned by their said negligence and malfeasance as aforesaid, and to account for whatever moneys have been lost thereby; that your orator has frequently applied to the said Directors and requested them to come to an account with him as Commissioner as aforesaid and to pay him the amount of said losses, and your orator still hoped that said Directors would have complied with such a reasonable request, as in justice and equity they ought to have

done; but they have refused and still refuse to do so, a leging and pretending that they have faithfully and legally discharged their duties as such Directors.

All of which actings, doings and pretenses of the Directors are contrary to equity and good conscience, and tend to manifest wrong, injury and oppression to your orator in the premises. To the end, therefore, that the said Directors Harvey Mott, Emile C. Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim George E. Krug Charles C. Lurich G. Rowland Munroe, John B. Scarlett, Raymond E. Smith and Edward D. Dunn and each of them may, but without oath, answer under oath being hereby duly waived, to the best and utmost of their knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and as fully and particularly as if the same were here again repeated and they and each of them distinctly interrogated thereunto, and that an account may be taken to ascertain the amount of the losses suffered by the company, and your orator, by reason of the negligent, illegal and improper conduct of the said directors as aforesaid, that it may be ascertained for what amount each of said Directors should be held responsible on account of the matters hereinbefore alleged; and that they may be required, by a decree of this honorable Court, to pay your orator the amounts thereof in order that the same may be distributed as required by law, and that your orator may have such further and other relief as may seem just.

Bill of Complaint

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issued out of and under the seal of this honorable Court, to be directed to the said Harvey Mott, Emile C. Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim, George E. Krug, Charles C. Lurich, G. Rowland Munroe, John B. Scarlett, Raymond E. Smith and Edward D. Dunn, commanding them, and each of them, by a certain date and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable Court then and there to answer all and singular the premises and henceforth to abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, etc.

Complainant.

Solicitor for Complainant.

Of Counsel.

Exhibit J

	Paid in cash.	Surrender of credit.
William Fairlie	$30,000.00	
John S. Bell	$15,000.00	
William P. Odell		$41,000.00
Elmer K. Sexton	432.97	4,567.03
Frederick Kilgus	6,770.14	8,229.86
William J. Banister	12,500.00	
James B. Banister	8,000.00	
Clinton F. McCord	9,000.00	
William W. Woodward	5,000.00	
	$86,703.11	$53,796.89