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## EXHIBITS

- C-1—Minute book of Bank. Introduced in evidence on page 29.
- C-2—Minutes of September 2, 1920. Introduced in evidence on page 29. Printed on page 29.
- C-3—Minutes of September 17, 1920. Introduced in evidence on page 32. Printed on page 33.
- C-4—Minutes of September 24, 1920. Introduced in evidence on page 33. Printed on page 33.
- C-5—Minutes of October 7, 1920. Introduced in evidence on page 35. Printed on page 35.

- C-6—Minutes of April 18, 1921. Introduced in evidence on page 36. Printed on page 36.
- C-6—Bank book. Introduced in evidence on page 39. Printed on page 58.
- C-7—Check for \$3167.20. Introduced in evidence on page 38. Printed on page 60.
- C-8—Account relative to preceding. Introduced in evidence on page 39. Printed on page 60.
- C-9—Transfer to general account. Introduced in evidence on page 42.
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(Filed June 12, 1925.)  
 IN CHANCERY OF NEW JERSEY

Between:

John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyer, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc. of the Estate of Frederick Weiler, deceased, and Anna Eisele, and Marshall Van Winkle, executors etc. of the Estate of John Eisele, deceased.

Complainants,

vs.

The First National Bank of Edgewater, New Jersey, Rollo Steenland, and Elmer J. S. Coe.

10

On Bill, etc.

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**BILL OF COMPLAINT**

The complainants, John Eisele, Jr. of Englewood, New Jersey, S. Wood McClave, Jr. of Englewood, New Jersey, Daniel A. Higgins, of Edgewater, New Jersey, Robert C. Winters, of Leonia, New Jersey, Robert L. Post of Cliffside, New Jersey, Otto Meyer of Edgewater, New Jersey, George H. Lambach, of Cliffside, New Jersey, Louis R. James, of Edgewater, New Jersey, Annie Weiler, Executrix of the Estate of Frederick Weiler, deceased, of Edgewater, New Jersey, Marshall Van Winkle, of Jersey City, New Jersey, and Anna Eisele, of Weehawken, New Jersey, Executor and Executrix of the Estate of John Eisele deceased, respectfully show that:

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*Complaint*

1. At all the time hereinafter mentioned the defendant, The First National Bank of Edgewater, was and still is a corporation organized and existing under and by virtue of the laws of the United States, of America, located and doing business at all time hereinafter mentioned in the Borough of Edgewater, in the County of Bergen and State of New Jersey.

10 2. At all the time hereinafter mentioned and between the First day of July, 1920, and the Eighteenth day of April, 1921, John Eisele and Frederick Weiler, and the complainants, John Eisele, Jr., Daniel A. Higgins, Louis R. James, George H. Lembach, S. Wood McClave, Jr., Otto Meyer, Henry L. Post, Robert C. Winters, and the defendants, Elmer J. S. Coe, and Rollo Steenland, were the Directors of the defendant, The First National Bank of Edgewater.

20 3. On the 28th day November, 1922, John Eisele died, leaving a Last Will and Testament, which was thereafter, and on December 12, 1922, duly admitted to probate, by the Surrogate of said County, of Hudson, and Letters Testamentary thereon were issued to the complainants, Marshall Van Winkle and Anna Eisele.

30 4. On or about June 22, 1922, Frederick Weiler died, leaving a Last Will and Testament, which was thereafter duly admitted to probate, by the Surrogate of the County of Bergen, and Letters Testamentary thereon were issued to Annie Weiler.

5. At all the time hereinafter mentioned, the said defendant, Elmer J. S. Coe was the cashier of The First National Bank of Edgewater, and as such cashier was in general charge of money by checks drawn on the said defendant, the certification of checks, the collection of moneys, and in general the

*Complaint*

usual duties of cashier in a National Bank of the character of the defendant.

6. At all times, hereinafter mentioned, George B. Hitchcock, Inc., was a corporation duly organized and authorized under and by virtue of the laws of the State of New Jersey and located at and doing business in the Borough of Bogota, County of Bergen and State of New Jersey.

7. On or about the 18th of August, 1920, George B. Hitchcock, Inc. deposited two (2) checks in the Defendant, The First National Bank of Edgewater, drawn on the Bogota National Bank, one in the sum of \$10,500, and the other in the sum of \$12,900, both of which checks were deposited to the account of George B. Hitchcock Inc. both of which checks were duly protested by the Bogota National Bank, and were returned to the defendant, The First National Bank of Edgewater, marked, "insufficient funds," and were not paid.

8. At the time the two checks were deposited, as aforesaid, George B. Hitchcock, Inc. had a cash balance to its credit in its account in the said defendant, The National Bank of Edgewater, of an amount not exceeding, \$1067.77.

9. About the time of the two deposits, made by George B. Hitchcock, Inc. as aforesaid, or shortly thereafter, and before the return of the two protested checks, from the Bogota National Bank, the said George B. Hitchcock, Inc. through its officer or agent, presented certain checks for payment to the defendant, The First National Bank of Edgewater, drawn upon said bank by said defendant, George B. Hitchcock, Inc. and that thereupon the said defendant, Elmer S. Coe, who was the cashier of the defendant, The First National Bank of Edgewater,

Complaint

paid the said checks to the holders thereof. That the bank thereby incurred a loss of \$23,400, besides protest fees.

10 10. The defendant, Elmer J. S. Coe, unlawfully credited the Hitchcock Inc. account and paid the said checks without the consent or knowledge of the other Directors or any of them, or any of the officers of the defendant The First National Bank of Edgewater.

11. The defendant, The First National Bank of Edgewater at this time had a paid in Capital of One Hundred Fifty Thousand dollars, (\$150,000) and a small amount of undivided profits, but it did not have any surplus over and above its Capital and undivided profits, as aforesaid.

20 12. As soon as the two checks on the Bogota National Bank had been returned uncollected a critical situation existed and a Directors' meeting was held on September 2, 1920, at which all the Directors were present.

30 13. It was at the time of this meeting believed by the defendant, The First National Bank of Edgewater, its officers and directors, that the over-payment of the checks of George B. Hitchcock, Inc. which had been returned protested and unpaid by the Bogota National Bank, had caused a permanent and total loss to the defendant, The First National Bank of Edgewater, of the sum of \$23,400.00 the total of the two checks, except the small balance which the said George B. Hitchcock, Inc. had on deposit with the defendant, The First National Bank of Edgewater,

14. At this meeting, the entire situation was explained to the Directors, in detail in the presence of the attorney of the bank. The attorney for the

Complaint

bank, believing that the bank had suffered a total and permanent loss, advised the Directors, that owing to the financial condition of the bank, the over-payment of the checks impaired the Capital and undivided profits to such an extent that the Directors would be compelled to either go to jail, close the bank or make up the loss sustained in some manner.

15. After a discussion, it was decided that the Directors should establish a fund of proper account, to be known as the account of John Eisele and others, out of which any loss sustained by the bank on account of the Hitchcock loss, would be paid, in order that it might continue business, and that the Directors, should pay into such account of John Eisele and others, enough moneys to take care of the situation created by the indebtedness of George B. Hitchcock Inc. It was agreed that each Director should contribute to the fund a proportionate amount equal to the amount of their capital stock, and as a result of such agreement, the sum of \$28,998.40 was contributed by the Directors in amounts according to their Capital stock, as follows:

John Eisele	66	\$8,870.40	Check	
John Eisele, Jr.	10	1,344.00	Check	
Daniel A. Higgins	10	1,344.00	Check	
L. R. James	10	1,344.00	Check	
George B. Lembach	10	1,344.00	Check	
S. Wood McClave, Jr.	10	1,344.00	Check	
Otto Meyer	10	1,344.00	to be paid	30
H. L. Post	10	1,344.00	Check	
Rollo Steenland	10	1,344.00	Check	

*Complaint*

President of the Edgewater Trust Company and a Mr. Doremus, who was the cashier of the said Trust Company. At this meeting, the old Directors resigned and a new Board of Directors was elected. At the time of the transfer of the stock as aforesaid, the matter of George B. Hitchcock Inc. was gone into fully and explained in great detail, and also the manner in which the money paid in by the said Hitchcock Inc. had been deposited in the name of John Eisele and Others, and the circumstances surrounding the matter and Doremus and Lowe stated that they fully understood the situation, and agreed that the same method be continued in the future and to pay over to the Directors the money when payment had been made in full.

23. On information and belief the said George B. Hitchcock Inc. has fully paid the amount of money which was due the said defendant, but said payments have not been deposited or credited to the account of John Eisele and Others, since April 17, 1921, but on the other hand the moneys in said account have been withdrawn or credited to some other account by the defendant without the consent of, or notice to the complainants or defendants Coe or Steenland.

24. Although the said money has been fully paid and demand has been made frequently for payment, either by said complainants in person or by someone in their behalf, no part of said money has been paid, and the said defendant, wrongfully, refused and still refuses to pay said money or any part thereof.

25. The complainants further say that the money that was paid to the defendant was paid under mutual mistake of facts, and that the defendant has been unjustly enriched to the extent of the pay-

*Complaint*

ments made by the complainants and defendants, Coe and Steenland as aforesaid.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That the First National Bank of Edgewater, Rollo Steenland and Elmer J. S. Coe, who are the defendants in this cause may answer this bill of complaint and each statement herein made.

2. That the defendant the First National Bank of Edgewater, may be ordered to make discovery on oath of the books, paper notes, minutes, agreements or other documents which are or may have been in its possession or under its control relating to the matters in controversy, in this cause.

3. That the defendant *First National Bank of Edgewater* may be ordered to account to the complainants, as to the answer, in which the payments of the indebtedness of George B. Hitchcock have been credited, and to that account and the method, time and amounts of the payments.

4. That if the moneys paid by said George B. Hitchcock Inc. have been credited to the Special account of John Eisele and Others that said fund may be decreed to be held in trust for the benefit of the complainants and the defendants, Rollo Steenland, and Elmer J. S. Coe, and that the defendant has no right, title or interest in said fund.

5. That if the moneys paid by said George B. Hitchcock, Inc. have not been credited to the special account of John Eisele and Others, that the defendants may be compelled to account to the complainants for the said money so paid.

6. That the defendant *First National Bank of Edgewater* may be decreed to have held the moneys paid by the said George B. Hitch-

Complaint

cock Inc., and Others as Trustees for the benefit of the complainants and the defendant, Rollo Steenland and Elmer J. S. Coe

7. That the defendant <sup>First National Bank of Edgewater</sup> may, by decree be ordered to pay the said money to the complainants and the defendants, Rollo Steenland and Elmer J. S. Coe, or their respective solicitors, upon such terms and at such time as the court may decree or that the money may be ordered paid into this court.

8. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the circumstances.

9. That the complainants may have such other and further relief in the premises as may be equitable and just.

Seufert and Elmore.

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Answer

IN CHANCERY OF NEW JERSEY

Between:

John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyer, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc., of the Estate of Frederick Weiler, deceased, and Anna Eisele and Marshall Van Winkle, executors, etc., of the Estate of John Eisele, deceased,

Complainants,

vs.

The First National Bank of Edgewater, New Jersey, Rollo Steenland, and Elmer J. S. Coe,

Defendants.

On Bill, Etc.

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ANSWER.

The answer of the First National Bank of Edgewater, New Jersey, a corporation organized under the laws of the United States.

The defendant, the First National Bank of Edgewater, New Jersey, answering the bill of complaint says that:

1. It admits paragraph 1.

*Answer*

2. It admits paragraph 2.
3. It admits paragraph 3.
4. It admits paragraph 4.
5. It admits that said defendant, Elmer J. S. Coe, was the cashier of the First National Bank of Edgewater, New Jersey, as alleged in paragraph 5, but avers that he occupied such position only until October 7th, 1920.
- 10 6. It admits paragraph 6.
7. It admits paragraph 7.
8. It admits paragraph 8.
9. It admits paragraph 9.
10. It admits that the Hitchcock Inc. account was credited and that said checks were paid, as alleged in paragraph 10, but has no knowledge or information sufficient to form a belief as to the remaining allegations in said paragraph.
11. It denies paragraph 11 and avers that the capital account at this time, August 18, 1920, showed a capital of \$50,000. a surplus of \$35,000. and undivided profits of \$6,882.50.
- 20 12. It admits paragraph 12.
13. It admits paragraph 13.
14. It admits at said meeting the financial condition of the bank was discussed and that it was stated that the capital and undivided profits were greatly impaired, but has no knowledge or information sufficient to form a belief as to the remainder of said paragraph, 14.
- 30 15. It admits that the directors contributed money to the bank, as alleged in paragraph 15, but avers that said contributions were made as gifts to the bank and were credited to the undivided profits account, and further avers that the sum total of the

*Answer*

contributions of the directors as shown by the individual list in said paragraph is \$23,654 and not \$28,998.40, as alleged in said paragraph.

16. It denies paragraph 16.

17. It admits the allegations in paragraph 17 except that George B. Hitchcock was present at said meeting of the board of directors as to which allegation, it has not sufficient knowledge or information to form a belief.

18. It admits that \$5,033.34 was received from George B. Hitchcock, Inc. on October 13, 1920, and that \$1067.77 was received from said company on October 7, 1920, as alleged in paragraph 18 but avers that said payments were credited to the undivided profits account, and it has no knowledge or information sufficient to form a belief as to the remaining allegations in said paragraph.

19. It denies paragraph 19.

20. It admits the receipt of \$5,033.34, as alleged in paragraph 20, but avers that said payment of \$5,033.34 was credited to the undivided profits account, and denies the remaining allegations of said paragraph.

21. It admits that payments were made by George B. Hitchcock Inc. up to April 21, 1921, as alleged in paragraph 21, but avers that said payments were credited to the account of John Eisele and Others Special, only after December 29th, 1920 when said account was opened, and it admits that there was \$11,771.83 in said account on April 21, 1921.

22. It admits that on April 16, 1921, a special meeting of the directors was called, the old Board of Directors resigning and a new one elected, and the

*Answer*

matter of George B. Hitchcock, Inc., was discussed, as alleged in paragraph 22 and denies the remaining allegations of said paragraph.

23. It admits paragraph 23.

24. It admits that said money due from George B. Hitchcock Inc. has been fully paid and that no part of said money has been paid to complainants, as alleged in paragraph 24, and denies the remaining allegations of said paragraph.

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25. It denies paragraph 25.

26. On or about August 18th, 1920, George B. Hitchcock, Inc., deposited two checks in the defendant bank, one for \$10,500. and the other for \$12,900. and drew said money from said bank by checks before said checks so deposited were returned unpaid, creating a condition of such insecurity and danger to the assets of said bank as the result of said loss of \$23,400, that the directors of said bank soon thereafter met and decided to make such permanent contributions to said bank as would be required to make up said loss, in order that the reputation of said bank and its directors might not be injured, that a run on said bank might be avoided, that law-suits against said bank and its directors might be prevented and that the faith of the public in the integrity and business ability of said directors might not be in question, and upon the payment of such contributions into the undivided profits account of said bank, the bank's former financial condition was re-established and the matter was closed.

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William B. Gourley,  
Solicitor of Defendant,  
First National Bank of Edgewater,  
New Jersey.

*Replication*

IN CHANCERY OF NEW JERSEY

Between  
John Eisele, Jr., et als,  
Complainants,  
and  
The First National Bank of  
Edgewater, New Jersey, et  
als,  
Defendants.

On Bill &c.

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REPLICATION

The Complainants herein replying to the Answer of the defendant filed herein respectfully allege:

1. They severally deny the allegations set forth in paragraphs numbered 15 and 26, and as to the several other allegations set forth in the said Answer, these complainants join issue with the said defendants.

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Respectfully,  
Seufert and Elmore,  
Solicitors and of Counsel for  
Complainants.

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*On Pleadings and Proofs*

who was only secondarily liable should be entitled to have the money paid by him returned. Otherwise, the obligee would be unjustly enriched to the extent of having received payment of its obligation twice.

Whether the relief granted the complainants in the present case is by way of impressing a trust on the funds, or through the application of the equitable right of subrogation, or otherwise, makes no difference in the result. I think that the complainants should prevail; and that the moneys advanced by them and deposited with the bank to meet any loss ultimately sustained through the failure of the overdrawing depositor to make good his deficit, should now be returned. The depositor appears to have paid his obligation in full; and the amount now due the complainants, as indicated, should be a matter of simple calculation.

I will advise a decree accordingly, and will settle its terms in the usual way upon presentation of the same by counsel.

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*Final Decree*

(Filed October 17, 1927.)  
IN CHANCERY OF NEW JERSEY

Between	}	On Bill, etc.,
John Eisele, Jr., et als,		
Complainants,		
and	}	10
The First National Bank of		
Edgewater, N. J., et als,		
Defendants.		

*Final Decree.*

This matter coming on to be heard on Bill, Answer, Replication and Proof in Court, in the presence of Eeufert and Elmore, solicitors for the complainants, William B. Gourley, Esq., solicitor for the defendant, The First National Bank of Edgewater, and Louis O. Condit, solicitor for the defendant, Elmer J. S. Coe, and the Court having read and considered the pleadings and proof and heard the arguments of the respective solicitors, whereby it appears that the defendant, The First National Bank of Edgewater, on September 2, 1920, received from the complainants and the defendants, Rollo Steenland and Elmer J. S. Coe, the sum of Twenty-eight thousand One hundred and sixty-five dollars and sixty cents (\$28,165.60) to secure the said defendant, The First National Bank of Edgewater, from possible loss because of an overdraft of George B. Hitchcock, Incorporated; that the said George B. Hitchcock, Incorporated, by payments made at designated intervals repaid the said overdraft;

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Final Decree

And it further appearing that the said defendant, The First National Bank of Edgewater, still has in its possession the said moneys advanced by the complainants and the defendants, Rollo Steenland and Elmer J. S. Coe, which said moneys should be returned to the said complainants and the defendants, Rollo Steenland and Elmer J. S. Coe;

10 And it further appearing that the amount due to the said complainants and the defendants, Rollo Steenland and Elmer J. S. Coe, for the amount advanced as stated above, together with interest thereon from the date of said advancement of said moneys in excess of the amount of said overdraft, from September 2, 1920, the date said moneys were advanced, and interest on the amount of said overdraft from the dates of payments on account of principal and interest by said George B. Hitchcock, Incorporated, to the said defendant, The First National Bank  
20 of Edgewater, to the date hereof at the rate of six per cent (6%) amounts to <sup>seventy</sup> ~~thirty-eight~~ <sup>seventy</sup> ~~thirty-eight~~ thousand <sup>forty</sup> ~~thirty-eight~~ five hundred <sup>eighty</sup> ~~thirty-eight~~ twenty-six dollars and <sup>six</sup> ~~six~~ cents (\$38,526.06); <sup>\$</sup> 37,746.86

And it further appearing that the complainants advanced One hundred sixty-one one hundred eighty-sixths (161-186ths) of said money; that the defendant, Rollo Steenland advanced Ten one hundred eighty-sixths (10-186ths) of said moneys and that the defendant, Elmer J. S. Coe, advanced Fifteen  
30 one hundred eighty-sixths (15-186ths) of said moneys;

It is, on this <sup>17<sup>th</sup></sup> ~~July~~ <sup>Oct</sup> day of ~~July~~ <sup>Oct</sup>, 1927, ordered, that the said defendant, The First National Bank of Edgewater, pay to the defendant, Rollo Steenland, the sum of Two thousand <sup>twenty-nine</sup> ~~seventy-one~~ dollars and

Final Decree

<sup>forty</sup> ~~twenty-nine~~ cents (\$2,071.29); to Louis O. Condit, solicitor for the defendant, Elmer J. S. Coe, the sum of <sup>forty-four</sup> ~~three thousand one hundred six~~ dollars and <sup>ten</sup> ~~nine~~ <sup>ten</sup> ~~four~~ cents (\$3,106.94); and to Seufert and Elmore, solicitors for the complainants, the sum of <sup>two</sup> ~~thirty-three thousand three~~ hundred <sup>seventy-two</sup> ~~forty-seven~~ dollars and <sup>sixty-six</sup> ~~eighty-three~~ cents (\$33,347.83), together with interest on each of the above amounts from the date hereof to the date of payment;

10 It is further ordered, that the defendant, The First National Bank of Edgewater, pay to complainants or to their solicitors, the costs of this suit to be taxed, together with counsel fees of <sup>One (1,000)</sup> ~~One (1,000)~~ <sup>Thousand</sup> ~~One (1,000)~~ Dollars, to be included in said taxed costs and that execution issue for the same in accordance with the practice of this Court.

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*Handwritten notes:*  
Final Decree 2,079.40  
\$37,672.76

Notice of Appeal

(Filed December 10, 1927.)  
IN CHANCEY OF NEW JERSEY

Between:

10 John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyer, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc., of the Estate of Frederick Weiler, deceased, and Anna Eisele and Marshall Van Winkle, executors, etc., of the Estate of John Eisele, deceased,

Complainants,

and

20 The First National Bank of Edgewater, New Jersey, Rollo Steenland, and Elmer J. S. Coe,

Defendants.

On Bill etc.

Notice of Appeal

30 The defendant, The First National Bank of Edgewater, New Jersey, hereby appeals from the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Vice Chancellor, Vivian M. Lewis) in the above entitled cause on October 17th, 1927, and from the whole and every part thereof to

Notice of Appeal

the Court of Errors and Appeals in the Last Resort in All Causes.

William B. Gourley,  
Solicitor for and of Counsel  
with Defendant, The First National Bank of Edgewater, New Jersey.

Dated: December 9, 1927.

I conceive there is a good cause for appeal in the above entitled cause. 10

William B. Gourley  
Of Counsel with Defendant,  
First National Bank of Edgewater.

Service of the within amended Notice of Appeal is hereby acknowledged this 12th day of December, 1927.

Seufert & Elmore,  
Solicitor of Complainants. 20

Service of the within Notice of Appeal is hereby acknowledged this 14th day of December, 1927.

Louis O. Condit,  
Solicitor of Defendant Elmer J. S. Coe.

*Petition of Appeal*

New Jersey Court of Errors and Appeals.

10	John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyer, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc., of the Estate of Frederick Weiler, deceased, and Anna Eisele and Marshall Van Winkle, executors, etc., of the Estate of John Eisele, deceased,	On Appeal from Court of Chancery.
	Complainants-Appellees	
	vs.	
20	The First National Bank of Edgewater, New Jersey, Defendant-Appellant, and Rollo Steenland and Elmer J. S. Coe, Defendants.	

## PETITION OF APPEAL

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

The petition of The First National Bank of Edgewater, New Jersey, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor,

*Petition of Appeal*

Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 17th, 1927, advised by Honorable Vivian M. Lewis, Vice Chancellor, in a certain cause in said Court of Chancery wherein the said John Eisele, Jr., et. al. were complainants and the said The First National Bank of Edgewater, New Jersey, Rollo Steenland and Elmer J. S. Coe were defendants, in this respect, to wit, that the said decree adjudges that the said complainants were entitled to the relief sought and prayed for in their said bill of complaint filed in said cause. And your petitioner appeals from the said decree of the Chancellor and the whole and every part thereof upon the ground that the same is erroneous for that the said decree adjudges that this appellant The First National Bank of Edgewater, New Jersey, pay to the defendants, Rollo Steenland, Elmer J. S. Coe and to the complainants, certain sums of money in said decree specifically set forth and to the complainants' counsel, fees and costs of said suit.

Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as to this court shall seem proper.

William B. Gourley  
Solicitor for and of Counsel  
with Appellant.

*Answer to Petition of Appeal*NEW JERSEY COURT OF ERRORS  
AND APPEALS

10 John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyer, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc., of the Estate of Frederick Weiler, deceased, and Anna Eisele and Marshall Van Winkle, executors, etc., of the Estate of John Eisele, deceased,

Complainants-Appellees.

vs.

20 The First National Bank of Edgewater, New Jersey,  
Defendant-Appellant,  
and

Rollo Steenland and Elmer J. S. Coe,

Defendants.

On Appeal from  
the Court of  
Chancery.

## Answer to Petition of Appeal

30 The answer of John Eisele, Jr., S. Wood McClave, Jr., Daniel A. Higgins, Robert C. Winters, Herbert L. Post, Otto Meyers, George H. Lambach, Louis R. James, Annie Weiler, Executrix, etc., of the Estate of Frederick Weiler, deceased, and Annie Eisele and Marshall Van Winkle, executors, etc., of the Estate

*Answer to Petition of Appeal*

of John Eisele, deceased, the above named appellees to the petition of appeal of the First National Bank of Edgewater, New Jersey, the above-named appellant.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admit that a decree was on October 17, 1927, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believed that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

Seufert and Elmore  
Solicitors for and of Counsel  
with Appellees.



*S. Leslie Doremus—direct*

Eisele, Jr., Limbach, Steenland, Post, Meyer, Higgins, Coe, James and McClave. Also, Attorney Clarence Mabie.

Mr. Post was appointed secretary by Mr. Eisele for this meeting.

Mr. Higgins, moved, seconded by Mr. Winters, that funds deposited in the name of Messrs. Eisele, Sardi and Weiler as Trustees, and indicated by pass-  
 10 book No. 3988, amounting to \$3,167.20, be turned over to the Bank. This was carried unanimously. A check was accordingly drawn, signed by Mr. Eisele, endorsed by all present, covering the amount represented in the account, and made payable to the First National Bank, with a notation on the check: 'To be credited to The First National Bank, undivided profit account.'

"Motion made by Mr. James, seconded by Mr. Higgins, that the Attorney be instructed to with-  
 20 hold procedure in bankruptcy against George B. Hitchcock, Inc., and criminal liability against George B. Hitchcock, until satisfactory arrangements have been made by the Bogota National Bank with our attorney. A telegram was sent by the Attorney to Mr. Wm. N. Smith, President, Bogota National Bank, addressed to Chaplin, Conn., and Plymouth, Mass., as follows:

'New York, September 2nd, 1920.

'Unless satisfactory arrangements in the matter  
 30 of George B. Hitchcock, Inc., are made with the First National Bank of Edgewater by September 8th, 1920, I am instructed to start drastic action in bankruptcy and for criminal liability.

Clarence Mabie, Attorney.'

"The cashier was instructed to institute a system of entering deposits on the ledger, so that the Book-

*S. Leslie Doremus—direct*

keepers would be informed as to the items which had been collected, so as to prevent drawing against uncollected items.

Checks drawn in the following amounts were paid by various directors, and credited into the undivided profit account, total, \$19,622.

66 shares, John Eisele,	\$8,870.40	paid by check	
10 shares, John Eisele, Jr.	1,344.00	paid by check	
10 shares, D. A. Higgins	1,344.00	paid by check	10
10 shares, L. R. James	1,344.00	paid by check	
10 shares, Geo. H. Limbach	1,344.00	paid by check	
10 shares, S. W. McClave, Jr.,			
10 shares, Otto Meyer	1,344.00	to be paid	
10 shares, H. L. Post	1,344.00	paid by check	
10 shares, Rollo Steenland	1,344.00	paid by check	
10 shares, R. C. Winters	1,344.00	paid by check	
15 shares, Fred Weiler	2,016.00	to be paid	
15 shares, E. J. S. Coe	2,016.00	to be paid	

It was agreed by the board to assess each member  
 20 in accordance with the amount of stock held, so much per share, to cover the deficiency and overdraft of Geo. B. Hitchcock, Inc.

Assessments paid later by Messrs. Otto Meyer, Fred Weiler and E. J. S. Coe.

Mr. Hitchcock stated that no lien suits had been started and no attempt had been made to force him in bankruptcy. He admitted that he was guilty of illegally drawing checks. Mr. Hitchcock's proposal  
 30 was, to give the bank a series of notes aggregating \$23,400., payable \$500. per month, and indorsed by his brother, Dr. Swift and Clarenc F. Walker. He stated that his brother owned a house and was worth \$8,000. Mr. Hitchcock also proposed to use every possible effort to secure the release from Mr.

*S. Leslie Doremus—direct*

Smith of the bank building which he had assigned to Mr. Smith, and if this can be effected he will turn this bank building over to the First National Bank or Mr. Walker, either individually or jointly as trustees as security for his indebtedness.

Mr. Hitchcock was willing to release to the First National Bank all income from the Building, said income being about \$5,000. gross per year, and the net income being about \$1,750.

Mr. Hitchcock agreed to get in touch with Mr. Smith by Tuesday morning and use every possible effort to try to get him to release the bank property which had been assigned to him."

Mr. Seufert—Then follows a schedule; I don't know whether it is necessary to put it in detail. The sum and substance of them are a statement of the debts of George B. Hitchcock and George B. Hitchcock, Inc.

Mr. Gourley—If you give the total, I want the substance.

Mr. Seufert—I hardly think that is necessary.

Mr. Gourley—All right.

Q. Turn to the minutes of the meeting of the finance committee of September 17th, 1920. A. Yes, sir.

Mr. Seufert—I offer the minutes in evidence. Minutes received in evidence and the same are marked Exhibit C-3 on behalf of the complainants, as of this date.

*S. Leslie Doremus—direct*

"Meeting of the Finance Committee Held Friday, September 17, 1920.

Members present were Messrs. Eisele, Higgins, Steenland, Weiler, Winters and James.

Mr. Mabie came before the committee in relation to the Hitchcock matter.

Offer of settlement in the Hitchcock matter made to Mr. Mabie by Mr. Content was fully discussed and rejected.

There being no further business, the meeting adjourned."

Q. Turn to the minutes of Friday, September 24th, 1920. A. Yes, sir; here they are.

Mr. Seufert—I offer the minutes in evidence.

Minutes received in evidence, and the same are marked Exhibit C-4 on behalf of the Complainants, as of this date.

"Meeting of Finance Committee Held Friday, September 24, 1920.

Members present were the following: Messrs. Eisele, Higgins, Weiler, Steenland and Winters.

Notes coming due from October 1st to October 7th were read and notations made on notes and notices as to renewals to be allowed or reductions to be made.

Motion made by Mr. Steenland and seconded by Mr. Higgins, that we accept the following resolution on the Hitchcock matter.

'Resolved, by the Finance Committee of the First

*S. Leslie Doremus—direct*

National Bank of Edgewater, at a meeting held Friday, September 24th, 1920, that the indebtedness of George B. Hitchcock and George B. Hitchcock, Inc., be adjusted in the following manner:

There shall be credited upon this indebtedness the sum of \$1067.77 now on deposit in this bank by check of George B. Hitchcock, Inc.

There shall be credited the further sum of \$9000. in cash, to be paid at once, and the balance of said indebtedness, amounting to \$13,492.15, shall be secured by a guaranty now signed by Melancthon S. Ayers, Charles D. Walker, Clarence F. Walker, Henry G. Hitchcock, Frank Young and Wm. I. Schnepf, under date of September 13th, 1920, whereby said guarantors agree to secure and guarantee unto the First National Bank of Edgewater, a principal sum of \$23,400. with interest thereon from August 15, 1920, to be paid in monthly installments of not less than \$500. on account thereof, plus interest on unpaid balances from said August 15th, 1920, said agreement of security and guaranty to be delivered with seven notes of George B. Hitchcock and G. B. Hitchcock, Inc., as makers, and said Melancthon S. Ayers, Charles D. Walker, Clarence F. Walker, Henry G. Hitchcock, Frank Young and Wm. I. Schnepf, as endorsers in the following amounts and periods of payment:

- I. \$492.15 at one month, with interest.
- II. \$500.00 at two months, with interest.
- III, IV, and V. \$2500 each at three months each, with interest.
- VI and VII. \$2500 each at four months each, with interest.

Provided, that the fees of the Attorney for the

*S. Leslie Doremus—direct*

bank in the matter of George B. Hitchcock, Inc., and George B. Hitchcock be paid by one or both of them."

The Court—This is purely documentary proof.

Mr. Seufert—Yes.

The Court—Is there any oral proof?

Mr. Seufert—Yes; a little bit; not much.

Q. Turn to the minutes of the board of directors held October 7th, 1920. A. Yes, sir.

Mr. Seufert—I offer them in evidence. Minutes received in evidence and the same are marked Exhibit C-5, on behalf of the complainants, as of this date.

First National Bank of Edgewater, New Jersey  
Minutes of the Regular Meeting of the Board of  
directors held October 7th, 1920.

The roll call showed the following directors present: Messrs. Eisele, Higgins, Weiler, Eisele, Jr., Meyer, Limbach, James, Steenland, Post and Winters.

Mr. Robert Smith was appointed by the Chairman to act as Secretary pro tem.

Minutes of the meeting of September 2nd, 1920, were read and upon motion made by Mr. Higgins, seconded by Mr. Winters, were adopted as read.

The Chairman presented Mr. Mabie's report as to the settlement of the George B. Hitchcock matter, consisting of the turning over of a check in amount

*S. Leslie Doremus—direct*

\$5,033.34, also the transfer of balance of Mr. Hitchcock's account to the Bank. This balance amounts to \$1,067.77.

In addition to this, the turning over of seven (7) notes, each in amount of \$2,500.00, aggregating \$17,500.00. Aggregate amount of notes and checks \$23,400.

10 These seven (7) notes to be covered by an agreement given the Bank, whereby the following men guaranty the payment of these notes in the manner described by the agreement: Messrs. Melancthon S. Ayers, Chas. D. Walker, Clarence F. Walker, Henry G. Hitchcock, Frank Young and Wm. I. Schnepf.

Upon motion made by Mr. Post, seconded by Mr. Meyer, this plan of settlement was unanimously approved by the Board."

20 Q. Turn to the minutes of the meeting of April 18th, 1921. A. Yes, sir; I have them.

Mr. Seufert—I offer the minutes in evidence. Minutes received in evidence, and the same are marked Exhibit C-6, on behalf of the complainants, as of this date.

30 "Special Meeting of the Directors of the First National Bank, Edgewater, N. J., called by the President, at the request of Mr. Higgins, Mr. Steenland and Mr. Winters, held Monday, April 18, 1921, all Directors being present."

Q. This is the meeting when the new members took charge, isn't it, Mr. Doremus? A. Yes.

Q. And you were present at the meeting? A. Yes.

*S. Leslie Doremus—cross*

"Mr. Low and Mr. Doremus were acquainted with the method of handling the Hitchcock account. They were advised that the Directors advanced the money to cover Mr. Hitchcock's overdrafts and the money to be collected by the bank and put into a fund in the name of John Eisele and others, which, when the entire indebtedness with interest is paid up, is to be distributed among the directors who contributed. Mr. Low and Mr. Doremus understand 10 thoroughly how this account of John Eisele and others is taken care of and agree to continue the method already adopted in regard to this matter."

Mr. Seufert—That is all.

Cross Examination by Mr. Gourley:

Q. Turn to the minutes of the meeting of November 23rd, 1920. A. Here it is.

Q. Will you read that for me? A. "Special 20 Meeting of the board of directors held November 23, 1920. Motion made by Mr. Steenland, seconded by Mr. James, that Mr. Winters be instructed to write to the Chief National Bank Examiner, for permission to adopt amended minutes of the meeting of the Board of Directors, held September 2nd, 1920, correcting the entries in the profit and loss account, in connection with the Hitchcock transaction. Carried unanimously." 30

Mr. Gourley—All right; that is all.

*Benjamin C. Warner—direct*

BENJAMIN C. WARNER, a witness produced on behalf of the Complainants, being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Seufert:

Q. Mr. Warner, you are the Assistant Cashier of The First National Bank of Edgewater? A. Yes, sir.

10 Q. And as such are acquainted with the books of that institution? A. Yes, sir.

Q. Were you the bookkeeper of the period of 1920? A. No, sir.

Q. But you were able to examine and read the books? A. Not at that time; I wasn't in the bank.

Q. You weren't in the bank, but you were present and could read the books? A. Yes.

Q. The Bank is under subpoena to furnish book No. 3988, savings account; have you that with you?

20 A. Yes, sir; card system.

Q. Card system is used; you haven't the bank book? A. I have the cancelled bank book.

Mr. Seufert—I offer the bank book in evidence. The bank book is received in evidence and the same is marked Exhibit C-6 on behalf of the Complainants as of this date.

Q. This account seems to be wiped out by the payment of \$3167.20; have you got that check? A.  
30 Yes, sir.

Mr. Seufert—I offer the check in evidence. Check received in evidence and the same is marked Exhibit C-7, on behalf of the complainants, as of this date.

*Benjamin C. Warner—direct*

Mr. Seufert—I also offer the account in evidence. The account is received in evidence, and the same is marked Exhibit C-8, on behalf of the complainants, as of this date.

Q. Can you tell in what account that item was placed? A. To be credited to undivided profit account.

Q. I didn't ask you that. Can you tell me from your book what account it was actually placed in? 10

A. The ledger will show that it was placed in undivided profit.

Q. Have you got the ledger here? A. Yes, sir.

The Court—That is the check?

The Witness—Yes, sir.

The Court—Was it certified?

Mr. Gourley—No; it was an overdraft.

Q. Mr. Warren, is this a book of original entries, or have you another? A. This is the only book I have been able to find. 20

Q. This I understand is a general entry? A. Yes, sir.

Q. So the only account is in the general ledger? A. Yes, sir.

The Court—What is there?

The Witness—It gives the amount of the credit to undivided profits. 30

Q. Is that the only item you can find? What is the date of that item? A. September 7th, \$24,805.60.

*Benjamin C. Warner—direct*

Q. Where is the item of \$24,701.20? A. I couldn't tell you; I wasn't there.

Q. It has been cashed? A. There is no record of it there.

Q. This has been cashed by the bank? A. Taken out of the savings account, yes.

Q. And you can't find any record of this? A. No.

10 Q. And the other item you refer to is the contribution of the directors, isn't it? A. Evidently; I couldn't tell you.

Q. Have you got in your possession the two checks of Hitchcock that were overdrawn? A. No, sir.

Q. What has become of them, do you know? A. No, sir; they were never in the possession of the bank.

Q. Have you got the special account No. 6024? A. 6024?

20 Q. And the bank book? A. No.

Q. What has become of the bank book? A. The bank book isn't in our possession.

Q. This bank book of 3988 was in your possession? A. Yes, sir.

Q. It is your custom to keep bank books when it is paid in? A. Yes, sir.

Q. But you haven't this book? A. No, sir.

Q. And this book has been closed? A. Yes, sir.

30 Q. How? A. Paid out.

Q. Did you ever see a book? A. No, sir.

Q. In what shape does it appear on the books of the bank at the present time? A. At the present time it is to undivided profits.

Q. But this is an account of that special account? A. Yes, sir.

*Benjamin C. Warner—direct*

Q. This wasn't drawn out by draft, was it? A. No, sir.

Q. I find a note on here "The balance of April 21st,—of June 1st, of \$11,781.83 on the withdrawal side; that indicates that the account is wiped out?"

A. That is right.

Q. So there is nothing in that account now? A. No, sir.

The Court—What did you do, transfer it to undivided profits? 10

Mr. Seufert—We didn't do it.

The Court—I mean the new directors?

The Witness—Yes.

The Court—On this account there is an endorsement: "This is turned over to the undivided profits special account"; what is that?

The Witness—That was just for that item. 20

The Court—Then it isn't in the general account?

The Witness—At the present time it is the general account.

Q. When was that done?

The Court—I don't understand it. First it was paid in the undivided profits special?

The Witness—Yes, sir.

The Court—And then it was put in the undivided profits, general? 30

The Witness—After it was all paid.

The Court—General?

The Witness—Yes.

*Benjamin C. Warner—direct*

Q. When was that done?

The Court—First it went to the special and then it went to the general. When was it done, and who by was it done, the new board?

The Witness—Yes.

The Court—When did the new board come in?

10 Mr. Seufert—April 18th, 1921. The new board wiped out the account.

Q. When was it transferred to the general account? A. Transferred from undivided profits special, April 23rd, 1924.

The Court—Transferred to the general account, undivided profit; all right; that is what I want to know.

20 The same is offered in evidence and is marked Exhibit C-9, on behalf of the complainants, as of this date.

Q. Was there any other undivided profits account special besides this one? A. No.

Q. This was done to hold these funds separate from the others? A. Yes.

Q. What does that undivided profits special account mean? A. To keep that item of Hitchcock separate.

30 Q. Then it didn't mean undivided profits special, did it? A. Yes, it did.

Q. Then why did you call it special? A. There was in this case.

Q. This was a special account that you didn't know what to do with and you put it that way?

*Benjamin C. Warner—direct*

Mr. Gourley—This isn't cross examination.

The Court—You don't think the witness is hostile?

Mr. Gourley—We don't dispute the facts.

Q. You don't know the details passed back and forth; you weren't bookkeeper at this time? A. No, sir; I was assistant cashier.

The Court—The money was all paid back? 10

The Witness—All paid back; yes, sir.

Mr. Seufert—I understand it has been admitted in the pleadings that the Hitchcock indebtedness has all been paid up with interest?

Mr. Gourley—I think that is so, but I would like to know the various steps.

Q. Can you turn to the Hitchcock account? 20

The Court—As I understand the case, your directors paid this off and then Hitchcock paid it off, and now the old directors want it back; is that right?

Mr. Seufert—Yes.

The Court—That has been done in this State very many times—the directors make a payment.

Mr. Gourley—They put it in the profits account; they made a gift. 30

The Court—Have you got the Hitchcock account, showing the repayment?

The Witness—I have the record of all these items that were passed; they were paid.

*Benjamin C. Warner—direct*

The Court—You haven't a copy of the account, have you?

The Witness—It would be spread through the ledger; not any particular account.

Q. Let us have the dates? A. I have a statement here of the exact dates, etc.

10 Mr. Seufert—Then why not offer that in evidence?

The Court—If they can agree on it.

Mr. Gourley—That is all right.

The Court—Mr. Witness, do the payments back—do the books show, or do you know—do the payments back include interest?

The Witness—They did.

The Court—They do as an actual fact, from your examination of the books?

20 The Witness—Yes.

Mr. Seufert—I offer the statement in evidence.

Statement received in evidence and the same is marked Exhibit C-10, on behalf of the complainants, as of this date.

The Witness—February 16th, 1924, is the last date of payment.

30 Q. On April 21, 1921, by that statement, there was a payment made by Hitchcock and entered into the Eisele Special Account, wasn't it? A. Note No. 6024; yes, that is right.

Q. And that was after the new bank had assumed control? A. Oh, yes.

Q. And June 1st, 1921, is when the account was

*Benjamin C. Warner—direct*

transferred from this savings account to the undivided profits special account? A. What date was that?

Q. June 1st, 1921? A. Yes, sir.

Q. That was just the cashier making the transfer himself? A. Yes, sir.

Q. On direction of the board? A. No, sir.

Q. He was instructed to transfer it to the general undivided profits account? A. Yes, sir. 10

Q. What date was that? A. Letter of April 20th.

Q. What year? A. 1921.

Q. After that date of April 20th, 1921, you deposited that Hitchcock matter in the special undivided profits account, didn't you? A. Yes, sir; we didn't have this letter yet; it is dated April 20th.

Q. And you dated it June 1st? A. Yes, sir.

Q. Do you know why they made a special account of this? A. Only to keep it separate until the item was entirely paid. 20

Q. Why was that necessary? A. It was easier to account for it. If it had been mixed in with the other accounts it would have been more difficult.

Q. Account for it to whom? A. For whom?

Q. Yes. A. For our own benefit, to see when it was all paid.

Q. You had an account with Hitchcock, didn't you? A. No; not on the ledger where it would show anything of that account. 30

Q. Didn't the bank run an account with Hitchcock, to show his indebtedness to the bank? A. No; only this book.

Q. No payments credited to the day book or cash

*Benjamin C. Warner—direct*

book or journal? A. It would have to appear from the cash book into the general ledger.

Q. So you didn't obey the order of the Comptroller? A. I certainly did.

Q. In 1924; four years later? A. Oh, no.

Q. Why did you transfer it in 1924? A. The bank examiners were satisfied.

10 Q. Why did you transfer it in 1924 to the general profit account? A. Because it had been all cleared up.

Q. That was the only reason? A. That was the only reason.

Q. At that time you had in the general profit account the \$23,400 that the old board of directors had contributed to cover this Hitchcock matter? A. Yes; I guess we did, according to that.

20 Q. So you had this Hitchcock matter covered twice as a matter of fact? A. I didn't stop to consider anything of that kind; I simply acted under instructions from the comptroller.

Q. But you know that for the indebtedness of \$23,000, you got \$46,000, to cover it? A. The papers show that.

30 The Court—When you returned this Hitchcock indebtedness and put it in the undivided profits general account, were there any other moneys in the undivided profits general account?

The Witness—Yes, sir; it was our idea to open a special account to keep them separate.

Q. Did you get any instructions from the Comptroller of the Currency at the time you made the ac-

*Benjamin C. Warner—direct*

tual transfer to the undivided profit account? A. No.

Q. Was it an undivided profits or profit and loss account? A. No, sir; we call it undivided profits.

Q. Did you get any instructions from the Comptroller? A. No, sir; the board of directors changed it.

Q. That is all the instructions you got from the comptroller? A. Yes, sir. 10

Mr. Seufert—That is all.

(The following is a copy of Exhibit C-10).

## Hitchcock Account

Check drawn on the Bogota National Bank		
Aug. 17, 1920, .....	\$10,500.00	
Protest fees .....	1.60	
Check drawn on the Bogota National Bank		20
Aug. 18, 1920, .....	12,900.00	
Protest fees .....	1.60	
<hr/>		
Debited to Undivided Profits Sept. 3, 1920.		
Credited to Undivided Profits Dec. 29, 1920, and debited to Savings Account No. 6024 .....	\$23,403.20	

## Received on Account of This Loss

George B. Hitchcock's balance credited to Undivided Profits Oct. 7, 1920. 7 notes \$2500 each dated Oct. 4, 1920, due Oct. 15, 1920, \$17,500 .....	\$ 1,067.77	30
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*Benjamin C. Warner—direct*

	Check of Marinus Contant, Special Account \$5,000 and interest. Credited to Undivided Profits Oct. 13, 1920, ..	5,033.34
	Oct. 15, 1920. First Payment. Credited to Undivided Profits Account .....	500.
	Nov. and Dec. payments and int. credited to Savings account, No. 6024, Dec. 29, 1920 .....	1,166.46
10	Jan. payment and interest credited to Savings account No. 6024 Jan. 18, 1921	588.00
	Feb. payment and interest credited to Savings account No. 6024 Feb. 17, 1921	580.10
	Mar. payment and interest credited to Savings account No. 6024 Mar. 18, 1921	570.02
	Apr. payment and interest credited to Savings account No. 6024 Apr. 21, 1921	577.32
11	Monthly payments and interest less Attorney's fees credited to Undivided Profits, Special, Sept. 23, 1922 .....	6,020.00
20	Balance due less \$1600 note N. M. Ayers on Attorney's fees credited to Undivided Profits, Nov. 5, 1923, .....	6,525.00
	Payment on N. M. Ayers note and interest credited to Undivided Profits, Feb. 4, 1924 .....	824.16
	Payment on N. M. Ayers note credited to Undivided Profits, Special, Feb. 16, 1924 .....	800.00
30		<hr/> \$24,252.17

*Stephen W. McClave—direct*

Cross Examination By Mr. Gourley:

Q. Mr. Warner, how long have you been with the Edgewater National Bank? A. Since April, 1921.

Q. You came in with the new board? A. With the new board.

Q. With any knowledge of the transactions in that period, except what the books showed? A. No, sir.

Q. The books showed that when the directors paid this money in September 2nd, 1920, it is what the books showed an undivided profit account? A. Yes, sir.

Q. And it remained there until the Eisele account was opened? A. Yes, sir.

Q. And that was around September, 1920? A. Yes; I think that is when the books will show.

Q. And then the next transaction was the transfer by order of the Comptroller, April 21, 1920? A. That is right.

Q. Then in 1924 it went to the regular undivided profits? A. Yes, sir.

Mr. Gourley—I think that is all.

STEPHEN W. McCLAVE, a witness produced on behalf of the complainants, being first duly sworn according to law, testified as follows:

Direct Examination, By Mr. Seufert:

Q. Mr. McClave, where do you live? A. Englewood.

Q. Where did you live in 1920? A. Cliffside.

*Stephen W. McClave—direct*

Q. That is adjacent to Edgewater? A. Yes, sir.

Q. Were you connected with the First National Bank of Edgewater in 1920-1921? A. I was a director there.

Q. Are you the McClave mentioned in the minutes? A. I am.

10 Q. Were you present at the meeting of September 2nd, 1920? A. I was.

Q. Do you remember what occurred at that meeting? A. We were called together—I don't remember just how, but everybody seemed to be rather excited and mentioned of somebody kiting checks, or something like that, and it later developed that it was a man named Hitchcock, and as I say, everybody was rather excited, and particularly so when Clarence Mabie said we had one of three things to do: Close the doors of the Bank, go to jail or pay  
20 twenty-five thousand dollars into the bank, or thereabouts.

Q. What was done? A. We all decided we wouldn't go to jail and we made up the checks.

Q. Previously you had sustained some small loss, hadn't you? A. Yes.

The Court—Why do you go in that?

30 Mr. Seufert—Because I want to show what this book was and that it had been carried on right along.

Q. I hand you a bank book, marked Exhibit C-6—do you remember that account? A. Yes.

Q. How is that account made up? A. Why, it is—

*Stephen W. McClave—direct*

Mr. Gourley—Is this important?

Mr. Seufert—I think so; it is a part of the transaction.

Mr. Gourley—If so this money is their money and I am not going to challenge that.

Q. As I understand it, that account was made up of your directors' funds, and it was to make up losses? 10

Mr. Gourley—I object to it.

The Court—I will allow it.

Mr. Gourley—I pray an exception.

Q. Is that what it was for? A. Yes, sir.

Q. And this account was wiped out and paid into the bank at the time of the Hitchcock alleged loss?

A. Yes; it was ordered paid in to reduce our assessment. 20

Q. What was the understanding of the additional money that was paid in?

Mr. Gourley—I object to that.

The Court—Yes; what was done?

Q. What was the understanding, and what was done with the moneys that was handed in by the members of the board of directors? 30

The Court—It went in the account special, didn't it?

Mr. Seufert—As I understand it, this arrangement was to be continued right along. The account was to be open and that as soon as moneys were paid into this account by the

*Stephen W. McClave—cross*

directors, and then paid by Hitchcock, it was to be paid back.

The Court—That is what is claimed, of course.

Mr. Gourley—Your Honor can see that they were in control of the minutes and everything, and this is in conflict with the minutes.

The Court—What is the use of doing it? You have it all in.

10

Q. What did you do, Mr. McClave? A. I made out a check for the amount.

The Court—Who did you hand it to?

The Witness—I think they were all handed to the cashier at the time.

The Court—I see; the cashier. Now, there is the transaction. You are not a director now, are you?

20

The Witness—No; I resigned with the understanding that the account was to be carried on that way. I wanted to get the money back.

Mr. Seufert—That is all.

Cross Examination, By Mr. Gourley:

Q. Coe was the cashier? A. Yes.

Q. Now, I believe two checks had been drawn by Hitchcock on the Bogota bank for \$25,000? A. Yes. I don't remember the amount.

30

Q. And Coe permitted Hitchcock to draw on these two checks? A. I understand that now; I didn't know it at the time.

*Stephen W. McClave—cross*

Q. There was no certification of the checks; they were simply cashed?

The Court—He probably doesn't know that. You weren't in the bank as an official?

The Witness—No.

Q. You were there and you put your share in?

A. Yes.

10

Q. What was the capital stock of the bank, do you know? A. I believe \$50,000.

Q. And this \$23,000 seriously affected the bank? A. I understand there were some other kited checks there, and with both of them together we were given the option of going to jail or paying this money.

Q. Who was sending you to jail? A. Our own attorney.

Q. Your own attorney; that was pretty good. You didn't go? A. Not yet.

20

Mr. Gourley—That is all.

Cross Examination, by Mr. Condit:

Q. Mr. McClave, you have testified that Mr. Coe, who was cashier at the time, permitted the overdrafts. Have you any knowledge of that, or is that what you were told? A. That is what I was told.

Q. You have no first class knowledge of that yourself? A. No, sir.

30

The Court—I haven't seen Mr. Coe's answer; are these things denied?

Mr. Condit—Yes; there is a slander suit.

*Stephen W. McClave—cross*

pending and I don't want Mr. Coe's name slandered here.

Mr. Gourley—There is no serious dispute about the overdraft?

Mr. Condit—There is no dispute about that, but Mr. Coe didn't do it at the time. It was done by his subordinates, and I don't want his name bandied here. There are overdrafts every day and it is not a crime.

10

The Court—Isn't he responsible to the bank anyhow?

Mr. Condit—I might call your Honor's attention to some Federal opinions on the point.

The Court—No; I don't want to hear them now.

Mr. Condit—That is all.

(Complainants Rest)

20

The Court—What do you want to put in, Mr. Gourley?

Mr. Gourley—I want to show the financial condition of the bank at the time. Have you a statement?

Mr. Seufert—There is a bankers' statement.

The Court—What do you want to put in, Mr. Condit?

Mr. Condit—I have nothing to put in.

30

Mr. Gourley—I will call Mr. Mabie for a minute.

*Clarence Mabie—direct*

CLARENCE MABIE, a witness produced on behalf of the defendant, The First National Bank of Edgewater, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Mabie, you are a counsellor at law of this State? A. Yes, sir.

Q. And were counsel for the Edgewater National Bank? A. Yes, sir. 10

Q. Were you brought in with reference to this matter? A. I was.

Q. Were you present at the meeting of August, 1920? A. I was.

Q. Will you state what advice you gave to the bank? A. A very brief history was that the bank had had a series of unfortunate affairs with its customers, and had suffered severe loss. One was in the name of Hitchcock—in the name of George B. Hitchcock, Incorporated. This corporation drew two checks aggregating \$23,400— 20

The Court—I don't think I would state the figures.

(Witness continuing) Well, about that. There was a meeting of the board of directors called and I was present. The minutes read by Judge Seufert are correct, insofar as the names of the persons being present are concerned, and otherwise, too. They asked what should be done, and Mr. Hitchcock, or the company of Mr. Hitchcock had about a thousand dollars in the account, and this left a deficit of about twenty-two thousand dollars, and I assumed that 30

*Clarence Mabie—cross*

Mr. Hitchcock had no way of making this up, and I said: "Gentlemen, for the benefit of the bank you had better make good this account, because it wiped out the undivided profits, and with that loss of Hitchcock, and I assumed that it was a loss at that time, together with the loss of some other customer of the bank money." The capital was only \$50,000. I said: "You had better make this good for the credit of the bank, because if the Federal authorities discover this they are going to close your doors, and if they do there may make a criminal proceeding." I don't think I said: "You will go to jail"; that may be the way they interpreted it.

The Court—Who allowed the overdraft?

The Witness—I believe they stated that Mr. Hitchcock always made good at three o'clock.

The Court—Who allowed it, Mr. Coe?

The Witness—I don't know. Mr. Coe was the cashier of the bank at the time. I suggested to the board and advised them at the time to make good this default, and they made it good. There was nothing to turn over to the directors in the way of notes. There were simply two checks that came through and were not paid. I was then directed to bankruptcy and settlement.

The Court—Do you want to go in that?

Mr. Gourley—No. That is all.

Cross Examination by Mr. Seufert:

Q. Were there any statements made in that meeting of September, to indicate that the directors

*Clarence Mabie—cross*

had any knowledge of these overdrafts? A. Well, they knew there was a loss stated to the board; yes, they knew there was a loss.

Q. But before the loss occurred, was anything said by the board that they knew anything about these transactions—the directors themselves? A. No.

Mr. Seufert—That is all.

Cross Examination by Mr. Condit:

Q. Mr. Mabie, you never told these directors that if they didn't make good the overdrafts they would go to jail, did you? A. No.

Q. Mr. Mabie, you were counsel for the bank, and as part of your duties you investigated this transaction pretty thoroughly? A. I was counsel for the bank until October, 1920, when I turned it over.

Q. You investigated this transaction thoroughly? A. Only so far as told me at the special meeting of September 2nd, 1920.

Q. You know that Mr. Coe knew nothing about this overdraft personally, didn't you? A. No.

The Court—Didn't he know about it?

The Witness—He told the directors about it.

Q. Did you hear any director express any knowledge of it? A. Only at this meeting, and as advised by Mr. Coe.

Q. How many officers were in the bank? A.

*Clarence Mabie—cross*

Mr. Coe was the cashier, and there was another young man and three or four girls—I think there were two men under Coe and three or four girls.

Q. Coe was in charge of the bank, was he not?

A. Coe was in charge of the bank.

Mr. Condit—That is all.

10

Mr. Gourley Rests.

Case Closed.

(Briefs are to be submitted.)

20

30

*Exhibit C-6*

## EXHIBITS

## EXHIBIT C-6

No. 6024

SAVINGS DEPARTMENT

THE

FIRST NATIONAL BANK

of Edgewater, N. J.

In Account With

JOHN EISELE & OTHERS,  
SPECIAL.

10

Open every day, except Sundays and  
Holidays, from 8 A. M. to 3 P. M.  
Saturdays, 8 A. M. to 12 M.

Take care of this book. It must be  
presented when money is deposited  
or withdrawn.

20

If lost or stolen notify Bank at once.

No. 6024

The First National Bank

Edgewater, N. J.

In Acc't With

John Eisele & Others  
Special.

	Withdrawals	Deposits	Balance	
Dec. 28, 1920	\$23,403.20	\$	\$24,998.40	30
Dec. 28, 1920			1,595.20	
Dec. 28, 1920		6,601.11	8,196.31	
Dec. 28, 1920		1,166.46	9,362.77	
Jan. 18, 1921		588.00	9,950.77	
Feb. 17, 1921		580.10	10,530.87	

Exhibit C-7, C-8

EXHIBIT C-7

Copy

To be credited to Undivided Profit Account of the  
First National Bank of Edgewater, N. J.

Edgewater, N. J., Sept. 2, 1920.

Received of The First National Bank of Edgewater.  
Account Book No. 3988

10 Thirty one hundred & sixty seven & 20/100 Dollars.  
\$3167.20

Sign Here: Eisele, Sardi & Weiler,  
by John Eisele,  
Fred Weiler

Cashed — Paying Teller.

20 Daniel A. Higgins  
Otto Meyer  
H. Lawrence Post  
Rollo Steenland  
Geo. H. Limbach  
S. Wood McClave, Jr.  
John Eisele, Jr.  
E. J. S. Coe  
L. R. James  
R. C. Winters

EXHIBIT C-8.

Copy

3988

Eisele, Sardi & Weiler

30	1919	Withdrawals	Deposits	Balance
	Sept. 4		\$100.00	\$ 100.00
	Sept. 12		50.00	150.00
	Sept. 19		50.00	200.00
	Sept. 26		50.00	250.00
	Oct. 2		100.00	350.00

Exhibit C-8

Oct. 3	60.00	410.00	
Oct. 10	50.00	460.00	
Oct. 17	50.00	510.00	
Oct. 25	60.00	570.00	
Oct. 30	50.00	620.00	
Nov. 6	80.00	700.00	
Nov. 13	40.00	740.00	
Nov. 20	50.00	790.00	
Nov. 28	60.00	850.00	10
Dec. 4	80.00	930.00	
Dec. 12	50.00	980.00	
Dec. 19	50.00	1,030.00	
Dec. 26	30.00	1,060.00	
1920			
Jan. 1 — Int.	4.60	1,064.60	
Jan. 2	80.00	1,144.60	
Jan. 9	50.00	1,194.60	
Jan. 16	90.00	1,284.60	
Jan. 23	50.00	1,334.60	20
Jan. 26	40.00	1,374.60	
Jan. 30	50.00	1,424.60	
Feb. 6	50.00	1,474.60	
Feb. 13	50.00	1,524.60	
Feb. 20	50.00	1,574.60	
Feb. 27	40.00	1,614.60	
Mar. 4	110.00	1,724.60	
Mar. 12	60.00	1,784.60	
Mar. 19	60.00	1,844.60	
Mar. 26	50.00	1,894.60	30
April 1 — Int.	11.94	1,906.54	
April 1	100.00	2,006.54	
April 9	60.00	2,066.54	
April 16	50.00	2,116.54	
April 23	50.00	2,166.54	

*Exhibit C-8*

	April 30	60.00	2,226.54
	May 6	100.00	2,326.54
	May 14	40.00	2,366.54
	May 21	60.00	2,426.54
	May 28	50.00	2,476.54
	June 4	90.00	2,566.54
	June 11	60.00	2,626.54
	June 24	80.00	2,706.54
10	July 1 — Int.	20.66	2,727.20
	July 1	70.00	2,797.20
	July 10	60.00	2,857.20
	July 17	50.00	2,907.20
	July 23	50.00	2,957.20
	July 30	60.00	3,017.20
	Aug. 6	110.00	3,127.20
	Aug. 14	40.00	3,167.20
	Sept. 3		
			\$3,167.20

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**New Jersey Court of Errors and Appeals**

<p>JOHN EISELE, JR., <i>et als.</i>,  <i>Complainants-Respondents,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>THE FIRST NATIONAL BANK OF              EDGEWATER, NEW JERSEY,  <i>Defendant-Appellant,</i></p> <p style="text-align: center;">and</p> <p>ROLLO STEENLAND and ELMER              J. S. COE,  <i>Defendants.</i></p>	<p>On Appeal from              Court of              Chancery.</p>
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**BRIEF ON BEHALF OF COMPLAINANTS-RESPONDENTS.**

This case comes up on appeal from a decree of the Court of Chancery advised by Vice-Chancellor LEWIS in favor of the complainants-respondents.

**Statement of Facts.**

The decree in this case directed the payment by the defendant-appellant, The First National Bank of Edgewater, of the sum of twenty-eight thousand one hundred and sixty-five dollars and sixty cents (\$28,165.60) with interest, which said amount was acquired by the defendant-appellant, The First National Bank of Edgewater under the following circumstances:

The First National Bank of Edgewater is a bank in the Town of Edgewater, Bergen County, New

Jersey, with a capital stock of fifty thousand dollars (\$50,000.00) and was operated under the management, domination and control of the cashier, a Mr. Coe. The bank was similar to many banks wherein the Board of Directors are business men with no banking experience, and the only man of banking experience is the cashier.

In the latter part of August, 1920, one George B. Hitchcock deposited checks with the defendant-appellant bank in the sum of twenty-three thousand four hundred dollars (\$23,400.00) against which, checks were immediately drawn by Hitchcock and paid out by the defendant-appellant bank before the checks deposited by Hitchcock were collected. In the course of a few days the checks deposited by the said Hitchcock were returned unpaid and protested, as a result of which the bank apparently would suffer a loss of the said sum of twenty-three thousand four hundred dollars (\$23,400.00), if they were not made good. This fact was brought to the attention of the Board of Directors, as a result of which a meeting of the said Board was hurriedly called by its president on September 2, 1920; Hitchcock was sent for and appeared before the Board on the said date, and the matter of the overdrafts was taken up with him for the purpose of arranging for the payment and liquidation of the indebtedness caused by the overdrafts.

The overdraft of the Hitchcock account, if not paid up would have reduced the assets of the bank to such an extent that the counsel for the bank, Mr. Clarence Mabie, said that the directors had one of three things to do; close the doors of the bank, go to jail or pay twenty-five thousand dollars (\$25,000.00) into the bank, or thereabouts (State of the Case, p. 50). The directors thereupon arranged to deposit with the bank an amount

to "cover" the deficiency and overdraft of George B. Hitchcock, Inc., and for that purpose agreed among themselves that each director should deposit with the bank an amount in proportion to the number of shares that each director held (State of Case, p. 31).

The directors thereupon paid into the bank the sum of twenty-four thousand nine hundred and ninety-eight dollars and forty cents (\$24,998.40), and in addition transferred to the bank an account then carried in the name of Eisele and others amounting to three thousand one hundred and sixty-seven dollars and twenty cents (\$3,167.20) making a total of twenty-eight thousand one hundred and sixty-five dollars and sixty cents (\$28,165.60), which the directors had paid into the bank out of their personal funds to cover the indebtedness and overdrafts of the said Hitchcock.

Negotiations with Hitchcock were continued which resulted in a final settlement being had on September 24, 1920, whereby the Hitchcock indebtedness was liquidated, partly in cash and partly by giving notes with acceptable endorsement carrying the payment of principal and interest, fees and costs of the bank in connection with the matter, and the entire indebtedness was paid in accordance with the agreement without any default or delay.

The system of accounting is not at all clear owing to two factors:

First, the discharge of Coe, who was the cashier and had the custody of the records, immediately after the Hitchcock transaction and was not available for explanation and did not appear at the trial; and

Secondly, the transfer in 1921 of the control of the bank to the Edgewater Trust Company and the new officers coming in.

It was disclosed at the hearing that a Special Account Number 6024, was established. This was a savings account and showed a balance as of April 21, 1921 of \$11,781.83 (State of Case, p. 40); in this account was carried the payments made by Hitchcock in accordance with his agreement. This account was wiped out by order of the new Board of Directors without the consent of the interested parties and was transferred first to the undivided profit special account, and on April 23, 1924, it was again transferred by the Board of Directors, without the authority of the parties interested, into the general undivided profit account (State of Case, pp. 41-42).

As soon as the Hitchcock indebtedness to the bank had been fully paid the complainants-respondents demanded a return of their money, but every demand was refused by the new Board of Directors, and the action in the Court of Chancery was thereafter started.

#### Argument.

The appeal presents three issues for the determination of this Court.

1. The bank holds this money under a constructive trust.

2. This money was turned over to the bank by the directors on a mistake of fact and can, therefore, be recovered by the directors.

In any event, the doctrine of "unjust enrichment" applies.

3. The money deposited by the directors with the bank did not constitute a voluntary payment (argued under reply to appellant's brief).

#### POINT I.

##### **The bank is holding the money under a constructive trust.**

While it is a fundamental proposition needing no citation for support that the relationship between the bank and its directors is one of trust, the directors acting as trustees and the bank as *cestui que* trust, this Court has recently passed upon this particular feature in the case of *Schaedel v. Liberty Trust Company*, 99 N. J. Law at page 383, in which Chancellor WALKER who wrote the opinion states:

"The relation of a director to a corporation is not contractual, but is that of a trustee. In *Stephany v. Marsden*, 75 N. J. Eq. 90, Vice Chancellor LEAMING said (at page 93): 'A director's duties are trust duties, or, more accurately speaking, are so nearly of the nature of the duties of a trustee to his *cestui que* trust that a fiduciary relationship, with its attendant responsibilities, is appropriately said to exist between the director and the corporation.'"

It therefore follows that if a director or Board of Directors do an act believing it necessary for the benefit of the bank and it is subsequently ascertained not to be required because of mistake of fact on the part of such Board of Directors all equitable doctrines call for the restoration of the *status quo* of the directors.

The facts in this case disclose the creation of a constructive trust. In 39 Cyc. in the notes on page 27, the following definitions of constructive trusts are given:

"Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity

that it should be retained by him who holds the legal title." Washburn Real Property. (quoted in *Lewis v. Lindley*, 19 Mont. 422, 439, 48 Pac. 765, and cited in *Walker v. Bruce*, 44 Colo. 109, 117, 97 Pac. 250.)

"Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. They are also known as trusts *ex maleficio* or *ex delicto*. Resulting and constructive trusts, while frequently confused, are clearly distinguishable. In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust, by reason of which, although it is by no means an express trust, it approaches more nearly thereto. Constructive trusts on the other hand have none of the elements of an express trust, but arise entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention. They are entirely *in invitum*, and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud" (39 Cyc., p. 27).

An examination of the facts will disclose:

1. That the directors of the bank in the turmoil and scare arising out of the overdraft of Hitchcock and under the mistaken advice of counsel, paid into the bank over twenty-eight thousand dollars (\$28,000.00) to cover this loss. This payment was based upon two factors which were at that time vividly impressed upon the minds of the directors by the spectacular circumstances of the Hitchcock indebtedness and the manner and method in which the transaction was handled at the time. First, that the directors were acting in a fiduciary capacity; second, that they were advised that the loss sustained would impair the capital of the bank, and that they had the choice of covering the loss, closing the bank, or going to jail.

If there had been anybody with the experience or the slightest foresight to advise them there would have been no necessity for the payment of this money by the Board of Directors, because the Hitchcock indebtedness was almost immediately liquidated by a new financial arrangement with new agreements, and cash together with notes, wherein the payments were guaranteed by five wealthy men and these commitments were in all respects carried out on the dot and to the letter. Neither the Board nor the bank did at any time either directly or indirectly sustain a loss through the Hitchcock transaction. The situation was never adequately or properly understood by the Board of Directors nor by the bookkeeping system of the bank, and as a result the account showing the transaction of the Board of Directors was shifted to post and pillar; so far as this case is concerned this does not appear material except to demonstrate the fact that the bank still has in its possession over twenty-eight thousand dollars (\$28,000.00) belonging to the old Board of Directors, the complainants-respondents in this case.

The conclusion cannot be escaped, therefore, that because of the relation between the bank and the Board of Directors, the bank has twenty-eight thousand dollars (\$28,000.00) or more of the directors' money for which there is no legal application and until it is repaid to the directors, the Board is a trustee in a trust that is squarely set up in the transactions between the directors and the Board concerning the Hitchcock transaction.

2. The bank, instead of having suffered a loss by the overdrafts of Hitchcock, was actually paid the full indebtedness of Hitchcock and thereby became unjustly enriched to the extent of the amount turned over by the directors to the bank.

3. That the bank had received this money from the directors through a mistake of fact and, therefore, was in conscience bound to return it; and

4. That after returning the money to the directors the bank and the directors would be in *status quo*.

#### POINT II.

**The money was deposited with the bank on a mistake of fact and therefore can be recovered.**

In the case of *United States Fidelity & Guaranty Co. v. Hellen*, 259 Federal Reporter 885, at 888, the Court said:

“Whenever there has been a transaction between the parties upon the faith of a state of facts in the absence of which it is clear (within the equitable rule) they would not have acted, the mistake may be corrected subject to the limitation that no person affected by the correction will in other respects be adversely affected.”

In the case at bar the directors deposited the money to protect the bank from a supposed loss, which as a matter of fact was an indebtedness that was later repaid and was not in any sense a loss to the bank. It is obvious that had the directors not been laboring under the mistaken impression that the bank had suffered a loss, they would not have deposited the money with the bank.

In the case of *Kelly v. Sollari* (9 M. & W., p. 54), cited in the case of *United States v. Barbour* (132 U. S. 271), the Court said:

“Where money is paid another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money but

which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back and it is against conscience to retain it.”

The Court of Appeals of Kentucky in the case of *Robertson v. Jefferson County* (205 Ky. 479) said:

“It is a settled rule in this state adopted at an early date and followed by a long line of decisions, that whenever on a palpable mistake of law or fact essentially bearing upon or affecting the contract, money has been paid without consideration, which in law, honor or conscience was not due and payable and which in honor and good conscience ought not to be retained, it may be recovered.”

The Supreme Court of Iowa in the case of *Fidelity Savings Bank v. Reeder*, 120 N. W. 1029, said:

“The right to recover money paid by mistake is not dependent on the admission of the party receiving it or on his agreement to refund it.”

The Court of Errors of Georgia in its opinion in the case of *Atlanta Telephone and Telegraph Company v. Fain*, 85 S. E. 79, said:

“Money paid on a mistake of fact or in ignorance of the facts may be recovered, where the party receiving it ought not in equity to retain it.”

It will, therefore, be seen that the law from an early date not only of this State but of the various States and Federal Courts, has been that money received by a person or corporation on a mistake of fact, which such person or corporation could not in good conscience and equity retain, can be recovered, and in the case at bar the bank has been unjustly enriched by the deposits made by the directors, and the money deposited by the said directors can therefore be recovered.

### Reply to Appellant's Brief.

The brief filed on the part of the appellant contains so many conjectures, not borne out by the testimony, and so many inaccurate statements that becloud the issue, that we feel compelled, even at the expense of repetition to burden the Court with our version of the situation, in an effort to submit in as brief way as possible a word-picture of the circumstances, intentions and result of the transaction which is the subject of this appeal.

In the statement of facts in the brief filed on behalf of the appellant, there is reference to a resolution adopted by the Board of Directors at the meeting of September 2, 1920, to *assess* each member. There was no such resolution passed by the Board. The minutes (State of Case, p. 31) disclose that the Board agreed to assess each member in accordance with the amount of stock held, so much per share to cover the deficiency and overdraft of George B. Hitchcock, Inc. The term "assess" as used in the minutes is not used in the technical and legal sense based upon any legal liability, because there was no assessment levied on the stock of the bank as a whole. It was in reality a misnomer because the Board actually agreed among themselves to arrange for the collection of a fund for the purpose of covering the Hitchcock account, and further agreed that each would put into the fund an amount in proportion to the number of shares of stock held by each director. Attention is respectfully called to the fact that an "assessment" means an assessment of all the stock, and is a formal procedure laid down by the Act of Congress conducted under the supervision of a branch of the department of the Comptroller of the Treasury; whereas this transaction was merely an informal matter among the Board of Directors.

The same condition exists in reference to the instructions to the cashier; again there was no resolution passed. The minutes of the meeting (State of Case, page 30) show "the cashier was instructed to institute a system of entering deposits on the ledger, so that the Bookkeepers would be informed as to the items which had been collected, so as to prevent drawing against uncollected items."

This is alleged to be an admission of negligence on the part of the directors. How the directors can be charged with negligence because of the overdraft of the Hitchcock account is unexplainable. The negligence was in the cashier, who is the executive officer in charge of the bank.

The banking laws expressly make it unlawful for any officer, clerk, or agent of a bank to certify checks unless the maker of the check has funds on deposit with the bank at the time of certification, in an amount equal to the amount of the checks so certified. It, therefore, follows that it is also illegal for the cashier to permit checks to be cashed by the bank on uncollected items when the maker of the check does not have on deposit with the bank sufficient funds to cover the amount of the check.

In *Pratt's Digest of National Banking Laws*, page 239, it is stated:

"The Bank Cashier is usually the chief executive officer of the bank. Primarily he represents the will of the Board of Directors, and his duty is to see that the policy and plans formulated by it are properly carried into execution; yet he is not the mere representative and subordinate of the Board, he has also responsibilities as the chief executive officer and agent of the corporation. To him is generally intrusted the general management of the affairs of the bank, the receiving of deposits, the safe keeping of all funds, and their dis-

bursements. \* \* \* He therefore should be thoroughly conversant with the law, customs and practices of the banking business, and especially of those of his office; he should maintain a vigilant oversight of all the work of his subordinates, being responsible for the good conduct and faithful service of the clerical force of the bank."

It will, therefore, be readily seen that no negligence can be charged to the Board of Directors because of this transaction, but rather the entire matter is the result of negligence of the cashier.

The brief on the part of the appellant also suggests that a portion of the money turned over to the bank, that is, the special account in the name of Eisele and others, was for some other indebtedness. There is nothing in the testimony that would suggest any such idea. The minutes disclose that practically the only business taken up at this meeting was the Hitchcock matter and the Board turned over their special account together with the amount deposited by the directors, to cover the Hitchcock indebtedness.

The Court's attention is respectfully directed to the fact that the bank is in possession of all the records in this case. There was no testimony produced by them of any other indebtedness; there is nothing in the records or otherwise to show that the \$3,167.20 was to be applied toward anything else but the possibility of the Hitchcock loss; consequently the inference is that the suggestion of other indebtedness is only a subterfuge. The Hitchcock indebtedness was always carried under its own head, and all details in connection therewith are ascertainable from the books.

It is, therefore, respectfully submitted that the creation of this new thought at this late date is merely for the purpose of beclouding the issue.

Vice-Chancellor LEWIS gathered the situation together and in his opinion very clearly sets forth the situation as follows (State of Case, page 17) :

"Stripped of all the technicalities urged in behalf of the contention of the defendants, I feel that the situation presented is the simple one where one party in whose favor an obligation may exist has been indemnified or paid by one, who, under some form of pressure felt that he was obligated to so respond, and later on the principal obligor or debtor himself pays the obligation in full. Under such circumstances it would be inequitable for the grantee or obligee to retain the money of both obligors; and manifestly the one who was only secondarily liable should be entitled to have the money paid by him returned. Otherwise the obligee would be unjustly enriched to the extent of having received payment of its obligation twice.

"Whether the relief granted the complainants in the present case is by way of impressing a trust on the funds, or through the application of the equitable right of subrogation, or otherwise, makes no difference in the result. I think that the complainants should prevail; and that the moneys advanced by them and deposited with the bank to meet any loss ultimately sustained through the failure of the overdrawing depositor to make good his deficit, should now be returned. The depositor appears to have paid his obligation in full; and the amount now due the complainants, as indicated, should be a matter of simple calculation."

As a result of the Hitchcock negotiations, the bank had actually received from Hitchcock when the account was closed the sum of twenty-four thousand two hundred and fifty-two dollars and seventeen cents (\$24,252.17) and it, therefore, did not suffer a loss but profited to the extent of at least the interest that was received from the trans-

action. In addition thereto it received from the directors the sum of twenty-eight thousand one hundred and sixty-five dollars and sixty cents (\$28,165.60) by and through the occurrence of the Hitchcock transaction and for no other reason. The bank, therefore, is today and has been since the closing of the Hitchcock account in possession of the sum of fifty-two thousand four hundred and seventeen dollars and seventy-seven cents (\$52,417.77). This amount represents the amount paid in by Hitchcock amounting to twenty-four thousand two hundred and fifty-two dollars and seventeen cents (\$24,252.17) plus the amount advanced by the directors twenty-eight thousand one hundred and sixty-five dollars and sixty cents (\$28,165.60).

It is therefore respectfully submitted that the amount advanced by the directors and now retained by the bank cannot be retained under any theory of law, equity or good conscience.

Under Point 1 of appellant's brief it is alleged that the bank was in a perilous condition. This statement is entirely incorrect.

The solvency of the bank was never impaired because there was never any loss. The Hitchcock indebtedness, by reason of the overdrafts, was immediately secured by regular banking methods. It therefore follows that at the time the directors paid the money into the bank there was in actual reality no situation that either in law, equity or good conscience called upon any of the directors to pay. As a matter of fact, the minutes disclose that at and after the meeting of September 24, 1920, the Hitchcock transaction was referred to in the minutes of the meetings as an indebtedness and not a loss.

The whole misunderstanding in connection with the transaction was well illustrated in the testi-

mony of Mr. Mabie, the counsel of the bank, when he said:

"Gentlemen, for the benefit of the bank you had better make good this account, because it wiped out the undivided profits, and with the loss of Hitchcock, and I assumed it was a loss at that time, \* \* \*"

and again:

"You had better make this good for the credit of the bank, because if the Federal authorities discover this they are going to close your doors and if they do there may make a criminal proceeding. \* \* \*" (State of Case, p. 56).

The Hitchcock relationship to the bank was never changed. He was a customer of the bank, overdrew his account, made it good and his account was ultimately closed out after full payment by him had been made. This was done in the regular course of business at the bank. The money from the Hitchcock transaction was kept in a separate account, distinct and apart from the rest of the funds of the bank, and there was therefore, no reason why the old directors should apply each payment of Hitchcock to repay themselves.

It must be remembered, and the picture can easily be obtained from the testimony that this was a one man bank wherein the cashier dominated, and immediately after the Hitchcock transaction the cashier was discharged. It was during this period that the accounts concerned became more or less muddled under a condition which is hard to explain at the present date. At any rate out of all this clouded situation, three situations are plain.

1. That the Hitchcock matters were kept in a distinct and separate account.
2. That there was never a loss and that every dollar of his indebtedness, interest and costs was

paid by Hitchcock and credited to him, and his indebtedness was cancelled.

3. That the moneys contributed by the directors were actually paid in, can be identified and traced and are now in possession of the bank.

Particular attention of the Court is called to the fact that the appellant endeavors to relieve the new Board of Directors of the responsibility for the transfer of the money from the special savings account to the undivided profit special account and then to the undivided profit general account by claiming that such transfer was made by order of the Comptroller of the Treasury. There was no such letter offered in evidence at the trial, and as stated before, the records were in possession of the bank and could be produced if such a letter was in existence.

The testimony of Mr. Warner who was admitted to be a hostile witness (State of Case, p. 43) simply refers to a letter dated April 20, 1921, but the records show that the account was not transferred to the undivided profit general account until 1924, some three years later, and when pressed for an explanation he stated:

"Q. Did you get any instructions from the Comptroller of the Currency at the time you made the actual transfer to the undivided profit? A. No.

"Q. Was it an undivided profits or profit and loss account? A. No, sir; we call it undivided profits.

"Q. Did you get any instructions from the Comptroller? A. No, sir; the board of directors changed it" (State of Case, pp. 46 and 47).

We submit, therefore, that the money was transferred from the undivided profits special account to the undivided profits general account by the new Board of Directors, without authority of the

interested parties and that they were entirely responsible for such transfer.

The brief further sets forth a case of *William O. Ross v. The First National Bank of Edgewater*, but does not give any citation. We are not familiar with the facts in that case, but there is nothing disclosed which indicates that the *Ross* case has any relevancy or is in any way connected with the case at bar.

We further submit that the points raised in the brief filed on behalf of the appellant are not in point, for the reason that the entire argument is based upon an entirely different situation than that presented in the case at bar. In every case submitted, there was an actual loss suffered by the bank. Further, the theory running through the entire brief is that the money was turned over to the bank by the respondents with full knowledge of the facts.

A reading of the testimony will clearly disclose that the respondents did not have full knowledge of the facts but that they were laboring under the mistaken impression that the bank had suffered a loss, when as a matter of fact, as stated above, the overdrafts were simply an indebtedness which was afterward repaid.

**The Money Deposited by the Directors with the Bank Did Not Constitute a Voluntary Payment.**

"To constitute a voluntary payment, it must be made with full knowledge of all material facts" (37 *Cyc.*, p. 1300).

A reading of the testimony in this case will clearly disclose that the deposits made by the complainants were not "voluntary payments" because two of the elements necessary to constitute a voluntary payment as laid down in *Cyc.*, cited above, are lacking.

The first is that the directors did not have a full knowledge of all material facts. The testimony clearly discloses that they were laboring under a mistaken impression, and that they believed the bank had suffered a loss, whereas, subsequent developments disclosed that instead of the overdraft of Hitchcock being a loss to the bank it was merely an indebtedness and in no sense a loss, and was subsequently repaid to the bank. The second is that the money was not paid to the bank in the ordinary sense of the word; instead the money was only deposited with the bank for a designated purpose, and when this purpose failed the consideration for the deposit also failed and the bank had no right to retain the money.

An exhaustive study of the bank or financial institutional cases in which payments were held to be voluntary, discloses that in every case the bank had actually suffered a loss.

The most recent case in this State and the one on which the appellant places a great deal of reliance is *Schaedel v. Liberty Trust Company*, 99 N. J. Law 380. At first glance the ruling in this case is somewhat misleading because the facts are somewhat similar. However, a careful perusal will disclose the important difference between the *Schaedel* case and the case at bar, and that is, in the *Schaedel* case the bank had actually lost \$52,000.00. This loss had been detected by the Department of Banking and Insurance of the State of New Jersey, and it demanded that the loss be immediately made good or the bank would be closed as insolvent, while in the case at bar the bank did not sustain any loss. The directors had no notice from any department and there had been no official threat to close the bank, but acted upon the advice of the bank's counsel, which advice was rendered on the mistaken assumption that the bank had suffered a loss.

In the *Schaedel* case this Court speaking through Chancellor WALKER said:

"If the plaintiff was legally bound to make good his just proportion of the loss he but paid the legal obligation. If he were not liable for it he, nevertheless, paid it voluntarily. It is a general principle that if a person *without mistake of fact* (Italics ours) or in the absence of fraud, duress or coercion pays money on demand which is not enforceable against him the payment is deemed to be a voluntary one and cannot be recovered."

In the above opinion at page 383, the Court cited *Eaton v. Eaton*, 35 N. J. Law, page 292, as authority for the general rule, that a voluntary payment cannot be recovered. Like all general rules, however, this rule has qualifications and exceptions and in the *Eaton* case the exception is set forth by Justice DEPUE in his decision as follows:

"Where a person, with a full knowledge of the facts, voluntarily pays money which the law would not compel him to pay, *but which in equity and good conscience, he ought to have paid* he has no remedy to recover it back. From a payment under such circumstances, no promise will be implied to refund the money, *there being nothing against conscience in the party who received it retaining it*. The authorities to this effect are numerous." (Italics ours.)

From the rule set forth by Justice DEPUE in the *Eaton* case it will readily be seen that the three important conditions necessary to constitute a voluntary payment are absent in the case at bar. First, there was a mistake of fact in that the directors were laboring under the mistaken impression that the bank had suffered a loss which in fact was but an indebtedness that was repaid. Second, in equity and conscience there was no

necessity for the payment of the money to the bank by the directors; and third, and most important, that the bank has money which does not belong to it and therefore there is something "against conscience in the party who received it retaining it." There was no demand made for the payment of the money by the directors, but on the other hand, the facts clearly disclosed an arrangement whereby the money was deposited to protect the bank in case it had actually sustained a loss.

The point to be remembered in the *Schaedel* case is that the money contributed by the directors was to replace good money actually lost by the bank.

Among the cases that have been examined on the question of voluntary payments are the following:

*Campbell v. Watson*, 62 N. J. Eq. 396;  
*Four Corners Building and Loan Association v. Schwarzwaelder*, 88 N. J. Equity 121;  
*Schaedel v. Liberty Trust Company*, 99 N. J. Law 380;  
*State Bank v. Kirk*, 216 Pa. 452;  
*Union Bank v. Sullivan*, 214 N. Y. 332;  
*Broderick v. John*, 69 Federal Reporter, page 497.

In each of the above cases the bank or other financial institution involved had actually suffered a loss, and the money was contributed to make the bank whole, and therefore, are not applicable to the case at bar.

### Conclusion.

It is, therefore, respectfully submitted that the decree of the Court of Chancery should be affirmed with costs.

Respectfully submitted,

SEUFERT & ELMORE,  
 Solicitors for Complainants-Respondents.

RYLAND E. LIPPINCOTT,  
 MARSHALL VAN WINKLE,  
 Of Counsel.

1871  
The first of the year  
was a very dry one  
and the crops were  
very poor. The  
winter was also  
very cold and  
the snow was  
very deep.

89 FEB. 7. 1928

### New Jersey Court of Errors and Appeals

John Eisele, Jr., et als.,	}
Complainants-Appellees,	
vs.	
The First National Bank of	
Edgewater, New Jersey	
Defendant-Appellant,	
and	
Rollo Steenland and Elmer J. S.	
Coe,	
Defendants.	

#### BRIEF FOR DEFENDANT-APPELLANT.

#### STATEMENT

The bill of complaint in this case was filed by certain former directors of The First National Bank of Edgewater, in the County of Bergen and personal representatives of other directors to recover certain sums of money with interest paid by them to the bank in September, 1920 to preserve and maintain the credit of the bank due to impairment of the capital because of certain losses. The particular circumstances attending the principal loss are as follows:

George B. Hitchcock, Inc. on August 18, 1920 deposited two checks in the bank of the defendant, drawn on the Bogota National Bank. One check was for \$10,500 and the other for \$12,900, or \$23,400 in all. The bank through its officers permitted George B. Hitchcock Inc. to draw against these two checks for a like amount although later both these checks

the account was transferred to the Undivided Profits Special Account. This was done by the order of the Comptroller of the Currency who directed the change in April, 1921. On April 23, 1924 after the last payment was made the account was closed and transferred to the General Undivided Profits, p. 44, 45, 46, 47, and 48.

### ARGUMENT

The contention of the complainants is that because Hitchcock subsequently paid the indebtedness therefore the original amount contributed by the complainants should be returned to them. It is not claimed that there is any agreement in writing that supports this view. The basis of the claim is that it is inequitable to withhold it. No member of the present Board of Directors was a member at that time. The complainants made no entry to record the claim they now make. They had complete control of the minutes. They recorded their assessment "to cover the deficiency and overdraft of George B. Hitchcock, Inc." They credited the contribution to undivided profits and thus incorporated it with the funds of the bank. In other words, these moneys belonged to the bank, strengthened its resources, preserved its solvency. The amount paid to the bank was not wholly for the Hitchcock loss. It was also because of other deficits. This is shown by Mr. Mabie, the counsel of the bank, p. 55,

"that the bank had had a series of unfortunate affairs with its customers and had suffered severe loss. One was in the name of Hitchcock, in the name of George B. Hitch-

cock, Inc. This corporation drew two checks aggregating \$23,400."

Mr. McClave, one of the complainants, p. 53 in answer to the question

"Q. And this \$23,000 seriously affected the bank?

answered

A. I understand there were some other kited checks there, and with both of them together we were given the option of going to jail or paying this money."

Evidently the first payment of \$3167.20 was to cover some of these other losses.

While all liability is denied in this case as will be argued later, yet it may be said here that there is no evidence in the case that the difference between the amount of the Hitchcock loss which was \$23,400 less \$1067.77 taken from their balance at the bank, or \$22,332.23 and the \$28,165.60 paid by the Directors has ever been restored to the bank. Yet the complainants want this money also and it is included in the decree. Therefore the decree aside from any other reason directing the payment of \$28,165.60 with interest is without authority.

As stated the sum of \$3167.20 was paid first by the directors from a savings bank book and then an assessment of \$134.40 per share was levied on the 186 shares held by the directors which assessment made \$24,998.40. It is clear that an assessment of \$105 per share with the contribution of \$3167.20

aforesaid would have made up the amount needed to restore the \$22,332.23 of the Hitchcock loss. They thus paid \$5833.34 more than the amount of this loss.

The bill alleges, p. 6, that it was the understanding of all the directors that the fund was to be used to defray the loss incurred by the Bank in the Hitchcock loss; that if any part of the moneys was not necessary for that purpose it was to be repaid to the parties paying the same. There is no proof offered of such an understanding. Of the original twelve directors, ten survive, yet the complainants called only one of their number, Mr. McClave, to explain this whole situation. His testimony was unimportant. He testified as stated, *supra* that there were other losses. The Hitchcock loss was fixed to a penny. It consisted of but two checks. It is clear therefore aside from the testimony of Mr. Mabie and of Mr. McClave, that the sum of \$3167.20 paid from the joint account of the directors and the calculation of the pro-rata assessment shows that they had other losses in view. There was no assurance for some time thereafter that anything could be recovered from Hitchcock.

Hitchcock appeared before the directors p. 31 and made a proposal of adjustment. At the meeting of Finance Committee on September 17, 1920, p. 33, the offer of Hitchcock was rejected. At the Finance Committee meeting September 24, 1920, p. 33 an offer to adjust the matter was proposed by the bank.

At the directors' meeting of October 7, 1920, p. 35, the minutes of the meeting of September 2 were ap-

proved and the plan of settlement of Hitchcock un-animously accepted. This settlement was as follows:

Check from Hitchcock .....	\$ 5,033.34
Transfer of Hitchcock Balance ..	1,067.77
7 notes each in the amount of \$2500	
aggregating .....	17,500.00
	<hr/>

The aggregate amount of these notes and checks is stated to be \$23,400. (it is really \$23,610.<sup>01</sup>11)

The minutes of the meeting of September 2, contain nothing to support the claim now made. These minutes were approved October 7, 1920, by these complainants as accurate. Mr. Warner, was asked by counsel for the complainants, p. 42 concerning the method of crediting the Hitchcock payments,

“Q. What does that undivided profits special account mean? A. To keep that item of Hitchcock separate.”

and again

“Q. Do you know why they made a special account of this? A. Only to keep it separate until the item was entirely paid.

Q. Why was that necessary? A. It was easier to account for it. If it had been mixed in with the other accounts it would have been more difficult.

Q. Account for it to whom? A. For whom?

Q. Yes. A. For our own benefit, to see when it was all paid.”

After September 23, 1922, the remaining payments were credited to the Undivided Profits Account as they were at the beginning.

Exhibit C-10 shows the payments on the Hitchcock account p. 47. The two Hitchcock checks representing \$23,400 with \$3.20 protest fees were debited to the Undivided Profits Account September 3, 1920. The items by which this money was paid is shown in this Exhibit.

Hitchcock Balance .....	\$ 1,067.77
Oct. 13, 1920 credited to Undivided Profits Account .....	5,033.34
Oct. 15, 1920 1st payment credited to Undivided Profits .....	500.00
Nov. and Dec. payments and interest, credited Savings Account—	
Dec. 29, 1920—No. 6024 .....	1,166.46

Thus it was not until December 29th, 1920, nearly four months after September 2nd, that any money was placed under a different head than Undivided Profits Account.

The remaining payments:

Jan. 18, 1921—Payment with Int.	\$ 588.00
Feb. 17, 1921—Payment with Int.	580.10
Mar. 18, 1921—Payment with Int.	570.02
	<hr/>
	\$ 9,505.69

were collected before April 18th 1921.

It was on this 18th day of April, 1921, that the complainants as directors vacated their office and

new directors were installed. Thereafter there was collected upon the account the following:

April 21, 1921—Payment with Int.	\$ 577.32
Sept. 23, 1922—11 monthly payments and interest amounting to	6,020.00
Nov. 5, 1923—credited to Undivided Profits .....	6,525.00
Feb. 4, 1924—credited to Undivided Profits .....	824.16
Feb. 16, 1924—credited to Undivided Profits .....	800.00
	<hr/>
Account closed .....	\$14,746.48

Thus it appears that there had been paid during the term of office of the complainants, \$9,505.69 and there was collected by the new directors, \$14,746.48. Together these amounts make the sum of \$24,252.17. This closed the Hitchcock account.

All the Bank therefore has been able to collect with interest is the sum of \$24,252.17 for the Hitchcock loss. It would seem that such interest as was collected was credited to principal. No director or officer of the old Board of Directors has been called to aid the Court about this phase of the matter.

## POINT I.

**THE MONEY WAS CONTRIBUTED BY THE DIRECTORS TO PRESERVE THE SOLVENCY AND GOOD NAME OF THEIR BANK, WAS PAID VOLUNTARILY WITH FULL KNOWLEDGE OF THE FACTS AND CANNOT BE RECOVERED.**

The bank at this time was in a perilous condition as appears from the testimony of Mr. Mabie as stated *supra*:

"The bank had had a series of unfortunate affairs with its customers and had suffered severe loss. One was in the name of Hitchcock in the name of George B. Hitchcock, Incorporation etc."

He said at the meeting of September 2nd,

"Gentlemen: for the benefit of the bank, you had better make good this account, because it wiped out the undivided profits, and with that loss of Hitchcock, and I assumed that it was a loss at that time, together with the loss of some other customer of the bank." The capital was only \$50,000. I said, "You had better make this good for the credit of the bank because if the Federal authorities discover this they are going to close your doors, and if they do they may make a criminal proceeding." P. 56.

I suggested to the Board and advised them to make this default good, and they made it good. There was nothing to turn over to the Directors in the way of notes. There were

simply two checks that came through and were not paid.

On cross examination he was asked:

Q. Were there any statements made in that meeting of September, to indicate that the directors had any knowledge of these overdrafts? A. Well they knew there was a loss, stated to the Board, yes, they knew there was a loss.

Counsel in their argument below spoke of the Hitchcock matter not as a loss but as in indebtedness. No matter what it is called the important fact is that it placed the bank in peril. The vigilance of the Comptroller over National Banks is very marked. With its capital impaired, the directors could not continue. These complainants had control of the minutes yet they record that:

"It was agreed by the Board to assess each member in accordance with amount of stock held so much per share to cover the deficiency and overdraft of George B. Hitchcock, Inc." P.

Nothing was said about any claim to the Hitchcock payments if recovered.

Counsel bases their equitable claim on the understanding had. It is clear the understanding here is only that there was a deficiency to be covered and to cover it, they were to assess each member of the Board. This is plain. They were personally obligated to restore this fund. They were trustees for the stockholders. They exercised no vigilance over the

subordinates. It was too late for them to instruct the Cashier to institute a system of entering deposits on the ledger so that the bookkeepers would be informed as to the items which had been collected so as to prevent drawing against uncollected items. There is no doubt that an action would lie against them by creditors of the Bank for this want of care in observing proper control. If this rule had been heretofore adopted and the Cashier had violated it, a different complexion might be put on their obligation to their stockholders.

The relation of a director to a corporation is not contractual, but is that of a trust.

Stephany v. Marsden, 75 N. J. Eq. 90-93.

As stockholders of a National Bank under the United States statute they are liable for twice the amount of the par value of their shares. This was a further reason why they would have to pay. They disliked an assessment against the whole body of their stockholders as it is reasonable to apprehend that the majority would displace them and perhaps maintain an action against them for this loss owing to their want of vigilance. Again if it were a loan why should there be an assessment per share? It is difficult to see how there can be any misunderstanding about these facts. Their own declaration in their own minutes, under their own control, betrays them. If these directors thought that the money paid was not a contribution as it is now claimed, why was not the first payment of Hitchcock, \$5,033.34 on October 13th, 1920 repaid immediately to themselves? This was not done.

When they all ceased to be directors April 18, 1921 there had been paid to the Bank \$9,505.69. Yet they had not distributed this sum among the persons assessed originally. The complainants in paragraph 20 of their Bill of Complaint p. 7, allege that this first payment of \$5,033.34 was paid to the Bank and credited to the Special account of John Eisele and Others for the benefit of the directors and in trust for them. The fact is otherwise. This first payment of \$5,033.34 was made October 13, 1920, six weeks after the directors' contribution, and was credited to undivided profits by these very complainants. This fact tells heavily against them. They allege also in paragraph 15 of the Bill of Complaint, p. 5, that at this meeting of September 2, 1920 it was decided that the directors should establish a fund of proper account out of which any loss sustained by the Bank on account of the Hitchcock loss would be paid. This is wholly inaccurate. Only one of the ten living complainants testified, Mr. McClave. He testified p. 52 that they all handed their checks to the Cashier. This supports the entry to undivided profits. He says: "I resigned with the understanding that the account was to be carried on in that way."

The time of this resignation is not stated. Presumably it was with those of the other directors, April 18, 1921.

It is stated in the minutes of April 18th, 1921, p. 37 that

"Mr. Lowe and Mr. Doremus were acquainted with the method of handling the Hitchcock account. They were advised that the directors advanced the money to cover

Mr. Hitchcock's overdrafts and the money to be collected by the bank and put into a fund in the name of John Eisele and others, which, when the entire indebtedness with interest is paid up, is to be distributed among the directors who contributed. Mr. Lowe and Mr. Doremus understand thoroughly how this account of John Eisele and others is taken care of and agree to continue the method already adopted in regard to this matter."

This statement is a declaration of the complainants in their own behalf in their own minutes, more than seven months after the money was paid. It is self-serving. It does not appear that this information was imparted to the members of the new Board before the purchase of the majority stock. They were trying at this late hour to protect themselves. They were ousted and this Parthian arrow in their retreat was discharged to disable their adversaries. What authority had Mr. Lowe and Mr. Doremus who were just entering on their duties to bind the stockholders of the bank to return moneys paid under the circumstances of this case? Nothing but unanimous consent of the stockholders could authorize it. This declaration on April 18, 1921 was not in conformity with their present view that this was to be a loan to be repaid. For five years thereafter they made no demand for this money.

It is well known that

"Directors are liable to creditors of a bank at a suit of a receiver to make good, losses

suffered by the corporation on account of their neglect of duty in the management of the bank's business and affairs."

Campbell v. Watson, 62 N. J. Eq. 396.

Four Corners Bldg. & L. Ass'n. v. Schwarzwaelder, 88 N. J. Eq. 212.

Schaedel v. Liberty Trust Co., 99 N. J. L. 380.

"It is contrary to public policy to permit directors of a corporation to freely contract with the corporate body, such contracts are voidable at the option of the corporation."

Ibid, 99 N. J. L. 380.

No agreement was made here that moneys if afterwards collected should be repaid. The fact that they failed to take the commonest precautions for their protection supports the view that their claim for the Hitchcock payment was an afterthought. It was a very simple thing when they made their contribution to have taken an assignment from the Bank of the Hitchcock indebtedness. If the money paid had been a loan it would have been a liability but as it was a contribution it was an asset. If a liability the financial condition of the bank was not improved. Such contribution increased the value of their own stock which had been diminished by the Hitchcock and other losses. If the Hitchcock overdraft was finally collected such additional sum would further increase the value of their own stock. When they sold their stock, after the Hitchcock

payments had been incorporated with the funds of the bank, it is reasonable to infer that they received the book value thereof. Now they ask that they be paid again, \$37,746.86 (the amount of the decrease) out of a capital of \$50,000. The remaining stockholders will have only the shell. The complainants say that they rest their case on conscience. On these facts I too invoke its aid.

Their interest as directors in a prosperous bank was a good consideration for the contribution. Indeed if they had given notes to the bank to cover the deficiency such a consideration would be sufficient to obtain judgment.

It is quite clear then that the complainants had full knowledge of the facts. Indeed the Bill of Complaint alleges in paragraph 13, p. 4 that on September 2, 1920 at the meeting of the Directors the bank, its officers and directors believing that George B. Hitchcock, Inc. "had caused a permanent and total loss" of \$34,500 less their balance on deposit which was \$1,067.77 or \$22,332.23. This is not a case where a single payment was made under doubtful circumstances. Here twelve directors made separate contributions. They fixed the assessment for each. They multiplied this assessment by the number of shares each had and each separately wrote out a check for the amount and paid it to the bank.

It is hardly necessary to quote support for such a plain proposition as that a person who voluntarily pays money with full knowledge of the facts cannot recover it. The rule was established in *Brisbane v. Dacres* 5 Taunt (1 Eng. C. L. R.) 143. It is

enough to quote from a recent case in this court where Chancellor Walker, said:

"It is a general principle that if a person, without mistake of fact or in the absence of fraud, duress or coercion, pays money on a demand, which is not enforceable against him the payment is deemed a voluntary one and cannot be recalled."

*Schaedel v. Liberty Trust Co.*, 99 N. J. L. 380.

Citing: *Camden v. Green*, 54 N. J. L. 591.

*Shoemaker & Co. v. Bd. of Health*, 83 N. J. L. 425.

*Koewing v. West Orange*, 89 Id. 539.

*McCrary Stores Corp. v. Braunstein*, 99 N. J. L. 166.

The Chancellor also said in this case:

"So that, in either aspect—in face of legal liability or without it—the payment cannot be recovered. If the plaintiff were legally bound to make good his just proportion of the loss he but paid a legal obligation. If he were not liable for it, he nevertheless paid it voluntarily."

So that whether the directors were under an obligation to make the payment is of no concern.

The facts in the case of the Liberty Trust Company are stated in the syllabus:

"H~~e~~ overdrew his account with defendant L. T. Co., and its Board of Directors instructed defendant K. its president, to discontinue H's account and have it withdrawn from its bank; disregarding the instructions, H. was permitted to continue his account; the company suffered loss by his manipulations; the president called upon plaintiff, a director, for a contribution to make good the loss, and he paid his proportion for the purpose, and was afterwards partially repaid; he sued for the balance: HELD if plaintiff were bound to make good his proportion of the loss he paid a legal obligation; he had an opportunity to dispute the claim, and if not liable, to defeat it, but waived defense, and, with full knowledge of all the facts, paid voluntarily and cannot recover."

In the case of *William O. Ross, v. First National Bank of Edgewater*, (this defendant) Messrs. Griggs and Harding as attorneys for the plaintiff in 1920 brought suit to recover certain alleged loans to the Bank from 1909 to 1918 made by Ross as director. Other attorneys were substituted and the case came to trial April 26, 1927 at the Passaic Circuit. It was shown that the alleged loans made by Ross, who was a director, were really contributions made by him and other directors to protect the solvency of the Bank. The Court directed a verdict for the defendant.

## POINT II.

### *THERE IS NO TRUST RELATIONSHIP IN THE PRESENT CASE.*

In the Court below counsel argued that the facts established a constructive trust; that this was an equitable action and if the defendant could not retain the moneys in conscience and equity it is to be recovered.

"Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust."

Pomeroy Eq. Juris. (3rd Ed.) Sect. 1044.

The author adds however:

"An exhaustive analysis would show, I think, that all instances of constructive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill, an obligation should be imputed, and assumes that the purchaser *intended* to act in pursuance of his fiduciary duty, the no-

tion of fraud is not invoked simply because it is not absolutely necessary under the circumstances; the existence of a trust in all cases of this class might be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of constructive trusts arise from actual fraud; many other spring from the violation of some positive fiduciary obligation; in all the remaining instances there is latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud."

Ibid.

There run through the cases of constructive trusts questions of fraud, express or implied. It is clear there is nothing express in the present case. Nor can a trust be implied from this evidence. There was no declaration of trust. When equity impresses a constructive trust the element of fraud is commonly present or a breach of fiduciary duty, or at least the violation of some equitable principle independent of the existence of any fraud. How can it be said that this contribution did not equitably belong to the Bank, when it was voluntarily made? The Bill of Complaint, par. 15, p. 5, admits the money was paid in order that the Bank might continue business. It was a present benefit to these directors to make such payment. There was a consideration received by them for it. Having reaped the reward of their contribution by preserving the solvency of the Bank, their own positions as directors, their reputation in the community as compe-

tent business men, the future increase of their shares by the growth of the institution, they cannot recover now what they paid for their benefit then. The cases are as one that the evidence charging the trustee with infraction of his fiduciary duty must be clear and unmistakable.

Chancellor Green in *Sayre v. Fredericks*, 16 N. J. Eq. 205-207 says:

"Mr. Eden in his note to *Fordyce v. Willis*, 3 Brown's Ch. R. 588 states that declarations of trust of personal property are in the same situation as all declarations of trust were before the statute. But that he has not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."

While the modern rule has modified this statement it has never been relaxed as to the necessity of clear and convincing proof. Nor can fraud be inferred from the mere refusal to pay,

"The establishment of a constructive trust must be evidenced by something stronger than a mere breach of an oral promise to convey or to hold in trust."

*Brown v. Murray*, 94 N. J. Eq. 125.

It was held in *Winkelman v. Winkelman*, 138 N. E. Rep. 643 that where it is attempted to establish a constructive trust by parol testimony the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion and if the evidence is doubtful or capable

of reasonable explanation upon a theory other than the existence of the trust, it is insufficient.

Citing: *Ryder v. Ryder*, 91 N. E. 451; *McGinnis v. Jacobs*, 35 N. E. 214; *Streeter v. Gamble*, 131 N. E. 589; *Bangham v. Bangham*, 119 N. E. 589.

In *Union Bank v. Sullivan*, 214 N. Y. 332-340 the court said:

"The President and members of the executive committee were all stockholders of the bank and it meant a loss to them, through a fall in the value of their holdings if the surplus of the bank was reduced by the sum of \$175,000. \* \* \* \* Whatever increased the assets benefited the holders of the stock."

*Ibid.*

"The notes of the directors in the continuance of the bank as a sound, financial and business institution contained a sufficient consideration to support the notes of the defendants given to make good any possible deficiency which might exist."

Citing: *Dykman v. Keeney*, 10 App. Div. 612-619.

"There the defendants were directors of a banking corporation and each made a note to the corporation for \$10,000. The notes were made pursuant to an agreement which recited that doubt existed in the minds of the directors and in the mind of the Superintendent of banks as to the soundness of certain

of the bank's securities, and in order to remove such doubt and make the bank unquestionably solvent, the directors had each made his note for \$10,000. to the bank. It was held that these notes were supported by sufficient consideration."

The Court of Appeals cites *Broderick v. Brown*, 69 Fed. Rep. 497.

"In *Broderick v. Brown*, it appeared that a national bank had suspended business and was in the hands of a bank examiner under the Federal statutes. The examiner informed the directors that before the Comptroller of the Currency would permit the bank to resume its business, it would be necessary that the sum of \$50,000. be raised and placed in the bank. Acting on this information the stockholders voluntarily contributed and paid to the bank a sum equal to fifty per cent of their holdings and amounting to \$50,000. It was held that the amount was not a loan to the bank but a contribution, and was an asset of the corporation."

The Court in the case of *Union Bank v. Sullivan*, said

"The law is well settled that where stockholders voluntarily assess themselves to relieve the corporation from pecuniary embarrassment or for the betterment of their stock, *whatever may be the occasion of the assessment*, (italics mine) the advances thus

made are not debts against, but assets of the corporation.

"In *Broderick v. Brown*, the Examiner caused entries to be made on the books indicating that the contribution was a voluntary assessment. B. at a meeting of the directors subsequently held, protested against these book entries. The bank held two notes of Broderick and the bank again suspended payment. HELD that the advance to the bank was a voluntary assessment and not a loan, and could not be set off by B. in an action against him on the notes by the receiver of the bank."

It is a very common thing to give a name to a thing for the purpose of coloring the cause which on analysis cannot be vindicated. I am sure it will not now be seriously contested that if the Hitchcock account had not been paid that these directors could not recover any part of their contribution. At what time then does the obligation, if it exist, arise? There was no express understanding, that is to say there was nothing reduced to writing. The new Board of Directors took office on April 18th, 1921—7 months after the contribution in question. They found no record of such a claim.

Mr. Lowe and Mr. Doremus of the new board were told that the outgoing directors claimed the Hitchcock moneys but that of course gave the old directors no clearer claim. The new directors might well agree among themselves if told by Messrs. Lowe and

Doremus, that as there was no record of any agreement to return these moneys, they, as trustees of the stockholders might well refuse and refrain from recognizing such asserted rights.

Nobody knew when this contribution was made by the directors that they would ever get a dollar from Hitchcock. When does this so called equitable principle arise? If the money was recovered six years thereafter, would a claim be sustainable to reimburse the directors? Suppose the contribution had been made to keep the bank open because of impaired capital and the bank after a long period of time from its remaining assets and this contribution of the directors had restored its financial credit would it be claimed that the directors were entitled in the forum of conscience to be reimbursed? Where is the distinction? Suppose Hitchcock did not pay, but that other debtors unexpectedly paid and such payment restored the impaired capital, would the directors still be entitled to maintain an equitable action for recovery of their contributions? Suppose even at that time the bank was still in danger of its capital being impaired, would the equitable principle invoked cover such a claim? What hardship is there in the present case that does not in practice occur every day?

"Where a party voluntarily pays an unjust debt, he cannot recover back such payment, nor, if he pays a debt which has been before in part paid, can he recover back the first payment?"

Cummins v. White, 4 Black, 356.

"If a debt is not legally due and the money was voluntarily paid under no mistake of fact the money cannot be recovered."

Hollingsworth v. Stone, 90 Ind. 244.

"Where in a contract of sale the vendee agreed to pay certain debts of the vendor and afterwards voluntarily paid a sum much in excess of the one named, he cannot recover the payment in excess."

Montgomery v. Gibbs, 40 Iowa, 652.

"If there be no obligation to make such payment and it was voluntarily paid with the full knowledge of the facts there is no recovery. Our own state has declared that where a person with full knowledge of the facts voluntarily pays money which the law would not compel him to pay but which in equity and good conscience he ought to have paid, he cannot recover it back."

Easton v. Easton, 35 N. J. L. 290.

To the same purpose is the law of New York, citing, *City of New York v. Erben*, 23 N. T. Super Ct. (10 Bosw) 189.

It was held in the above cases that it was not against conscience to retain the moneys.

But this contribution is not wholly lost. It appears that the complainants owned 186 shares of the 500 shares of the stock of the bank, p. 31, or in other words, 27% of all the stock. As stated supra, their contribution increased the value of their own stock. The repayment of the Hitchcock claim increased the value of their stock still further. When they sold their stock it was reasonable to suppose that they received their proportion of this increase. Hitchcock's claim and their contributions were greater than the whole capital stock. Having received this increase upon their stock as it is reasonable to suppose, they now ask to be paid in full the original contribution in addition. If they can maintain this action they are thus being paid twice for their holdings.

I need hardly pause to consider the question of duress. It was not pressed below.

It is said that:

"Duress authorizing the recovery of payment must be a threatened act which the party threatening has no legal right to do, made in such a manner as to cause the party threatened against his will to do some act which he is not legally bound to do, and against which he had no present means of protection."

Dale v. Simon, 267 S. W. 467.

Even if a decree for the complainants was justified which is denied, it is in excess of the correct figures. The basis of the claim is the return of the Hitchcock money with interest. The amount of the

exact loss was \$22,332.23. The sum paid back by Hitchcock was for principal and interest \$24,252.17, p. 48. The difference is \$1,919.94. This is all the interest ever received. The last payment was not made until 1924, six years after the loss, yet the decree gives the complainants, \$9,581.26 for interest. The final decree awards them \$28,165.60 not \$22,332.23, p. 19, with \$9,581.26 interest making \$37,746.86. On their own view of the case it is only the moneys restored for which a claim is made. No other money was ever paid to the bank. This is a very marked error.

The amount of interest therein is calculated upon the wrong amounts and at the wrong rate. The interest on the sum of \$28,165.60 is calculated as follows:

"The moneys in excess paid on said overdraft from September 2, 1920 to date and in addition interest on the amount of the overdraft from the dates of payment on account of principal and interest by Hitchcock to the bank to date."

This is a manifest error. We have nothing to do with the excess paid by the directors upon the overdraft. They are not in any view of the case recoverable. It is error to charge us also with this interest from the dates of payment by Hitchcock. These very complainants deposited the Hitchcock payments in a Savings Bank account from December, 1920 where the money remained until after they left the bank. The interest upon a Savings Bank account is four percent. Yet they have obtained 6 percent by this decree.

### CONCLUSION

It is therefore respectfully submitted:

1. The contribution made under the circumstances of this case cannot be recovered.
2. The amount of the Hitchcock loss was \$22,332.23. The decree erroneously awards complainants, \$28,165.60 with interest.
3. The interest on this amount is calculated at 6 percent although complainants placed the Hitchcock payments when it was seen, five months after the loss, some recovery might be had in a Savings Bank account with interest at 4%.
4. The Bank received only \$1,919.94 in interest above the \$22,332.23 the amount of the Hitchcock loss, the last payment being made in 1924 or 6 years after the loss.

Respectfully submitted,

WILLIAM B. GOURLEY,  
Of Counsel with Defendant-Appellant.

## New Jersey Court of Errors and Appeals

John Eisele, Jr., et al.,  
 Complaints-Appellees,  
 and  
 First National Bank of Edge-  
 water,  
 Defendant-Appellant,  
 and  
 Rollo Steenland and Elmer J.  
 S. Coe,  
 Defendants.

On Appeal from  
 the Court of  
 Chancery.

### REPLY BRIEF FOR DEFENDANT-APPELLANT

The complainants-respondents in their brief have mistakenly set out certain alleged facts which call for a short reply:

It is alleged that the contribution of \$28,165.60 "was to cover the indebtedness and overdrafts of the said Hitchcock". This is not the fact. The entry in the minutes is as follows:

"It was agreed by the board to assess each member in accordance with the amount of stock held, so much per share to cover the deficiency and overdraft of Geo. B. Hitchcock, Inc." P. 31.

No amount was named. The Hitchcock overdrafts were only two items, one check for \$10,500. and one for \$12,900. or \$23,400. This company had on deposit \$1,067.77 which made the amount of the loss \$22,332.23. The sum of \$24,998. was raised by this assessment. Manifestly the assessment

"covered" the Hitchcock loss. It was greater than the loss. The directors also paid from a savings account \$3,167. or \$28,165. in all. It was clear there were other financial disturbances to take care of. Their brief says, "The suggestion of other indebtedness is only a subterfuge," and again, "There is nothing in the testimony that would suggest any such idea." Aside from the discrepancy between the amount required to meet the Hitchcock loss and the amount paid I call attention to the testimony.

The only complainant sworn of the ten living complainants said:

"I understand there were some kited checks there, and with both of them together we were given the option of going to jail or paying this money." P. 53.

The Attorney of the Bank said,

"The Bank had had a series of unfortunate losses, with its customers and had suffered severe loss. **One** (italics mine) was in the name of Hitchcock, etc." P. 55.

It is therefore thus quite clear why the large sum was paid. Their brief declares that the "solvency of the bank was never impaired because there never was any loss. The Hitchcock indebtedness, by reason of the overdrafts, was immediately secured by regular banking methods. It therefore follows that at the time the directors paid the money into the Bank there was in actual reality no situation that either in law, equity or good conscience called upon any of the directors to pay." This is a singular statement. The loss occurred on August 18th, 1920 and amounted to \$23,400 to the Bank, the capital of which was but \$50,000. The directors did not meet

until September 2, 1920, and then made their contribution as aforesaid. The agreement about Hitchcock was not made until October 7, 1920, p. 35, and the first payment thereunder October 13, 1920, p. 48, nearly two months after the loss. It seems sufficient to state these facts without further argument.

The Bill of Complaint itself, in paragraph 19, p. 7, alleges that "at the date of the final adjustment (October 7, 1920) with George B. Hitchcock, Inc. it became apparent to the directors that George B. Hitchcock's indebtedness would not be an entire loss but would be paid in part and **perhaps** (italics mine) entirely liquidated in time."

It is further stated in the opposing brief that "the respondents did not have full knowledge of the facts but that they were laboring under the mistaken impression that the Bank had suffered a loss." Yet paragraph 14, p. 4 of the Bill of Complaint declares, "at this meeting the entire situation was explained to the Directors in detail in the presence of the attorney of the bank". There could be no mystery about such a situation to the most ordinary business man.

Paragraph 13 of the Bill alleges that the directors believed that the Hitchcock checks "had caused a permanent and total loss". P. 4. Nobody then knew that they would ever get a dollar. Apparently the threat of criminal proceedings against Hitchcock produced results. The attorney for the Bank said, "I was then directed to bankruptcy and settlement." P. 56.

It is further stated in the brief of counsel for Complainants-Respondents:

"If there had been anybody with the slightest foresight to advise them there would have been no necessity for the payment of this money by the Board of Directors, because the Hitchcock indebtedness was almost immediately liquidated by a new financial arrangement with new agreements and cash together with notes etc."

The counsel for the bank advised the directors about the perilous financial situation. He denies that he said anything about jail. P. 57. He said,

"If the Federal authorities discover this they are going to close your doors." P. 56.

With half the capital gone this statement was correct. The government might "make a criminal proceeding" against the cashier or indeed against them if they sought to attract deposits on such impaired capital.

I am at loss to understand what counsel means when they declare that there were no resolutions of assessment passed by the Board. It is wholly unimportant whether you term the language used a resolution or a minute. It is found on page 31 of the State of the Case. The point is that the directors agreed to assess each member of the Board for the Hitchcock loss in accordance with the amount of stock held by each. The assessment was not against all the stockholders. It serves to establish the fact that they for various reasons desired the stockholders not to know.

It is not correct to state that the assessment was a "misnomer because the Board actually agreed among themselves to arrange for the collection of a fund for the purpose of covering the Hitchcock account". The Bill of Complaint sets forth the same error in paragraph 15, p. 5 as follows:

"After a discussion it was decided that the Directors should establish a fund for the proper account to be known as the account of John Eisele and others out of which any loss sustained by the Bank on account of the Hitchcock loss, would be paid in order that it might continue business and that the Directors should pay into such account of John Eisele and others enough moneys to take care of the situation created by the indebtedness of George Hitchcock, Inc."

This is wholly inaccurate. The checks of the Directors were not from such a fund. They were the individual contributions of each Director in accordance with the agreement spread on their minutes and paid by each directly to the Bank. It was not until December 29, 1920, four months and eleven days after August 18, the date of the dishonored checks, that a savings account was opened, p. 48. This was to receive and not to disburse.

The transfer by order of the Comptroller of the Currency does not relate to 1924, but to 1921. The Hitchcock payments, (\$5,533.34) from October 13, the date of the first credit to December 29, 1920 p. 48, were placed by these very complainants who had exclusive control of the Bank in the undivided profits of the Bank on December 29, 1920. The sum

of \$1,166.66 for the first time was credited to a Savings Bank account. This continued to April 21, 1921 when it was transferred by order of the controller, p. 49.

**IT IS NOT MADE CLEAR WHETHER THE COMPLAINANTS REST THEIR CASE UPON THE RECOVERY OF THE ORIGINAL CONTRIBUTION OR UPON THE HITCHCOCK MONEYS.**

The Bill of Complaint alleges that the money of the Directors was paid "under a mutual mistake of facts", p. 8; that it should be repaid, "when the full amount of the indebtedness had been paid in full with interest" p. 7, par. 19. The prayer however is that the Bank may be decreed to have held the moneys paid by the said George B. Hitchcock, Inc., and others as Trustees for the benefit of the complainants, and the defendants, Rollo Steenland and Elmer J. S. Coe, p. 9.

The language of the Vice Chancellor is,

"I think that the moneys advanced by them and deposited with the bank to meet any loss ultimately sustained through the failure of the overdrawing depositor to make good his deficit should now be returned." P. 18.

Thus the Vice-chancellor rests his opinion upon the return of the original contribution. The brief of the Complainants-Respondents presents two aspects, (1) a mistake of facts and (2) that the Bank holds the original contribution under a constructive trust. It is not, therefore, the Hitchcock payments that are sought but the original contribution. I presume that it will be conceded that if Hitchcock had

not paid that no recovery could be had. It is clear from the facts in the case that the Directors at the time of the contribution thought the affair was a total loss. The bill of complaint so declares, p. 4. It was not until October 7 the Bill states that it became apparent that the loss would be paid in part, p. 7. The last payment was on Feb. 16, 1924, or three years and a half after the loss. One payment of \$6,525. was made Nov. 5, 1923. They mingled the first and second Hitchcock payments with the funds of the bank, p. 48. The computation of interest is from the dates of the Hitchcock payments and upon these payments. While the precise legal and equitable view entertained by counsel is not made clear the conclusion seems to be that while at the time of the original contribution everybody deemed the affair an entire loss, yet by some principle of equity if ever any part of this debt in the years to come were recovered by payment or upon execution suit could be instituted. No citation for this view is quoted either by counsel or by the Vice Chancellor. It is not denied that the complainants have parted with their shares and reaped the financial advantages of the improved status of the Bank of which the directors' contributions and the Hitchcock payments were part. Shall they now be permitted anew to imperil the capital again and force an assessment upon innocent stockholders? It is not seen that the particular words of the minutes adopted aid such interpretation. If nothing was said

about any particular debtor but only that the capital was impaired and the directors were invited to restore it, the effect is the same.

The chronological statement of the payments is found on pages 47 and 48.

Respectfully submitted,  
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Of counsel with defendant-appellant.