

New Jersey Court of Errors and Appeals

DANIEL SUTTER, JR.,

APPELLANT,

VS.

SECURITY TRUST COMPANY,

RESPONDENT.

ON APPEAL.

ON BRIEFS

STATE OF THE CASE

Sat Below

WALKER, C.

LEAMING, V. C.

WILLIAM J. KRAFT,

HERBERT S. KILLIE,

Attorneys for Appellant.

FRENCH & RICHARDS,

Attorneys for Respondent.

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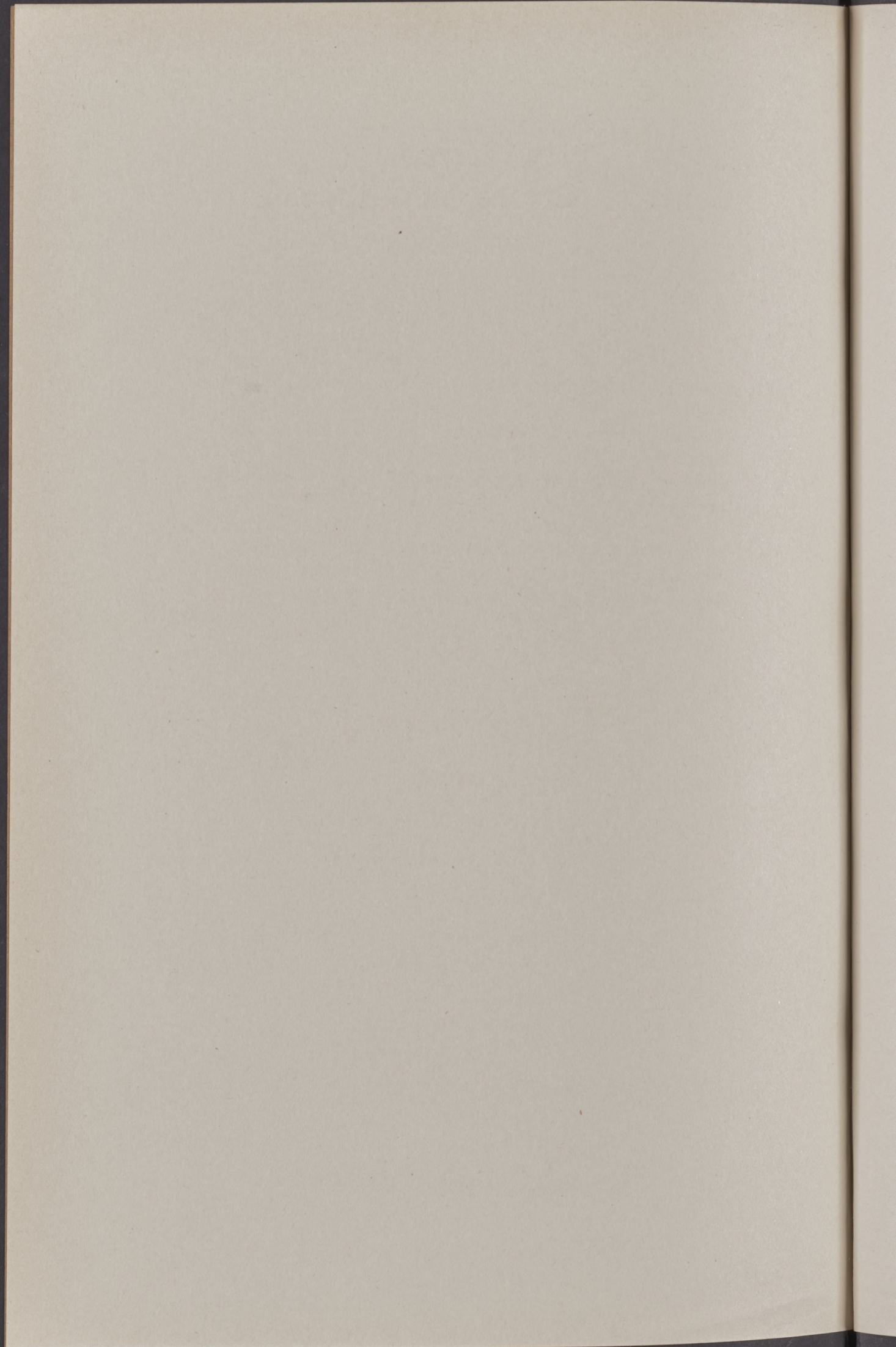
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Attorneys for Appellant.

FRENCH & RICHARDS,
Attorneys for Respondent.



THE STATE OF NEW JERSEY
TO
SECURITY TRUST COMPANY.

[L.S.] You are summoned to answer the
annexed complaint of Daniel Sutter,
Jr., in an action at law in the Supreme
Court. And take notice that unless
you file your answer to said complaint 10
with the Clerk of the Supreme Court, at Trenton,
within twenty days after service upon you of this
writ and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of
the Supreme Court, at Trenton, this twenty-eighth
day of April, nineteen hundred and twenty-two.

20

ENOCH L. JOHNSON,
Clerk.

H. S. KILLIE,
Attorney.

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

10	DANIEL SUTTER, JR.,	}	ACTION AT LAW.
	PLAINTIFF,		UPON CONTRACT.
	VS.		COMPLAINT.
	SECURITY TRUST COMPANY,		
	DEFENDANT.		

Plaintiff, Daniel Sutter, Jr., residing at Mount Holly, in the Township of Northampton, in the County of Burlington and State of New Jersey, says that:

1. Defendant is a corporation duly organized and incorporated as a Trust Company under the laws of the State of New Jersey; located in the City and County of Camden and State of New Jersey.

2. Plaintiff, on and prior to March 25th., A.D. 1922, maintained a checking account on the books of defendant corporation, which said account on said date amounted to the sum of \$1,034.41 to the credit of said plaintiff.

3. On March 25th., 1922, plaintiff, in the ordinary course of banking, drew a check against said account for the sum of \$1,000.00, bearing said date, payable to Grace A. Sutter at the place of business of said defendant company in the City of Camden, aforesaid. Said check was in negotiable form.

4. Plaintiff, on said March 25th., 1922, personally requested defendant company to certify said check, in the usual and customary manner. Defendant company, by its duly authorized agent and employee certified said check, as requested by plaintiff, and returned said check to the personal care and possession of plaintiff.

5. On March 27th., 1922, plaintiff personally saw the Treasurer of defendant company, prior to banking hours, and requested that payment on said check be stopped at the banking house of defendant; plaintiff, at about 8.30 o'clock in the forenoon of said March 27th., 1922, telephoned to the place of banking business of defendant company and was informed, in reply, that payment on said check had been duly stopped by defendant company.

6. At about 9.10 o'clock in the forenoon of said 10
March 27th., 1922, the payee on said check presented same for payment at the banking house of defendant, in Camden, aforesaid, and payment of the same was accordingly refused.

7. Plaintiff, since said March 27th., 1922, has legally demanded payment by defendant to him, said fund so held by defendant and belonging to plaintiff but has been refused the same.

8. Plaintiff has never received any portion of 20
said \$1,034.41 but the same is justly due and owing from the said defendant to the said plaintiff.

Plaintiff demands of the defendant the sum of \$1,034.41 with interest thereon from the 27th. day of March, 1922, until judgment.

H. S. KILLIE,
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

	DANIEL SUTTER, JR.,	} ACTION AT LAW.
	PLAINTIFF,	
	VS.	} AFFIDAVIT OF MERITS.
10	SECURITY TRUST COMPANY, DEFENDANT.	

STATE OF NEW JERSEY } SS:
COUNTY OF CAMDEN

CLARENCE H. POLHEMUS, being duly sworn on his oath says:

20 I am Secretary and Treasurer of the Security Trust Company, the defendant in the above-stated cause, and have knowledge of the matters involved in said cause. I believe that the defendant has a just and legal defense to said action on the merits of the case.

Subscribed and sworn to before me this Fourth Day of May, A.D. 1922.

GEORGE M. BRYSON,
M. C. C. OF N. J.

CLARENCE H.
POLHEMUS.

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

DANIEL SUTTER, JR.,

PLAINTIFF,

VS.

SECURITY TRUST COMPANY,

DEFENDANT.

ACTION AT LAW.

ANSWER.

10

Defendant, a corporation of New Jersey, says that:

FIRST DEFENSE.

1. It admits the first paragraph.
2. It admits the second paragraph.
3. It admits the third paragraph.
4. It admits the fourth paragraph.
5. It denies the fifth paragraph.
6. It denies the sixth paragraph.
7. It denies the seventh paragraph.
8. It denies the eighth paragraph.

20

9. Defendant has at all times on and since March 25th, 1922, and to the plaintiff's knowledge held and still holds the sum of \$34.41 to the credit of the plaintiff and subject to his check, but he has not seen fit to demand the same or to draw any check thereon.

SECOND DEFENSE.

The request which plaintiff made to this defendant to stop payment on the said certified check was in writing and stated that compliance with the request should be optional on the part of the defendant and afterwards, indemnity being demanded of plaintiff and the plaintiff not having furnished to the defendant satisfactory indemnity against loss or damage by reason of compliance with said written request, defendant exercised its said option and paid

30

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

DANIEL SUTTER, JR.,	PLAINTIFF,	ACTION AT LAW.
VS.		
SECURITY TRUST COMPANY,	DEFENDANT.	RULE TRANSFER- ING CAUSE TO THE COURT OF CHAN- CERY.

10

Upon motion on behalf of the defendant and statement on behalf of the plaintiff, it appearing that the above-entitled cause is one proper to be transferred to the Court of Chancery for hearing and determination.

It is, on this twenty-eighth day of November, nineteen hundred and twenty-two, ORDERED, that the above-entitled cause with the record thereof and all papers filed in the cause be transferred for hearing and determination to the Court of Chancery of New Jersey. 20

SAMUEL KALISCH,
J. S. C.

IN CHANCERY OF NEW JERSEY.

DANIEL SUTTER, JR.,
 COMPLAINANT,
 AND
 SECURITY TRUST COMPANY,
 DEFENDANT.

BY TRANSFER, &C.
 REFERENCE.

10

Upon opening this matter to the Court, by Herbert S. Killie, of Kelsey & Killie, Solicitors for and of counsel with Complainant, in the above entitled matter, and it appearing that said cause was transferred from the New Jersey Supreme Court (Burlington County) by an Order of Honorable Samuel Kalisch, Justice thereof, bearing date the 28th day of November, A.D. 1922, and filed in this Court;

20 and it further appearing that issue in said cause then in the said Supreme Court pending, was joined by the parties thereto prior to such transfer, as aforesaid:

It is, on this 18th day of January, 1923, ORDERED, that the above stated cause be referred to Hon. E. B. Leaming, one of the Vice-Chancellors, to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be

30 made therein.

E. R. WALKER,

C.

IN CHANCERY OF NEW JERSEY.

BETWEEN :

DANIEL SUTTER, JR.,	}	ON BILL FOR RELIEF.	FINAL HEARING.	10
COMPLAINANT,				
AND				
SECURITY TRUST COMPANY,	}			
DEFENDANT.				

Before his Honor, E. B. LEAMING, Vice Chancellor, at the Chancery Chambers, Camden, New Jersey, on Monday, October 1, 1923.

Appearances:

WILLIAM J. KRAFT, ESQ., &
HERBERT S. KILLIE, ESQ.,
For the Complainant. 20

FRENCH & RICHARDS, ESQS.,
For the Defendant.

THE COURT: Can you dictate to the stenographer matters that are not in dispute?

MR. KRAFT: I think the only thing we can admit would be that Mr. Sutter took this check to the bank and the bank certified the check and gave it back to him. 30

MR. RICHARDS: I think it is also undisputed that the notice which Mr. Sutter signed requesting the bank to stop payment left an option with the bank whether or not they would.

MR. KRAFT: I have never seen that.

THE COURT: Well, we won't crowd the mourners on stipulation; go ahead with the proofs.

MR. KILLIE: If the Court please, may we go a little out of the order of things in order to call Mr. Davis?

THE COURT: All right.

10

JAMES MERCER DAVIS, ESQ., SWORN.

BY MR. KILLIE:

Q. Mr. Davis, you were representing Mr. Sutter in a legal proposition in March, of 1922?

THE COURT: Let it appear on the record that Mr. Davis is an Attorney-at-Law with some little experience.

20 A. I was representing Mr. Sutter in some other matters and had advised him on some matters unconnected with this; I don't say I represented him in this particular matter.

Q. Do you recall the circumstances of an agreement being made between Mr. Sutter and his wife?

A. I knew nothing about that except as Mr. Sutter had advised me from time to time.

Q. Were you present at the time Mr. Sutter drew a check in favor of Grace A. Sutter?

30 A. No.

Q. You recall that there was a check which had been certified at the Security Trust Company by Mr. Sutter in favor of Grace A. Sutter?

A. Only by what I was told, I never saw it.

Q. Were you present with Mr. Sutter in a conversation with officers of the Security Trust Company in regard to this check?

A. I think perhaps I can explain it to you, all

I remember about it. I don't remember what date it was, but anyhow I was told that he had drawn a check and he had had it certified at the Security Trust Company and that he desired to stop payment on that check, and my recollection is he came to my house in the evening, or early morning, I don't remember which, at any rate he asked me if I wouldn't go to the bank with him, and he came to my house and I came down with him in an automobile; we got at the bank early in the morning, I don't remember what time exactly, but it is my recollection after the opening of the bank, I think it was during banking hours, and at that time we had a conversation with Mr. Polhemus, Trust Officer of the bank, I don't remember just what part of the bank we found him, but anyhow something was stated to him to the effect at any rate that Mr. Sutter desired to stop payment on the check—I don't remember whether the circumstances were discussed with Mr. Polhemus about why he wanted it stopped or not, I think it was, but I don't remember a single thing that Mr. Polhemus said, but I do remember he went and got a paper, I don't know that I read it, I don't think I did, but I understood it to be an order for the stopping of this check, and I do remember there was some conversation to the effect that Mr. Sutter would have to sign it, or a suggestion to that effect, and I remember that Mr. Sutter did sign it. Now, that is all, your Honor, that I remember that took place on that occasion; I don't remember any words that were spoken, it would be a pure guess, I couldn't tell. I can say what took place at that time, and that was the transaction I remember

Q. At that time, Mr. Davis, do you recall that Mr. Sutter said to Mr. Polhemus that he wanted the payment on this check stopped?

A. I don't think there was any doubt about

that, I can't be sure I heard him say those words, but that is why I was there with Mr. Sutter.

Q. Do you recall any words that Mr. Polhemus said at that time?

A. I can't remember a single word Mr. Polhemus said. I do remember he got the paper, I assumed it was the ordinary form that the bank uses, I don't remember that I looked at it, but I do know Mr. Polhemus got it and Mr. Sutter signed it in my
10 presence and left it with Mr. Polhemus.

Q. Later on, or subsequent I will say, to that particular transaction, did you see Mr. Polhemus in the presence of Mr. Sutter again regarding this matter?

A. I can't recall that I had a further conversation with Mr. Polhemus about it; it has been some time, and perhaps I should be expected to remember it better, but the fact is I don't. I do remember some conversation with Mr. Borton but I can't recollect whether that was in Mr. Sutter's presence or not,
20 and I can't exactly remember where that conversation took place, whether it took place in my office or whether it took place in the bank; I am inclined to think Mr. Borton came to my office.

Q. Was it subsequent to the signing of this paper?

A. Oh, yes, I didn't see Mr. Borton at the time this paper was signed; Mr. Polhemus was in the
30 bank.

Q. Was it the same day or the following day, do you recall that?

A. I can't be certain about it, but I think it was subsequent, that is, another day, but I won't be positive about that.

Q. Can you recall the substance of that conversation between Mr. Borton and you?

A. My recollection is that there was more than

one conversation. The conversation that I recollect with Mr. Borton—and I don't recollect, perhaps, all of that—Mr. Borton said to me that he didn't like this business of stopping payment on certified checks, that when the bank or trust company had pledged itself that he felt that it was the right thing and proper thing the bank should pay it—I am using my words not his—and that while he was desirous of attempting to help Mr. Sutter out of his difficulty by withholding the payment of this check that it finally would have to be paid unless some arrangement could be made by Mr. Sutter with the bearer of the check. That is, in substance, as I recollect it, and I don't think there is any dispute about that fact. I don't think I had any further—let me correct that—I may have had other conversations about it, but I don't think there was anything definitely said. In other words, if we had more than one conversation, and I think we did, I think both conversations were substantially to the same effect, but it has been quite a little while and I can't be positive of these details.

CROSS-EXAMINATION.

BY MR. RICHARDS :

Q. Mr. Davis, at the time the paper was signed, this interview, this conference you have spoken of, do you recall Mr. Sutter telling Mr. Polhemus all he really wanted was to have payment held up for two or three days and he thought he could then have things all in shape?

A. I don't know that I can answer that question either yes or no in the form in which you put it. I do remember that Mr. Sutter said that he was going to try to adjust this matter, now, whether he said he only wanted it held up for two or three days I

couldn't answer your question yes as to that, I can't say he did or did not, I don't recollect, but I do remember he said he was going to try to adjust it with his wife and thought he could do it, and I think subsequently he informed me and perhaps Mr. Polhemus that he was trying to do that thing through some action in Philadelphia.

10 Q. You have spoken of a paper that was signed there; I show you a paper purporting to be signed "Daniel Sutter, Jr.," and purporting to be witnessed by James Mercer Davis, tell me if that is your signature?

A. Yes, sir.

Q. And is that the paper to which you refer?

A. I assume it is; I have never seen it from that time to this, and I didn't read it at the time, but I think now it is the paper from the circumstances.

MR. RICHARDS: Shall we have it marked now?

20 MR. KRAFT: That is Mr. Sutter's signature.

THE COURT: Let it be marked.

(Paper marked Ex. D-1, for Iden.)

30 THE WITNESS: I think, Mr. Richards, that your question has refreshed my recollection to some extent in regard to that matter. I am somewhat hazy and uncertain about it, but my recollection is that Mr. Sutter did say he hoped to be able to adjust this matter with his wife and Mr. Polhemus in effect said to him he hoped he could, or words to that effect, he was sympathetic, as I apprehended, in the matter, and hoped that Mr. Sutter would be able to adjust the matter.

DANIEL SUTTER, JR., SWORN.

BY MR. KILLIE:

Q. You are the complainant in this case?

A. Yes, sir.

Q. And live at Mount Holly, New Jersey?

A. I do.

MR. KILLIE: Have you that check, Mr. Richards?

10

Q. In March of 1922 you had an agreement of separation from your wife, Grace A. Sutter?

A. Yes, sir.

Q. And at that time certain agreements were entered into between you and your wife relating to that separation?

A. Yes, sir.

Q. And as a part of that agreement you were to give her the sum of \$1,000?

A. \$1,000.

20

Q. And you did give it to her?

A. I did.

Q. By what method?

A. Certified check drawn on the Security Trust Company, Camden.

Q. I show you a check dated March 25, 1922, drawn by Daniel Sutter, Jr., to Grace A. Sutter, on the Security Trust Company, in the sum of \$1,000, and certified by the bank, and ask you if that is the check you gave her at that time?

30

A. It is.

THE COURT: May I see the check?

MR. KILLIE: Certainly, your Honor.

Q. There were some agreements relating to her and you which were to be performed by the respective parties as consideration for that check?

A. That is right.

Q. Did she perform her part of that agreement?

A. No.

Q. By reason of that did you request that payment on this check be stopped?

A. I did.

Q. And to whom?

A. In the presence of Mr. Davis and myself at
10 the Security Trust Company.

Q. When?

A. Oh, as soon as—on the day after; I think you will find that date was Saturday and I think this was Monday morning.

THE COURT: The day after the check was delivered?

THE WITNESS: The check was given Saturday.

20 MR. KILLIE: I think the defendant will admit that March 25th was a Saturday.

THE COURT: And the date of the stop-notice is what?

MR. KRAFT: The 27th, isn't it?

THE COURT: Two days later?

MR. KRAFT: The 25th was a Saturday, you see.

30 THE COURT: (To the witness). You stopped payment the same day you gave it to your wife?

THE WITNESS: No.

THE COURT: You gave the check on Saturday and stopped payment on Monday?

THE WITNESS: That is it.

Q. Where did you see Mr. Polhemus on Mon-

day morning, the 27th?

A. On his way to the train at Mount Holly.

Q. What did you say to him?

A. I told him my intention was I wanted payment stopped on this check, but that didn't satisfy me and I went after Mr. Davis and we came to the bank itself.

Q. What did Mr. Polhemus say to you, if anything, at the time you saw him at Mount Holly and requested stoppage of the payment? 10

A. Well, he was non-committal about it.

THE COURT: This was before Mr. Davis went with you?

THE WITNESS: Yes, sir, early in the morning.

THE COURT: Not the same day Mr. Davis went with you?

THE WITNESS: Yes, sir, the same morning.

THE COURT: You saw Mr. Polhemus twice that same morning? 20

THE WITNESS: Yes.

Q. Later you say that Mr. Davis went with you to the Security Trust Company?

A. Yes, before banking hours.

Q. What time was it?

A. About twenty minutes of nine.

Q. In the morning. 30

A. Before the bank had opened.

Q. You and Mr. Davis went in the institution?

A. That is right.

Q. Who did you see?

A. Both Mr. Borton and Mr. Polhemus were there, both of them.

Q. Joshua Borton and Mr. Polhemus?

A. Yes, sir.

THE COURT: Mr. Borton, the President, and Mr. Polhemus, the Trust Officer.

MR. KRAFT: Treasurer, Mr. Polhemus is the Treasurer.

THE COURT: Who is the Trust Officer?

MR. KRAFT: Howard Potter is Trust Officer.

10 Q. Will you state now the conversation which took place in the presence of Mr. Davis, Mr. Polhemus and Mr. Borton in the Security Trust Company?

A. There seems to be a great deal of doubt about the conversation that morning, but as near as I can recollect it and give everybody their due, it seems to me that Mr. Polhemus and Mr. Borton didn't wish to have payment stopped on the check, that was the idea when I first went into the office, and finally I brought it about to the point where
20 they said the payment would be stopped if I would sign a notice to that effect, and I said I would try amicably to fix this up in some way so it would not be any trouble to them if it was possible to do so before I signed that notice with that signature, and I walked out of the bank with the idea that payment had been stopped on that check.

Q. Did they tell you that payment would be stopped on that check?

A. Yes, sir, and they even went further than
30 that, because Mrs. Sutter was there ten minutes after the bank was open and she presented the check and they said that payment had been stopped on it, and they allowed it to get back into her possession again.

THE COURT: How would you know that?

THE WITNESS: I was right there at the Security Trust Company and Mr. Polhemus told Mr. Davis and I Mrs. Sutter had been there with this check.

THE COURT: Who told you that?

THE WITNESS: Mr. Polhemus; and they told her payment had been stopped on the check, and they allowed it to get back into her possession and into the hands of someone else and it was finally paid by the trust company.

Q. That was on Monday morning, the 27th of March?

A. Yes. 10

Q. Later on did you receive notice of protest of this check?

A. From the Federal Reserve Bank, as I recall it.

Q. I show you a slip of paper from the Federal Reserve Bank under date of March 30, 1922, and ask you if that is the slip of paper which you received?

A. Yes, sir, it is.

MR. KILLIE: I offer this, if the Court please, notice of protest on the check. 20

(Paper marked Ex. C-1).

Q. Did you subsequent to the Monday morning conversation with Mr. Polhemus have any other conversation with Mr. Polhemus or Mr. Borton regarding this check, and pertaining to the demand for payment by any of the other holders of the check? 30

A. Not as far as an interview was concerned; I might have been around the bank; I might have been around the bank, but I don't recall ever seeing them after that time, I mean, and having any conversation about it.

Q. When did you first learn that this check had been paid or the trust company intended to make payment?

A. Some time subsequent to the giving of the check, after it was put in Mr. Mack's hands and through the Union National Bank of Philadelphia, some time afterwards.

Q. Did you ever know or receive any notice of any kind that the check had been paid or that the Security Trust Company intended to make payment on that check prior to the time it was actually paid and charged to your account?

10 A. They told me that they thought it would be their policy to pay the check, they didn't see how they could do anything else, but pay the check.

Q. Was that after it was protested, or paid, or when?

A. No, it couldn't have been paid; after it came through Mr. Mack's hands and his bank in Philadelphia. When it was presented to them for payment they paid it, that is all there was to it.

20 Q. Did you ever receive any notice, written or otherwise, from the Security Trust Company to the effect that they intended to pay this check?

A. No, but I heard them say they intended to pay it.

Q. Who told you that?

A. I can't recall just who it was. Having the interest I did in the matter I certainly found out for myself that they intended to pay it as soon as it was coming through the way it did.

30 Q. That was after the check was protested, of course?

A. Yes, sir.

Q. Did you subsequent to the protest of that check draw upon or attempt to draw upon the \$1,000 and some odd dollars which you had previously had on deposit there?

A. Yes, sir, I drew on it, but I never overdrew my account.

Q. I show you a check signed by Daniel Sutter, Jr., on the Security Trust Company, of Camden, for the sum of \$416.16, under date of April 18, 1922, and ask you if you drew and negotiated that check?

A. Yes, sir.

Q. Was that check paid by the Security Trust Company?

A. What do you want to know now?

Q. Did you by this check make demand on the Security Trust Company, make demands for payments out of that \$1,000 held in your name? 10

A. As I recall, I did.

Q. This is the check which you drew?

A. Yes, sir.

THE COURT: And was that protested?

MR. KILLIE: Payment refused, your Honor. I offer, if the Court please, letter from me as attorney for Mr. Sutter to the Security Trust Company under date of April 22, 1922, and also the reply, copy of the reply, which is admitted, from the Security Trust Company to me under date of April 24, 1922. 20

Said papers marked Exhibits C-2 & C-3).

I offer, your Honor, the original check.

(Said papers marked Exhibits C-2 & C-3).

CROSS-EXAMINATION.

BY MR. RICHARDS:

Q. Mr. Sutter, in having the check for \$1,000 certified wasn't it your object to have the bank's liability added to your own?

A. I expected the check to be paid, of course, with funds that were put there for that purpose.

Q. You thought Mrs. Sutter would accept it more readily if it were certified?

A. It seems to me these kind of things are generally expected at a time like that.

Q. And you really felt she wouldn't accept it unless it were certified?

A. No, I didn't think so, I think she would.

Q. But you wanted to have the bank's liability added to your own as an inducement for her to accept it?

A. At a time like that it is my understanding the check should be certified.

Q. For what purpose?

A. Well, it seems as though business demands that checks be certified at a time like that.

Q. In other words, to make the bank the debtor rather than the drawer of the check?

MR. KRAFT: I object to that, if the Court please.

20 Q. All right. You had no thought then it was possible or permissible to stop payment on a certified check, did you, Mr. Sutter?

A. When I gave the check?

Q. When you had it certified?

A. I wasn't thinking of it being necessary to stop payment of it.

Q. You had no thought it was either possible or permissible?

30 A. That didn't enter into it at all.

Q. Didn't you tell Mr. Polhemus that you were giving the check to Mrs. Sutter to get—first, at the time the check was certified Mrs. Sutter was in your house, wasn't she? You have a house where, Mount Holly?

A. Yes.

Q. Wasn't she in the house at the time?

A. It seems to me—

Q. She was in possession of the house, wasn't she?

A. I think she was in possession of the house, I wouldn't say for sure.

Q. Well, didn't you tell Mr. Polhemus you were giving her the check to get her out of the property?

A. No, sir, I did not. Your Honor can I have a word here?

THE COURT: Your counsel will give you that opportunity; answer the questions the best you can. 10

Q. She did get out of the property, didn't she?

A. Yes.

Q. You knew when you drew that \$416.16 check you hadn't that much money in bank?

A. Yes, sir, but—

BY MR. KILLIE:

Q. But what? 20

A. As far as that check is concerned it was to find out if this check had been really paid.

Q. In the nature of a demand by you?

A. That is it exactly.

Q. Now, at the time you gave this check to your wife did you have any idea at that time you were going to stop payment on it or attempt to avoid payment?

A. No, sir.

Q. Why did you give her the check? 30

A. For obligations between ourselves.

Q. In accordance with your agreement?

A. That is it exactly.

Q. Which agreements were not fulfilled by her?

A. Not at all.

Q. When did you first learn her obligations to you were not fulfilled?

A. Well, the next day after she moved out of

the house; the moving was made at night, and the next day some time I found out that things were not there.

Q. Things which she was to leave there and which she took away with her?

A. That is it exactly.

MR. KRAFT: When was that check paid, that \$1,000 check?

10 MR. POLHEMUS: When was it paid?

MR. KRAFT: 4-6-22.

THE WITNESS: Nearly two weeks afterward.

MR. KRAFT: Is that the date?

MR. POLHEMUS: April 6, 1922.

COMPLAINANT RESTS.

THE CASE FOR THE DEFENDANT.

CLARENCE H. POLHEMUS, SWORN.

BY MR. RICHARDS :

Q. Mr. Polhemus, you are Secretary and Treasurer of the Security Trust Company, the defendant in this case?

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A. I am.

Q. Do you know Daniel Sutter, Jr., the plaintiff?

A. I do.

Q. Will you state, please, the conversation with Mr. Sutter regarding the consideration for the certified check, what he was to get for it, what he told you he was to get for this certified check?

A. Well, he never told me specifically what he proposed to get for this check.

20

Q. Did you have any talk with him about his wife going to get out of the property?

A. Well, if I may do as Mr. Davis did I think probably I could answer that. On the morning of March 27, 1922, as I approached the station at Mount Holly I met Mr. Sutter and he told me he had a check drawn to the order of his wife for \$1,000 and that it had been certified by our bank and he said he didn't want us to pay the check if it was presented, he had given the check to Mrs. Sutter and there was some differences between them which no doubt could be adusted in a day or two and wanted us to withhold the payment of that check until he fixed up those differences. I told him if a banking institution had certified a check it was their duty to pay the check, and I gave him no information, and the train came along and I boarded the train. When I arrived at the office of the Security Trust Company in Camden

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which is usually about a quarter of nine—after I had been there rather, Mr. Sutter telephoned me from Mount Holly, New Jersey, that he was coming down with Mr. Davis to Camden and see about this certified check. In the meantime Mrs. Sutter had presented that check for payment, and I told her that Mr. Sutter said there were some differences existing between himself and his wife and that he requested us not to pay the check at that time, and

10 I asked her if she would defer the presentation of that check until we could see Mr. Sutter and have the thing fixed, and she thereupon went away with the check. Now, Mr. Sutter wasn't in the Security Trust Company before banking hours, he wasn't there twenty minutes of nine, because I don't reach the office at twenty minutes of nine, I was on the train leaving Mount Holly at 7.50, which doesn't get me into the office until about quarter of nine, and

20 furthermore I had been in the office some time before Mr. Sutter telephoned me from Mount Holly that he was coming down to Camden, so that our conversation with Mrs. Sutter occurred before we saw Mr. Sutter—

THE COURT: Occurred what?

THE WITNESS: Before we saw Mr. Sutter in Camden. Now, that was on the 27th day of March.

THE COURT: That would be Monday?

30 THE WITNESS: Yes, sir. Mr. Sutter, Mr. Davis, Mr. Borton and I were present, and Mr. Sutter again reiterated that it would be only a matter of a day or two until he could adjust some matters with Mrs. Sutter and then he expected us to pay that check, whereupon we asked him to sign a notice to stop payment on the check, which he did.

Q. Is this the notice which was signed?

A. It is.

Q. Being the paper which has already been marked Exhibit D-1 for identification, and it is now offered in evidence on behalf of the defendant.

(Said paper marked Ex. D-1.)

Q. Proceed, Mr. Polhemus.

A. There was no time to my knowledge—rather there was no time when either Mr. Borton or I in the presence of each other and Mr. Sutter ever agreed to definitely stop payment on that check, Mr. Sutter never requested us to do so, he always stated that it was only a matter of a few days, and we deferred payment on the check rather than stop payment on it. Now, that was the 27th day of March; on the 30th of March the check was presented for payment by the Federal Reserve Bank of Philadelphia, and we refused to pay the check, and on the 31st of March, Mr. Spellenburg, of the Union National Bank, of Philadelphia, called me on the 'phone and said he would like an explanation as to why our trust company declined to pay a check which we had certified—

MR. KRAFT: I object; that is irrelevant.

THE COURT: The conversation is not relevant.

Q. As a result of that conversation what did you do?

A. We explained to him it was only a matter of a few days, it was deferred payment and we eventually expected to pay the check. Then on April 3rd we wrote and wired Mr. Sutter that we expected to pay that check and asked him to come down and see us, which he did, and I have a copy of the letter.

Q. You finally learned, didn't you, that Mr. Mack was the holder of the check?

MR. KRAFT: Don't lead him.

A. Yes, we learned this on April 3rd when we telegraphed and wrote Mr. Sutter that the check was in the hands of an innocent third person for value and we proposed to pay the check, and asked him to come and see us, which he did, and we told him that unless he would indemnify us by a bond of a surety company against any loss by reason of our non-payment of this check we proposed to pay the check, and he declined to do so, and later, on the
10 6th of April, Mr. Mack presented the check for payment and we paid him the money together with the protest fee.

Q. Now, before this check was paid to Mr. Mack what assurances from him did you require and obtain to show he was a holder in due course?

A. We asked him if that was so, and he said yes; in fact, he wrote us a letter to that effect.

BY THE COURT:

20 Q. Let me ask the witness when that pencil memorandum on the check "payment stopped" was written there, and by whom?

A. That was written there by one of the clerks of the bank, I presume.

Q. Do you know when?

A. On the day it was presented originally for payment.

Q. When Mrs. Sutter came with it, or later?

30 A. Yes, sir. If I may have the protest notice it will give me the date. That was on the 30th day of March, 1922, this was attached to this.

BY MR. RICHARDS:

Q. You stated, Mr. Polhemus, before making the payment you obtained from Mr. Mack assurances that he was the holder in due course; is the paper I now hand you purporting to be a letter from Edwin R. Mack to the Security Trust Company, dated April

6, 1922, the assurances to which you refer?

MR. KRAFT: I object; it is irrelevant and has no probative force whatsoever.

THE COURT: I think so; I think Mr. Mack had better testify. Is he here?

MR. RICHARDS: Yes, sir. He already stated he obtained a written assurance, and I am asking whether that is it?

10

THE WITNESS: Yes, sir, that is the letter.

MR. RICHARDS: That is offered in evidence, if the Court please.

MR. KRAFT: I object to it on the grounds stated.

THE COURT: I don't think it is competent unless you are going to offer him. I think it can be offered in connection with his testimony.

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CROSS-EXAMINATION.

BY MR. KILLIE:

Q. You stated, Mr. Polhemus, that there was a condition attached to your statement to Mr. Sutter that payment on this check for \$1,000 would be stopped, and you stated that condition was you would hold it for a matter of two or three days or so until he got the matter—

30

A. Hold the check or withhold the payment?

Q. Withhold the payment?

A. Yes, sir.

Q. Did he state to you any number of days he was going to get it fixed up in?

A. First when he saw me in Mount Holly he said it was a day or two, and in Camden, two or three days, that is about all.

Q. He didn't tell you it would be fixed up?

A. Yes, sir, he assured me that, no question about it, he said, "I just want you to withhold payment on that check for a couple of days."

Q. As a matter of fact, when Mr. Davis came into the Trust Company's office with Mr. Sutter and saw you, you stated to Mr. Sutter at that time, didn't you, that you were under the impression that the Trust Company could not refuse payment?

10 A. I told him it was bad policy for a company not to pay its checks if certified.

Q. And during that conversation Mr. Davis argued with you that it was not only right for you to do it, but you should do it in this particular case, didn't he?

A. I don't recall that conversation.

Q. You recall Mr. Davis being there with Mr. Sutter?

A. Yes, sir.

20 Q. And you recall he was representing Mr. Sutter in this particular matter?

A. He came in there with him.

Q. And following the conversation between Mr. Davis, and you, and Mr. Borton, you finally decided and told them you would stop payment on that check?

A. There is a distinction between stopping payment and deferring a payment.

Q. You had stopped payment on it?

30 A. We declined to pay it.

Q. That means a stoppage of payment?

A. Yes, sir, it does temporarily.

Q. It amounts to a stoppage of payment?

A. Yes, sir.

Q. And following that conversation and the arguments presented at that time you told Mr. Davis you would stop payment on that check?

THE COURT: I remember a livery stable man who hired me a balky horse, and the livery man said he didn't balk, he simply hesitated. Is that the difference between stopping payment and deferring payment?

THE WITNESS: What I was trying to impress upon the Court was that we never intended eventually to decline to pay that check, but at Mr. Sutter's solicitation we did decline to pay it when it was first presented. 10

Q. And you did decline to pay it?

A. Yes, sir.

Q. And you declined to pay it to Mrs. Sutter?

A. Yes, sir.

Q. And you declined to pay it when it was presented through bank?

A. Yes, sir.

Q. And declined to pay it after it was protested? 20

A. No.

Q. You didn't pay it?

A. The first time it was presented after protest we paid it.

Q. It wasn't paid for six or seven days after it was protested?

A. Surely. It wasn't paid until after it went to the bank at which it was deposited and was returned to the depositor and he presented it to us. 30

BY THE COURT:

Q. That is, the person to whom Mrs. Sutter transferred the check, Mack, I think the name was, deposited this in another bank?

A. Deposited it in the Union National Bank of Philadelphia, and they deposited it in the Federal Reserve Bank, of Philadelphia, and the Federal

Reserve Bank presented it to us with other checks that day for payment, and we refused to pay it, it went back to the Federal Reserve Bank, and then to the Union National, and they handed it to Mr. Mack.

Q. And he came after you personally and got the money?

A. Yes, sir.

10

EDWIN R. MACK, SWORN.

BY MR. RICHARDS:

Q. Mr. Mack, you are related by marriage to Mrs. Sutter?

A. Brother-in-law.

Q. That is, your wife is Mrs. Sutter's sister?

A. Yes, sir, that is right.

20

Q. Tell us how the check for \$1,000, the certified check in question came into your possession.

A. In my words?

Q. Yes.

A. Mrs. Sutter came to my office one Monday morning, I think it was, and told me she presented this check for payment at the bank in Camden and they told her to come back later with Mr. Sutter—

THE COURT: To do what?

30

THE WITNESS: To come back later with Mr. Sutter, and she said she didn't propose to have to do that with a certified check, and she asked my advice, and I told her that a certified check, in my opinion, was worth so much money, and it wasn't necessary, inasmuch as she—

Q. First let me ask you this; was or was not Mrs. Sutter indebted to you?

MR. KRAFT: I object, if the Court please, that certainly is leading.

MR. RICHARDS: Was or wasn't?

THE COURT: It is in the alternative, but it is suggestive just the same.

Q. What was the financial situation between you and Mrs. Sutter?

A. In December, 1919, Mrs. Sutter came to me and told me that her husband was about to leave her and she had pressing debts— 10

MR. KILLIE: I object to that, if the Court please.

A. Because of that I loaned her at that time \$500.00, and subsequent intervals thereafter frequent sums.

THE COURT: At the time that this check was endorsed to you was she indebted to you? 20

THE WITNESS: \$2,000.

THE COURT: Two?

THE WITNESS: Yes, sir.

Q. At the time this check was endorsed and turned over to you for what purpose was it, to apply on the indebtedness or for some other purpose?

MR. KRAFT: I object, if the Court please, that certainly is objectionable. 30

THE COURT: I don't think you had better suggest to this witness.

Q. Tell why the check was turned over to you?

A. To apply to her account, her indebtedness to me.

Q. These moneys you had previously loaned to Mrs. Sutter were advanced to her upon what promise

on her part?

A. To repay me as soon as she could make some kind of a settlement with her husband.

Q. Then when you received the check from her on account of the indebtedness, what did you do?

A. Deposited it in my bank, endorsed it and deposited it.

Q. It wasn't paid right away, was it?

A. No, sir, I was called up by the bank and they
10 told me the check had not been paid.

MR. KRAET: I object, that is hearsay. The proof is in about the check, all the reliable proof that is evidential.

THE COURT: I don't believe I gathered what the question was.

(Question repeated).

THE COURT: That is understood, isn't it? What
20 did you do with it after you got it, how soon did you dispose of it?

THE WITNESS: Probably the next afternoon or next morning in the ordinary course of business; I didn't immediately go down to the bank with it the next minute.

THE COURT: There is no dispute about the history of the check, it went to the other banks and came back to him.

30

Q. Did you have any negotiations, or talk, or conversations, or letters with the Security Trust Company?

A. I wrote them that I was a holder in due course and received the check in good faith.

Q. Before they paid it did they request of you a statement in writing to that effect?

A. They did.

Q. Is that the paper which I show you, being a letter dated April 6, 1922?

A. It is.

MR. RICHARDS: That is offered in evidence.
(Paper marked Ex. D-2.)

Q. Upon your giving them that assurance they did or did not pay the check?

A. They paid the check and protest fees.

10

CROSS-EXAMINATION.

BY MR. KILLIE:

Q. Mr. Mack, what time did Mrs. Sutter get to your office on Monday morning?

A. Probably eleven o'clock, half past ten, somewhere around there.

Q. What time was it you called the Trust Company, on the telephone immediately? 20

A. Oh, no, I didn't get in touch with the Trust Company for a week or ten days, until I knew the check wasn't paid.

Q. You didn't call the Trust Company immediately?

A. I don't think so.

Q. You didn't call them?

A. I have no recollection of doing so.

Q. She came to your office and she told you they wouldn't pay it? 30

A. That is true.

Q. And you didn't immediately call them on the 'phone?

A. No, sir.

Q. When did she turn the check over to you?

A. The same morning she called at my office.

Q. Right away as soon as she got there?

A. Yes, sir.

Q. And you deposited it within an hour or so?

A. Some time during the day; the bookkeeper deposited it, I don't know when.

Q. You say that Mrs. Sutter was indebted to you back in 1919?

A. Yes.

Q. How long a period did that indebtedness cover, that you extended loans to her?

A. Beginning 1919, December, up until that particular time.

Q. Up until 1922?

A. Yes, sir.

Q. Mrs. Sutter wasn't living apart from her husband during that time?

A. Part of the time, he had driven her away from home part of the time.

Q. They were separated and went back to live again?

A. Yes, sir.

Q. But she wasn't depending for support on you?

A. She had installments coming due on the household furniture they couldn't meet.

Q. You mean to say while Mrs. Sutter was living with her husband she was depending on your charity or loans?

A. Absolutely.

Q. Mr. Sutter didn't maintain and support her while she was living with him?

A. Evidently not.

Q. And you advanced loans for her support and maintenance?

A. Yes, sir.

Q. How did you advance that?

A. In the form of cash to herself or father.

Q. You never paid her by check?

A. I may have done so.

Q. Where are those checks?

- A. I will have to look them up.
- Q. Can you produce those checks?
- A. I gave money to her father for her.
- Q. How do you know it was for her?
- A. Because she asked me for it.
- Q. Yet you paid it to her father?
- A. Yes, sir.
- Q. What did the father have to do with her?
- A. He acted as a messenger, if I may say so.
- Q. You often saw her, didn't you? 10
- A. No.
- Q. Didn't she ever visit her sister who was your wife?
- A. Not often.
- Q. You went up there, didn't you?
- A. Once or twice a year only.
- Q. Didn't your wife go up there?
- A. No, only twice a year probably.
- Q. You knew Mr. Sutter's financial worth, didn't you? 20
- A. No, sir.
- Q. You knew he was a man who didn't have to depend on you for charity and support?
- A. I knew Mr. Sutter had some funds, but he evidently had no funds at that time.
- Q. And you know he has funds now?
- A. No, sir, I do not.
- Q. What evidence of Mrs. Sutter's indebtedness to you did you ever take?
- A. None. 30
- Q. Never took anything?
- A. No, sir.
- Q. In other words, you would advance her \$500,00 or \$1,000, pay it to her father to deliver to her and never take any form of indebtedness for it?
- A. That is right.
- Q. And you are her brother-in-law?
- A. Yes.

BY THE COURT:

Q. Did you give any receipt to Mrs. Sutter when you accepted this check?

A. This certified check?

Q. Yes.

A. No.

Q. Did you make any note of it as a credit on any of your books?

A. The only account is a notation in my check-
10 book; I have her initials or father's initials on my
check stubs, in case the checks are made out to her
father.

Q. When you deposited this check did you any-
where make a credit to her other than in your mem-
ory?

A. No.

Q. In listing the checks you deposited, did it
go in as a business check?

A. No, my own personal account.

20

BY MR. KILLIE:

Q. How much do you estimate she ever bor-
rowed from you or you ever advanced to her or her
father, as you say, for her?

A. Up to that time \$2,000.

Q. How much have you advanced her since
that time?

MR. RICHARDS: I object, it hasn't any bearing on
30 this check.

THE COURT: I think it has; I think the circum-
stances under which the check was received make it
very doubtful whether that was receiving a check in
due course within the meaning of that term, and
I think we ought to know as nearly as we can every-
thing that transpired in that transfer.

A. I can't tell you the exact amounts since that

time; I have contributed to her support by paying taxes, interest on mortgage, and I frequently gave her money for foodstuffs, and so forth.

Q. As a matter of fact, your wife's father, who was Mrs. Sutter's father was almost dependent upon what he got from your wife and Mr. Sutter, wasn't he?

A. No.

Q. He had no property in his name?

A. Yes.

10

Q. What?

A. A farm all clear in Bordentown, New Jersey, several dollars out in interest in Trenton; I would say he had a net worth at that time of \$25,000 or \$30,000.

Q. In what time?

A. We are talking about December, 1919.

Q. He was worth \$25,000?

A. You are talking about Mrs. Sutter's father?

Q. Yes, he was worth \$25,000 or \$30,000?

20

A. Yes, sir.

Q. How many children did he have?

A. Two.

Q. Your wife and Mrs. Sutter?

A. That is right.

Q. They were both married, of course?

A. Yes, naturally.

Q. How much have you advanced to Mrs. Sutter since this check was given?

A. I don't know, several thousand dollars.

30

Q. To her since March 30th, you say?

A. I practically gave it to them, no chance of getting it back.

Q. But you still keep on giving it to her?

A. Yes.

Q. She hasn't been living with her husband for how long?

A. March, 1922.

Q. And since that time you advanced several thousand dollars?

A. Yes.

Q. Have you taken anything in evidence of that?

A. No.

BY THE COURT:

10 Q. When you are making anything in the form of a loan do you not have some obligation of payment in writing so you can have something to show for it?

A. It would have been better, no doubt, but I didn't.

Q. Were you looking to collecting the money from her or the husband?

A. Through her having gotten it from her husband; she told me that her husband had a number of properties that could be cleaned up.

20

BY MR. KILLIE:

Q. As a matter of fact, Mr. Mack, you knew when she came into your office she had definitely separated from her husband?

A. Yes, sir, I did.

Q. And you knew from that time forth she would be dependent entirely upon alimony or some other charity which might come from some other source?

30

A. Yes, sir.

Q. And yet you took this \$1,000 from her?

A. Yes.

Q. But you continued to give her as you had given her in the past?

A. After an interval.

Q. When did you pay it?

A. Whenever the occasion required.

Q. If she came in and wanted \$25.00 you would give it to her?

A. Yes, sir, or if her father wanted it for her.

Q. Or if the father wanted money he would come in and get it?

A. Yes, sir.

Q. Did you ever inquire what the money was for?

A. Yes, sir, taxes, interest on mortgage, and other things.

10

Q. Anything else?

A. To buy clothes, something of that character.

Q. Did you ever see her when she needed clothes?

A. Yes, sir, now.

Q. Prior to March, 1922?

A. Oh, I can't answer a question like that.

Q. You said you knew?

A. You asked me if I ever saw her when she needed clothes.

20

Q. Don't you know she had a leopard skin fur coat she wore around, silk stockings, high French heel shoes?

A. Yes, sir, that is true.

Q. And yet she needed clothes?

A. Yes, sir.

Q. How much of the total money you ever gave her did you ever give to her by check?

A. At least \$500.00.

Q. At least \$500.00?

30

A. Yes.

Q. And those checks were payable to her?

A. I think the check was payable to her father, I am not sure.

Q. Were they endorsed by her?

A. I don't know that; as a matter of fact I think they were not, I don't think she had a bank account.

Q. Yet because you had made a check to Mrs.

Sutter's father and he had cashed that check you say Mrs. Sutter owes you money?

A. Yes.

Q. Did you ever pay this money over to her in the presence of any witnesses?

A. Her father a good many times, probably her mother, probably my wife.

Q. Isn't it true, Mr. Mack, that you never received one penny for that check you endorsed and
10 put through bank?

A. I eventually gave it back.

Q. As a matter of fact, you immediately turned it over to her credit?

A. Not immediately.

Q. Not immediately, but you did turn it over?

A. I eventually gave it back to her.

Q. You gave it back to her?

A. I gave it to her because she needed it.

Q. She needed it because it belonged to her?

20 A. Because she had legal charges brought by her husband, and she had counsel fees and expenses.

Q. She needed it because it belonged to her?

A. No more than to me.

Q. When did you give her this check for \$1,000, when did you return it to her?

A. I don't think I ever gave her \$1,000, to be correct.

Q. You mean to go on record as saying you did not turn that \$1,000 back to Mrs. Sutter after you
30 had deposited it to your credit in the bank and it had been collected?

A. To the best of my knowledge I never gave that to Mrs. Sutter, that particular \$1,000, I did give her father \$1,000.

Q. For Mrs. Sutter's benefit?

A. Yes, for her benefit.

BY THE COURT:

Q. How long was that after you got the check, a few days?

A. It might have been weeks, I don't know.

Q. Now, Mr. Mack, do you mean to say you were a holder in due course for that check?

A. I mean to say I was a holder in due course, and the money was due to me.

Q. For money that you had given to her before that time?

A. Because of loans.

10

Q. But you never had any account against her?

A. To be absolutely honest with you I never expected to get it back.

Q. But after you cashed that check for \$1,000 you did give Mrs. Sutter \$1,000 back, either her or her father?

A. That is true, if you wish to put it that way.

BY MR. RICHARDS:

Q. And you have let her have more than \$1,000 since that was paid?

A. Yes, sir.

BY THE COURT:

Q. But you gave \$1,000 back to her a couple of weeks after, to her father for her, at one time?

A. Yes.

Q. Wasn't that because of this \$1,000 you had received?

A. It might have been, yes. At that particular time her husband brought suit against her and she needed money, \$500.00 immediately, and that was probably the impelling reason for giving her the \$1,000 at that particular time rather than \$300.00, \$400.00 or \$200.00.

Q. You gave that to her father for her?

A. Yes, the father came down and got the money; he thought probably it wouldn't last long in

her hands, probably.

BY MR. RICHARDS:

Q. Before the \$1,000 was paid to you, the moneys you advanced to her prior to that time—I want to be sure I am right about this—were advanced upon her promise to pay you back upon her settlement with her husband?

10 A. She would eventually get some money from a settlement; I don't mean this particular settlement, that was several years before. Her husband had left the house at that time and she needed the money to pay for the installments on the household furniture, washing machine, and so forth.

Q. But the \$2,000 you had advanced her at the time you received this \$1,000 check had been advanced on her promise to pay you back upon a settlement with her husband?

A. Yes, sir.

20 BY MR. KILLIE:

Q. How did you know or she know there was going to be a settlement made with her husband?

A. I didn't know.

Q. She was living with her husband?

A. I think they had separated.

Q. That was in 1919?

A. Yes.

30 Q. But she went back with him after a few weeks' separation?

A. Yes, sir.

Q. And she continued to live with him up until March, 1922?

A. That is true, but he didn't support her all that time.

Q. During all that time she was traveling around in a big automobile, a sedan, wearing leopard skin coats, silk stockings, high French heel shoes,

silk stockings, and borrowing from you for her maintenance and support?

A. Yes, sir.

Q. And you believed anything like that?

A. Yes, sir; I had my serious doubts that the automobile or leopard coats were ever paid for.

Q. But she did have those things?

A. I don't know at that time; at one time she did.

Q. During the period from 1919 to 1922? 10

A. I am not admitting that, because I don't know; that particular period I probably saw her twice a year or once a year at her home.

Q. She had them in March, 1922, didn't she?

A. I don't know that.

Q. How was she dressed at the time she came in with the check?

A. I don't know, I rather think she had a black fur coat, I don't know.

20

JOSHUA E. BORTON, ESQ., SWORN.

BY MR. RICHARDS:

Q. What official position have you in the Security Trust Company?

A. I am the President of the Company.

Q. Were you present at a meeting between Mr. Polhemus, Mr. Sutter and Mr. Davis on March 27, 1922? 30

A. I presume I was, but I haven't any real, definite recollection of just what happened, except that I always said that it was our policy not to stop payment on a certified check.

MR. KRAFT: I object, if the Court please.

THE WITNESS: And that we wouldn't do it.

THE COURT. The objection is, if you don't remember what was said you shouldn't testify, because your policy won't control.

Q. If you happen to remember any of the conversation that took place that day I wish you would tell us.

A. I remember having several conversations about this particular matter.

10 Q. With whom, Mr. Borton?

A. Mr. Sutter, and I think someone with Mr. Sutter, and Mr. Davis, and at each time I explained to them that we would not stop payment on the check, and they went into a long detailed talk about the troubles Mr. Sutter had had with his wife, all of which I didn't know anything about and wasn't very much interested in, and they wanted to hold the payment of the check over, and my recollection is we deferred payment until this matter should be adjusted, and Mr. Sutter said it could be done within a
20 day or so and the matter would then be adjusted satisfactorily. Finally—I don't know the date—but finally we sent word—I don't know whether I did or Mr. Polhemus did—to Mr. Sutter that we were going to pay the check, and Mr. Sutter came in, I don't know whether Mr. Polhemus was present or not, and I said that we were going to pay the check, that time enough had elapsed and nothing had been done as he agreed to and we were going to pay it, and my
30 recollection is we did pay it.

NO CROSS-EXAMINATION.

DEFENDANT RESTS.

BOTH SIDES REST.

the trust company to Mr. Mack upon his signing a written statement to the effect that the check had been accepted by him for full value and without notice and that he was an innocent purchaser of it and that he would so testify if called upon to do so.

This suit was then brought by the drawer of the check against the trust company to recover from it the *amount for which the check was drawn*.

- 10 HERBERT S. KILLIE, Esq., with whom was associated WILLIAM J. KRAFT, Esq., for complainant.

THOMAS E. FRENCH, Esq., with whom was associated SAMUEL H. RICHARDS, Esq., for defendant.

LEAMLNG, V. C:

- 20 By our Uniform Negotiable Instruments Act a check is defined as a bill of exchange drawn on a bank, payable on demand, and it is there declared that, except as therein otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand shall apply to a check. 3 Comp. Stat. 3755, sec. 185. By section 187 of that act the certification of a check by a bank on which it is drawn is made equivalent to an acceptance, and by the following section it is provided that where the
- 30 holder of a check procures it to be certified the drawer and all endorsers are discharged from liability thereon. A holder "in due course" is defined by section 52 of the act and by section 57 his rights are declared to be free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and that he may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

From these provisions of our act, as well as by the accepted law prior to their enactment, it is clear that *had Mr. Mack been a holder of this certified check in "due course"* no defenses to his demand for its payment would have been available to the trust company or to the drawer, and any demand of the drawer upon the trust company for payment to be stopped could properly have been disregarded.

But the evidence in this case satisfies me that *Mr. Mack was not a holder in due course* and enjoyed no rights as against the trust company not enjoyed by the payee of the check. The truth touching the transaction between the payee and Mr. Mack is too obvious to be hidden by mere words. White cannot be made black, even by testimony. I fully believe the truth to be that *Mr. Mack did not take the check from the payee in good faith or for value or for his own use*, but that he in fact took the check merely to collect it for the payee, and did so not only well knowing that the trust company had refused to pay her, but also knowing why; and that when he got the money on the check by representing himself to be a holder in due course he paid it to her, or to her father for her, pursuant to his original plan. I refuse to do Mr. Mack the injustice to believe that during the period when he was generously contributing to the aid of his sister-in-law he seized upon her misfortune to collect for himself his former contributions to her needs, and that when their relations were wholly unchanged and at the very hour when her needs were necessarily the most pressing.

This view necessitates the inquiry whether the trust company was privileged to pay the check to the payee, as against the drawer of the check,—the plaintiff herein.

As already stated, the check was certified by the trust company at the request of the drawer and before its delivery to the payee. Plaintiff further

now claims that the check was procured from him by the payee by means of *fraudulent conduct on her part*. With these two elements concurring the case clearly falls squarely within the principles stated in *Times Square Auto Co. vs. Rutherford Nat. Bank*, 77 N. J. Law, 649. There the check was given to the automobile company for the purchase price of an automobile and was certified by the bank at the request of the Automobile Company. The bank subsequently refused payment at the request of the drawer of the check and suit was thereafter brought against the bank on its contract of certification. The bank sought to defend on the ground that the purchase of the car had been induced by false representations of the manager of plaintiff. That defense was allowed by the trial court. On appeal it was held that where the certification of the check is at the instance of the payee or holder of a check the certification is operative to discharge the drawer from further liability on the check and to substitute a new contract between the holder of the check and the bank, and no defense of the nature stated is available. *But it is there further set forth* that when the certification of the check is for the drawer *before delivery* of the check such certification "*does not operate to discharge the drawer, and so long as the drawer remains undischarged*, such a defense as that set up in the present case is open both to him and to the bank." While this latter statement may be said to have been unnecessary to the judgment of reversal there entered, it is yet a well considered and specific statement of the views of the members of our court of last resort, and cannot be properly disregarded here.

It is thus apparent that the payment of this check by the trust company denied to plaintiff the privilege of asserting his defense to its payment. Upon that theory, if any, the present suit must be

sustained.

It is urged by defendant that *State vs. Scarlett*, 91 N. J. Eq. 200, is inconsistent with the Rutherford Bank case already referred to. On the contrary the opinion of the court in *State vs. Scarlett* gives specific recognition to the statement in the earlier case that the discharge of liability of the drawer of a check to the holder may depend on whether the certification has been made by the bank *at the request of the drawer of the check before it is issued, or at the request of the holder after the check is issued.* 10
But it was held that where the inquiry is simply one of overdraft by the drawer of the check the certification by the bank at his request may be deemed the equivalent of payment. Nor is *First Nat. Bk. vs. Whitman*, 94 U. S. 343, cited by defendant, in point. The question there was merely one of privity between a bank and the payee of a check; it was held that a certification of the check created such a privity whether the certification was at the in- 20
stance of the drawer or the payee.

But notwithstanding the views already stated to the effect that defendant has rendered it impossible for plaintiff to assert any defense against the payment of the check, it is yet clear that any recovery herein against the trust company for so doing must be based upon *losses in fact sustained by plaintiff by reason thereof.* The suit is in form and effect for the *recovery of such damages.* It is essential to plaintiff's recovery that he *establish by adequate* 30
evidence his claim that the check was procured by the payee by fraudulent means or that it was held by the payee without right to enforce its collection from plaintiff. *In that plaintiff has failed.* Just what the check was given for does not *clearly* appear by the evidence. The utmost that appears is that the conduct of the payee after the check was delivered to her was reprehensible and injurious to plaintiff.

No counterclaim against her for damages could have been assessed or sustained on the evidence given, and fraudulent procurement of the check has not been established by the evidence. Indeed the engagements of the parties at the time the check was given or for which the check was given are not *fully* disclosed by the evidence. Whether the misconduct of the payee which has been referred to was touching or in any way connected with any matters for
10 which the check was given does not *specifically* appear. If fraud is relied on to vitiate the vitality of the check, that fraud must be shown to have been *fraudulent procurement of the check* as distinguished from a *breach of contract* after the check was given. It is accordingly impossible for this court to determine at this time upon the evidence before it that any damages were suffered by plaintiff by a denial of his right to defend against the check in the hands of the payee. It seems clear that in
20 a suit to recover damages from the trust company for paying the check the burden rests upon plaintiff not only to establish facts adequate to disclose that a successful defense in whole or in part could have been made by him to a suit on the check, but also *facts affording a basis upon which the amount of loss* so suffered, if any, could be ascertained.

This view renders it unnecessary to consider the claim of the trust company that plaintiff's request was for merely a deferment of payment for a few
30 days to enable him to adjust matters with the holder of the check, or the further claim that the written request to stop payment of the check expressly gave the trust company *an option not* to do so.

A decree will be advised denying relief to plaintiff.

Submitted: October 2, 1923.

Determined: October 5, 1923.

IN CHANCERY OF NEW JERSEY.

BETWEEN :

DANIEL SUTTER, JR.,
 COMPLAINANT,
 AND
 SECURITY TRUST COMPANY,
 DEFENDANT.

ACTION AT LAW.
 TRANSFERRED TO
 CHANCERY.
 FINAL DECREE.

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This action having been brought in the New Jersey Supreme Court by Daniel Sutter, Jr., plaintiff, against Security Trust Company, defendant, and transferred by the Supreme Court to this court because of equitable defenses asserted by the answer, and coming on to be heard in the presence of Herbert S. Killie and William J. Kraft, of counsel with the complainant, and Thomas E. French and Samuel H. Richards, of counsel with the defendants, and

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H. Richards, offered by the respective parties having been heard and the arguments of the respective counsel having been heard and considered and it appearing to the court that the complainant is not entitled to the relief sought and prayed for by him:

It is on this 26th day of October, 1923, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that a general judgment be entered against the complainant and in favor of the defendant; that the complainant

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so transferred to this court be and the same is hereby dismissed with costs to be paid by complainant to defendant.

Respectfully advised,
 (SIGNED) E. B. LEAMING.
 V. C.
 EDWIN ROBERT WALKER,
 C.

IN CHANCERY OF NEW JERSEY.

BETWEEN DANIEL SUTTER, JR., AND SECURITY TRUST COMPANY, DEFENDANT.	}	ON BILL, ETC. RELIEF. NOTICE OF APPEAL.
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The complainant, Daniel Sutter, Jr., appeals from the final decree made in this cause in this court, dated October twenty-sixth, nineteen hundred and twenty-three, and that part thereof which orders, adjudges and decrees that a general judgment be entered against the complainant and in favor of the defendant, and that the complaint so transferred to this court be and the same is dismissed with costs, to the Court of Errors and Appeals in the last resort in all causes.

HERBERT S. KILLIE,
Sol. of Complt. and Applt.

I conceive there is good cause for appeal in the above stated cause.

WILLIAM J. KRAFT,
Of counsel with Complt. and Applt.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

<p>DANIEL SUTTER, JR., COMPLAINANT AND APPELLANT,</p> <p>AND</p> <p>SECURITY TRUST COMPANY, DEFENDANT AND RESPONDENT.</p>	}	<p>ON APPEAL FROM CHANCERY.</p> <p>PETITION OF APPEAL.</p>	10
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To, the Honorable Court of Errors and Appeals
in the last resort in all causes:

The petition of Daniel Sutter, Jr., complainant,
and the appellant in the above stated cause, respect-
fully shows that your petitioner finds himself ag-
grieved by a final decree made in the Court of Chan-
cery by his Honor, Edwin Robert Walker, Chan-
cellor of the State of New Jersey, bearing date the 20
twenty-sixth day of October, nineteen hundred and
twenty-three, wherein the said Daniel Sutter, Jr.,
was complainant and the said Security Trust Com-
pany was defendant, in this respect; that said decree,
orders, adjudges, and decrees that a general judg-
ment be entered against the complainant and in
favor of the defendant, and that the complaint so
transferred to said court be dismissed with costs to
be paid by the complainant to the defendant.

Your petitioner therefore prays that the said 30
decree of the said Chancellor may be, in the particu-
lars aforesaid, reversed, set aside and for nothing
holden.

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

HERBERT S. KILLIE, Sol. of Applt.
WILLIAM J. KRAFT, Of counsel with Applt.

NEW JERSEY COURT OF ERRORS AND APPEALS

10	BETWEEN DANIEL SUTTER, JR., COMPLAINANT AND APPELLANT, AND SECURITY TRUST COMPANY, DEFENDANT AND RESPONDENT.	} ON APPEAL FROM CHANCERY. } ANSWER TO PETITION OF APPEAL.
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The answer of the above-named respondent to the petition of the above-named appellant.

20 This respondent, not acknowledging all or any of the matters which in the said petition are contained to be true, for answer thereto nevertheless says and admits, that a decree was on the twenty-sixth day of October, last, past, made and entered in the Court of Chancery as is therein stated, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and it prays that the same may be affirmed with costs to be adjudged to this respondent.

THOMAS E. FRENCH,
Solicitor for and of Counsel
with Respondent.

30 ENDORSED:

"Filed Jan. 12, 1924,
THOMAS F. MARTIN,
Clerk."

EXHIBIT C-1.
UNITED STATES OF AMERICA

Camden, N. J., March 25, 1922. No. 3
SECURITY TRUST COMPANY

Pay to the order of Grace A. Sutter \$1,000.00
One Thousand Dollars
Daniel Sutter, Jr.

(Duly Certified).

BE IT KNOWN, That on the day of the date hereof, I, Saml. O. Clemens, Notary Public for the State of New Jersey, by lawful authority duly commissioned and sworn, residing in the said State, at the request of the Federal Reserve Bank, of Philadelphia, Pa., exhibited the original check of which the above is a true copy, unto a clerk of the bank where same is made payable, and demanding payment received for answer: payment stopped. I therefore duly notify the drawer and endorsers of the non-payment thereof, to wit, by a notice of which the following is a true copy: Camden, N. J., March 30, 1922, Payment of Daniel Sutter, Jr., in favor of Grace A. Sutter, and by her endorsed for 1,000 dollars 00 cents being this day due, demand and unpaid it is delivered to me for protest by "FEDERAL RESERVE BANK OF PHILADELPHIA," and you will be looked to for payment, of which you hereby have notice.

SAML. O. CLEMENS, Notary Public.

Notice Served Respectively as Follows:

Daniel Sutter, Jr., Mount Holly, N. J.

Grace A. Sutter, } Endorsers.
Edwin R. Mack, }

Union National Bank, Phila., Pa.

WHEREUPON, I, the said Notary, at the request aforesaid, do hereby solemnly protest against the drawer and endorsers of the said check, and all others concerned, for all exchange, re-exchange, cost, damages and interest suffered and to be suffered for want of payment thereof.

Thus done and protested, at Camden aforesaid, the 30th day of March, 1922.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial seal, the day and year above written.

[Notary Seal]

[Signed]

SAML. O. CLEMENS,
Notary Public.

EXHIBIT C-2.

April 22nd., 1922.

Security Trust Company,
Market and Fourth Strs.,
Camden, N. J.
Gentlemen:—

I represent Mr. Daniel Sutter, Jr., in the matter of his account at your institution, involving a certified check upon which payment was stopped at Mr. Sutter's direction.

I have before me check of Mr. Sutter No. 8 on your Company, dated the 18th. inst., payable to Union National Bank of this town for \$416.16 and upon which you report insufficient funds.

Please forward to me, payable to Daniel Sutter, Jr., your check for \$1034.41 which, I am advised, is the amount due Mr. Sutter on his account, so that same may reach me not later than the 26th instant.

Very truly yours,

H. S. KILLIE,
Atty. D. Sutter, Jr.

EXHIBIT C-3.
SECURITY TRUST COMPANY
Camden, N. J.

JOSHUA E. BORTON, President.
HENRY D. MOORE, Vice President.
C. H. POLHEMUS, Secretary & Treasurer.

April 24, 1922.

Herbert S. Killie, Esquire,
Mount Holly, N. J.

Dear Sir:

We have your letter of the twenty-second instant, requesting us to forward to you a check payable to the order of Daniel Sutter, Jr., for \$1034.41.

The balance with us to the credit of Mr. Sutter, is \$34.41. Mr. Sutter is at liberty to withdraw this amount at any time.

Very truly yours,

C. H. POLHEMUS,
Treasurer.

EXHIBIT D-1.
REQUEST TO STOP PAYMENT OF CHECK

March 27, 1922.

Security Trust Company,
Camden, N. J.

Gentlemen:

You are hereby requested to stop payment on my certified check on you described below:

In consideration of your acceptance of this notice, compliance with which it is agreed shall be optional on your part only, I hereby agree for myself, heirs and legal representatives to indemnify and save you harmless of and from any loss or damage which you may at any time sustain by reason of your compliance with the above request, and from all claims, demands, costs, legal expenses, fees, charges and other expenses for and by reason hereof.

Daniel Sutter, Jr.

Witness, James Mercer Davis.

DESCRIPTION OF CHECK.

Date, March 25, 1922 No. 3
Amount One Thousand
Drawn to order of Grace A. Sutter.

\$1000.
Dollars

41 MAR 11 1901

NEW JERSEY COURT OF ERRORS AND APPEALS

BETWEEN

DANIEL SUTTER, JR.,
Complainant and Appellant,

AND

SECURITY TRUST COMPANY,
Defendant and Respondent.

}
APPEAL FROM
CHANCERY.

BRIEF FOR RESPONDENT

STATEMENT

The plaintiff, Daniel Sutter, Jr., drew a check for \$1000 upon the defendant, payable to Grace A. Sutter, and caused the defendant to certify the check. Plaintiff then delivered the check to the payee in some undisclosed settlement between them. Later plaintiff made an oral request of the defendant to defer payment for two or three days and signed a printed request, stating that compliance with it should be optional only on the part of the defendant.

The check was afterwards negotiated and passed by the payee to Edwin R. Mack, who claims to be a holder in due course and to whom the defendant paid the check.

Suit was then brought in the Supreme Court by plaintiff against defendant. One of the defenses set up was the equitable right of subrogation and the equitable jurisdiction to avoid circuitry of action. Then upon an application, not seriously opposed, the cause was transferred to the Court of Chancery, where the plaintiff proceeded with it according to the usual chancery practice.

Among the various defenses presented, Vice Chancellor Leaming contented himself with holding that there had been no proof of fraud, no proof of failure of consideration and no proof of damages. This conclusion, he held, made it unnecessary to consider the effect of the request to defer payment for a few days and the written statement giving the defendant an option as to whether or not it would pay the check. *Sutter vs. Security Trust Co.* (not officially reported) *122 Atl.*, 381.

A decree for the defendant was entered from which the plaintiff appeals.

BRIEF OF THE ARGUMENT

1. If any ground exists upon which the decree can rest, there should be an affirmance.
2. The plaintiff did not unqualifiedly or imperatively stop payment upon the check.
3. The plaintiff, by delivering the certified check to the payee, lost his right to stop payment and the bank became absolutely liable to make payment to Mrs. Sutter.
4. Mr. Mack was a holder in due course and the duty to pay him was absolute.

5. Even if Mr. Mack were not a holder in due course, the bank had reason to believe that he was, and paid the check in circumstances that make it inequitable for the plaintiff to question the right to make such payment.

6. The testimony shows that the plaintiff failed to show any damages and failed otherwise to establish a case against the bank.

ARGUMENT

I.

IF ANY GROUND EXISTS UPON WHICH THE DECREE CAN REST, THERE SHOULD BE AN AFFIRMANCE.

A decree in equity is presumed to be right. *Manhattan L. Ins. Co. vs. Wright*, 61 C. C. A., 138; 126 Fed., 88. *Big Six Development Co. vs. Mitchell*, 1 L. R. A. (N. S.) 332; 70 C. C. A., 569; 138 Fed., 280.

It sometimes happens that the Court below will give a wrong reason for a right ruling, but the appellate Court will never reverse, if it can discover any sound reason for the ruling.

Accordingly this Court at times declares that the decree should be affirmed, but not for the reason given below. *Canda vs. Canda*, 92 N. J. Eq., 423; *Allen vs. Francisco Sugar Co.*, 92 N. J. Eq., 431. At other times the Court expresses its dissent from some of the conclusions reached by the Vice Chancellor and affirms upon others. *Oleson vs. Somogyi*, 93 N. J. Eq., 506; *Rice vs.*

Mitsch, 92 N. J. Eq., 692; *Mackie vs. Cain*, 92 N. J. Eq., 631; *Turner vs. Ridge*, 92 N. J. Eq., 706; *Prindeville vs. Johnson*, 93 N. J. Eq., 425.

II.

THE PLAINTIFF DID NOT UNQUALIFIEDLY OR IMPERATIVELY STOP PAYMENT UPON THE CHECK.

Orally he stated that it would be only a matter of a day or two until he could adjust some matters with Mrs. Sutter and then he expected the bank to pay the check. (Page 26, lines 31 to 34; page 30, lines 1 to 4, and page 46, lines 18 to 22). Neither Mr. Davis nor Mr. Sutter would deny that this was the statement.

The printed notice that he signed and gave the bank was offered in evidence, admitted and marked Exhibit D-1. (Pages 14 and 27). The appellant has printed it in small type on the last page of the State of the Case. The Court will there see that it contains these words: "compliance with which it is agreed shall be optional on your part only."

Plaintiff's oral request to defer payment for a day or two was complied with and his written request left it entirely optional with the bank as to whether or not it would comply.

The bank therefore violated no obligation when it finally determined that the check should be paid and paid it.

III.

THE PLAINTIFF, BY DELIVERING THE CERTIFIED CHECK TO THE PAYEE, LOST HIS RIGHT TO STOP PAYMENT AND THE BANK BECAME ABSOLUTELY LIABLE TO MAKE PAYMENT TO MRS. SUTTER.

Much confusion upon this point has arisen because of *obiter dicta* in the opinion of this Court in *Times Square Automobile Company vs. Rutherford National Bank*, 77 N. J. L., 649. There the payee had the check certified and the Court held the bank could thereafter have no defense against him. Anything that the Court said about what would have been the situation if the drawer had had the check certified was purely *obiter*.

The case of *Watson vs. Merchants and Manufacturers Bank* and the case of *N. J. Textile Co. vs. U. S. Trust Company*, cited as addenda on the last page of appellant's brief, each recognize the right of the drawer to prove that the check was procured by fraud—something which is not here alleged in the pleadings and of which there is here no proof. Each of the Supreme Court cases so cited, as well as the opinion of Vice Chancellor Leaming in the present case, however, are based upon the theory that as subordinate tribunals, they are bound by the dicta of this Court in the Rutherford Bank case. This Court alone can clarify the situation.

In *State vs. Scarlett*, 91 N. J. L., 200, the Court in these words stated the principle of law that should govern here:

“The question here is not as to the effect of the check as payment between others, but whether the check has itself been paid by the bank. We think it is settled in other jurisdictions for reasons that command our assent that after a drawer of a certified check has parted with it, the situation as to him is ‘precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.’ The language is quoted from the opinion of Judge Peckham in *First National Bank of Jersey City vs. Leach*, 52 N. Y., 350, and is justified by the authorities he cites. The opinion itself was concerned with the same question that we dealt with in the case already cited, and was there referred to by us as authority.”

The Supreme Court of the United States in Washington, *First Nat. Bank vs. Whitman*, 94 U. S., 343, 345, declares the law thus:

“Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee.”

Our Uniform Negotiable Instruments Act also deals with this situation. It declares that where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. 3 *Comp. Stat.*, 3756, Sec. 187. Further that the acceptor by accepting the instru-

ment engages that he will pay it according to the tenor of his acceptance and admits:

I. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

II. The existence of the payee and his capacity to indorse. *3 Comp. Stat., 3742, Sec. 62.*

Here the bank having certified the check, it required only the delivery of the check to the payee to make the bank absolutely liable to the payee or to her indorsee. The drawer, having delivered the check to the payee, lost the right to stop payment and any attempt by him thereafter to stop payment must be disregarded by the bank.

IV.

MR. MACK WAS A HOLDER IN DUE COURSE
AND THE DUTY TO PAY HIM WAS ABSOLUTE.

The testimony of Mr. Mack stands undisputed that, prior to the time this check was indorsed and delivered to him, he had loaned to Mrs. Sutter, the payee, sums of money at different times, and she was then indebted to him to the extent of \$2000. (Page 33). Whether or not he had seen fit to demand security of her or to obtain written evidences of the indebtedness seems to us to be immaterial. Nor should his kind heartedness and willingness later to either loan or give her further moneys aggregating more than the amount of the check be urged against his position as a holder in due course. If he once

became a holder in due course nothing that he might subsequently do could make him less than that.

We submit that he became a holder in due course not subject to equities, if any, existing between the original parties. *Fidelity Trust Co. vs. Baker*, 60 N. J. Eq., 170, 173, 174.

Mack could have brought suit not only for \$1000 but also for damages.

The bank of necessity paid the check to Mack and that payment is a complete defense here.

V.

EVEN IF MR. MACK WERE NOT A HOLDER IN DUE COURSE, THE BANK HAD REASON TO BELIEVE THAT HE WAS, AND PAID THE CHECK IN CIRCUMSTANCES THAT MAKE IT INEQUITABLE FOR THE PLAINTIFF TO QUESTION THE RIGHT TO MAKE SUCH PAYMENT.

The bank made every effort to satisfy itself whether or not Mack was a holder in due course. It required Mack to give it assurances in writing of the circumstances attending his taking the check and showing that he was a holder in due course. He gave such assurances in the form of a letter which was offered in evidence, admitted and marked Exhibit D-2. (Pages 28, 29, 34 and 35).

This letter is not printed with the State of the Case. The Court should therefore raise every presumption favorable to the bank in connection with this letter. If it is possible to place in such a letter statements which,

if believed by the bank to be true, would justify the bank in paying the check, the judgment should be affirmed.

We might also invoke the rule that where one of two innocent parties must suffer it shall be he who has reposed the confidence. The plaintiff, by reposing the confidence that he did in his wife, and delivering to her the certified check, placed her in a position to create the condition which now confronts us. The bank is entirely innocent in the matter. Even if the plaintiff is also innocent, he should suffer, as he reposed the confidence.

In this connection, there are also some equitable principles which should not be overlooked. First, there is the principle of subrogation which is peculiarly equitable. It would not be recognized in a Court of law. *37 Cyc.*, 363.

The rights of each successive holder of the check may be greater but cannot be less than the rights of any preceding holder. Consequently if any one in the chain of title was a holder in due course that is a perfect defense for the bank. If either Mrs. Sutter or Mr. Mack was a holder in due course and had a perfect cause of action against the plaintiff, the bank upon payment of the check became entitled to stand in her or his shoes and be subrogated to her or his rights against the plaintiff.

Then, too, there is the recognized principle that equity will take jurisdiction upon the ground that it avoids circuitry of action. If the plaintiff were permitted to recover against the defendant, the defendant could either by itself or through Mack work out its rights against the plaintiff. The avoidance of such circuitry of action is a familiar ground of equity jurisdiction. *Crowell vs. Hospital*, 27 N. J. Eq., 650; *Society vs. DeLazier*, 85 N. J. Eq., 497.

Finally, by refusing to pay the check the bank would, no doubt, have subjected itself to an action by Mack for damages. It could not know what the measure or extent of such damages would be. Acting in good faith under the reasonable belief that payment was necessary to protect itself against such an unlimited liability, it paid the check. In such a situation even though perchance it turns out that the bank was not legally bound to pay, it still is entitled to subrogation. *5 Pomeroy's Equity Jurisprudence, page 5190, Sec. 2346.*

VI.

THE TESTIMONY SHOWS THAT THE PLAINTIFF FAILED TO SHOW ANY DAMAGES AND FAILED OTHERWISE TO ESTABLISH A CASE AGAINST THE BANK.

This is the ground upon which the Vice Chancellor saw fit to rest his decision.

It is vaguely stated (Pages 15 and 16 and page 23, lines 30 to 33) that there was some sort of agreement between Mr. and Mrs. Sutter under which the check was given. The agreement was not offered in evidence and there was no way in which the Court could tell whether there had been a total, a partial or indeed any failure of consideration. It is admitted that in connection therewith Mrs. Sutter surrendered possession of Mr. Sutter's house in Mount Holly (Page 23, lines 12 and 13). That surely would be some consideration.

There was no proof of any fraud and no proof of any damages.

It would seem, therefore, that upon this ground the Vice Chancellor could not have reached a conclusion other than the one he did reach.

CONCLUSION

Whether we rest the case upon the ground upon which the Vice Chancellor rested it or upon the grounds upon which he might have rested it, the result is the same, the decree should be affirmed.

All of which is respectfully submitted.

FRENCH & RICHARDS,
For Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

MARCH TERM, 1924.

Between
DANIEL SUTTER, JR.,
Complainant and Appellant,
and
SECURITY TRUST COMPANY,
Defendant and Respondent. } On Appeal
from Chancery

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Brief of
WILLIAM J. KRAFT,
Of Counsel with Appellant.

20

Sat Below:
WALKER, C.; LEAMING, V. C.

STATEMENT

30

On Saturday, March 25, 1922, Daniel Sutter, Jr., the complainant, drew a check for \$1,000, payable to his wife, Grace A. Sutter, upon his funds on deposit with the Security Trust Company, the defendant, and the same day Daniel Sutter, Jr., had said check certified by the defendant. On the afternoon

of the same day, after banking hours, he gave said check to his wife, Grace A. Sutter, in consideration of certain promises and agreements entered into by and between them, Daniel Sutter, Jr., and his wife, Grace A. Sutter, concerning certain furniture to be left at the residence of plaintiff upon his wife's separation from him. In the night time of said day, his wife removed the said furniture without the knowledge or consent of the plaintiff.

10 Mr. Polhemus, the Secretary and Treasurer of the defendant, resided at Mount Holly, N. J., as did the plaintiff, and on the morning of March 27, 1922, the plaintiff saw Mr. Polhemus at or near the railroad station at Mount Holly, and notified him that he did not desire the defendant to pay said check, and practically stopped payment thereon; and subsequently the plaintiff, that same morning, in company with James Mercer Davis, Esq., went to the defendant's banking house in Camden and notified

20 Mr. Polhemus and Mr. Borton, the President, that payment on the check was to be stopped. Mrs. Grace A. Sutter that same morning presented the check to Mr. Polhemus for payment. The check was taken to certain officers of the defendant bank and, after consultation by them, payment was refused and check returned to Mrs. Sutter, who then took the check to Philadelphia and endorsed the check over to Mr. Edwin R. Mack, her brother-in-law, who deposited the check to his account, and the check again

30 reached the defendant bank on March 30, for payment. Payment thereof was again refused, and the check being in their possession (page 28) was protested, and there was then written in lead pencil across the check "payment stopped" and the notice of protest had the same words written as the cause for non-payment.

On April 6, 1922, the check was paid by the de-

fendant to Mr. Mack. The complainant then brought suit in the Supreme Court against the defendant to recover said sum of \$1,000, so wrongfully paid by it, and Mr. Justice Kalisch, upon the application of the defendant, upon the ground that there was some equitable question involved, transferred the cause to the Court of Chancery, in which court the cause was heard by Vice Chancellor Leaming, who advised a decree denying relief to the complainant upon the ground that it was impossible to determine what damages had been suffered by the complainant; in other words, upon the ground that the complainant had failed to prove damages (printed book p. 47; Atl. Rep. 382), and it is from this finding that this appeal is taken. 10

ARGUMENT

Facts concerning the making, certification and delivery of check and its consideration. 20

Mr. Sutter testified (p. 15) that in March, 1922, certain arrangements were made between him and his wife, Grace A. Sutter, regarding a separation and that as part of the agreement he gave her the check in question; that (p. 23, 24) she moved out of their home at night, and did not leave the things in the home which she had promised to leave there, and that it was for this fraud and this reason that he stopped payment on the check (p. 16 &c.); that he gave the check to his wife on Saturday, March 25, 1922; that on Monday morning, March 27, 1922 (p. 17) he saw Mr. Polhemus, the Secretary and Treasurer of the defendant bank, at Mount Holly as he was about to take the train for the bank, and told him that he wanted payment on the check stopped, and that he (the plaintiff) not being satisfied with that, immediately saw James Mercer Davis, Esq., 30

and had him accompany him to the defendant's bank in Camden, and that he and Mr. Davis saw Mr. Polhemus and Mr. Borton, the President of the Bank, at the bank on the morning of March 27, 1922, about 8.40 A. M., to stop payment on the check and that the officials did not want to stop payment, but finally agreed to do so; and while in the bank Mr. Polhemus informed them that Mrs. Sutter had presented the check for payment about 9.10 A. M., but that
10 he had informed her that payment on the check had been stopped; that the check was subsequently protested for non-payment (see exhibit p. 19) and later plaintiff learned that the bank had paid the check.

JAMES MERCER DAVIS testified (p. 11) that he accompanied Mr. Sutter to the bank on the morning of March 27, 1922, and that Mr. Sutter signed a paper to stop payment on the check and that (p. 13) he subsequently had a conversation with Mr. Borton about the check and that Mr. Sutter told the officials
20 that he was going to try to adjust the difficulties with his wife.

CLARENCE H. POLHEMUS, the Secretary and Treasurer of the defendant bank, testified (p. 25) that on the morning of March 25, 1922, as he approached the railroad station at Mount Holly, N. J., to take the train for Camden, he was accosted by Mr. Sutter who spoke to him about the certified check, and who told him that there were some differences between him and his wife, and that he wanted payment on
30 the check stopped; that morning after he arrived at the bank Mr. Sutter and Mr. Davis called at the bank to see him about the check, and that before their arrival Mrs. Sutter (p. 26) had presented the check for payment, and that he had told her that payment thereon had been stopped by Mr. Sutter (when the check was presented on this occasion, the bank had the check in their possession and return-

ed it to Mrs. Sutter); that on this visit Mr. Sutter and Mr. Davis reiterated to him and Mr. Borton that he, Mr. Sutter, could adjust the differences with his wife in a day or so, and that Mr. Sutter signed exhibit "D-1"; that neither Mr. Borton nor witness definitely agreed to refuse payment on the check; that on March 30, 1922, the check was again presented for payment (this time by Mr. Mack), was in the bank's possession (p. 28) and payment was again refused, and the check later protested; that on April 3, 1922, 10 the bank wrote and telegraphed Mr. Sutter to come to the bank, that the bank expected to pay the check; that (p. 28) Mr. Sutter came to the bank, and the officials told him that unless he indemnified the bank the check would be paid; that he declined to do this and the bank paid the check.

JOSHUA E. BORTON, the President of the bank, testified (p. 46) that Mr. Sutter told him that he would adjust the differences with his wife and thought it could be done in a day or so, and that Mr. 20 Sutter merely wanted payment held up.

LAW

The check in question does not appear to have been offered in evidence, but was testified to by all the parties and hence is considered in evidence.

"When documents that are admissible are produced and referred to by the witnesses, they become evidence with formal offer." 30

Convery vs Conger, 53 N.J.L. 658.

The testimony clearly shows that Mr. Sutter had stopped payment on the check, that the bank acquiesced in it, and refused payment thereon on two occasions, and then paid it at its own peril; that the bank knew at the time payment was stopped by Mr. Sutter that there were some differences

between him and his wife as to the consideration of the check, and from Mr. Sutter's testimony it clearly appears that the consideration had failed and that his wife had practiced a fraud upon him. Under these circumstances the bank had no right to pay the check, and having done so, must answer to Mr. Sutter for such unauthorized payment.

10 Again the fact that the bank was content to pay the check to Mr. Mack upon his written statement that he was a holder in due course and received the check in good faith, cannot avail the bank as a defense because this was not true, and it has its action against him for obtaining this money under misrepresentations. If the bank paid this check to one who was not a bona fide holder, for value, in good faith, and who had notice of the infirmity in the check after receiving notice not to pay it, the loss is that of the bank and not the depositor.

20

I.

In Times Square Automobile Co., vs Rutherford Nat'l. Bank 77 N.J.L. 649, one Purdy employed one Ashton to assist him in purchasing a second-hand automobile. Ashton took him to the salesroom of the Times Square Automobile Co., and after looking over the stock, Purdy, with Ashton's approval, selected a car, the price of which was \$600, and gave his check on the Rutherford Nat'l. Bank for the purchase price.
30 The check was drawn to the order of Ashton who endorsed it and delivered it to the manager of the automobile company. Immediately after receiving the check the automobile company sent it by special messenger to the banking house of the Rutherford Nat'l. Bank, with a request that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused

to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It was 10
contended on behalf of the plaintiff that this defence was not open to the defendant. It was, however, admitted over its objection. At the close of the case plaintiff asked for a direction of a verdict in its favor. This request was refused, the case was sent to the jury and a verdict in favor of the defendant was rendered. The Court among other things said:

“The effect of a certification of a check by the
“bank upon which it is drawn depends upon 20
“whether it is done at the request of the drawer
“or of the holder. *When a check is presented*
“*by the drawer for certification, the bank knows*
“that it has not yet been negotiated, and the
“drawer wishes the obligation of the bank to
“pay it to the holder, when it is negotiated, in
“addition to his own obligation. A certification
“under such circumstances does not operate to
“discharge the drawer——, *and so long as the*
“*drawer remains undischarged such a defence* 30
“*as that set up in the present case is open both*
“*to him and the bank.*

“ But when the certification by the bank is done
“at the request of the holder, the effect is radi-
“cally different——. The result is to discharge
“the drawer from any further liability——.
“and to substitute a new contract between the

“holder and the bank by the terms of which the
“money called for by the check is transferred
“from the account of the drawer to the account
“of the holder. ———. The defence interposed
“should have been overruled, and a verdict di-
“rected for the plaintiff. The judgment under
“review will be reversed.”

See also *Jones vs Nat'l. Bank*, 95 N. J. L. 376.

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Many of the cases cited in 5 Enc. of Law 1079; Vol. 7 of Corpus Juris, Banks and Banking sec. 429, and Vol. 5 of Ruling Case law p. 528, holding that a drawer of a check who has it certified cannot stop payment thereon after he has delivered it to the payee, do not sustain that proposition.

20 In *Poess vs Twelfth Ward* 86 N. Y. Sup. 857, Poess on April 29, 1903, drew a check for \$500 payable to himself and had the bank certify it. He did not use the check and on July 29, 1903, he endorsed it and put it in his bank book and went to the bank to deposit it, and when he arrived at the bank found that he had lost the check, and at once notified the bank to stop payment thereon. The check was later deposited by an *innocent holder without notice*, and it was practically upon this question that the case was decided.

30 In *Nolan vs Bank of New York* 67 Barb. 24, M. Morgan & Son on Jan. 21, 1865, drew the check to their own order, had the bank certify it, and the check was endorsed by them and on Feb. 4, 1865, the check was in the possession of Meyer & Greve, from whom it was stolen. Nothing was heard from it until May or June, 1868, when plaintiff presented it for payment, which was refused. Suit was brought thereon and the trial court directed a verdict for the defendant. On appeal held that the plaintiff had a

right to have the jury pass on the question as to whether or not the plaintiff was a *bona fide holder for value, without notice*.

In *Larsen vs Breene*, 21 Pac. Rep. 498, the drawer, Larsen, had the check certified and delivered it to the payee, Breene, in settlement of a claim. There being some dispute about the claim, Breene held the check until the trial of his claim against Larsen, when he delivered the check to the judge who was trying the case. In the meanwhile the bank failed, 10 and it was held that the drawer, Larsen, was not relieved of his liability because he had the check certified and not the holder.

In *Born vs First National Bank*, 24 N.E. Rep. 173, the drawer had the check certified; the bank failed and the question raised was whether the drawer was relieved of liability, and the court held that he was not.

In *Blake vs Dime Saving Bank* 87 N.E. Rep. 74, C. G. Blake & Co. drew the check to the order of C. 20 G. Blake, who endorsed it over to one Werbel for the purchase of a horse. Werbel deposited the check and the bank refused payment on the grounds of fraud in the purchase of the horse. The bank filed an inter-pleader and the Court held that Blake by having the check certified had discharged C. G. Blake & Co. from liability.

Kahn vs Walton, 20 N.E. Rep. 203, it was held that there was no certification.

In *Nassau Bank vs Broadway Bank* 54 Barb. 236, 30 it does not appear whether the check was certified by the drawer or holder.

In *Freud vs Importers Bank* 76 N.Y. 353, the check was certified by the person to whom the check had been delivered, without endorsement, by the payee.

In *Davenport vs Palmer* 137 N.Y. Sup. 796, it

was held that the certification by the drawer does not release him, but that the bank by so doing also becomes bound with the drawer.

It is therefore respectfully submitted that the learned Vice Chancellor's conclusions upon this feature of the case are correct and should be sustained.

10 The signing by Mr. Sutter of exhibit "D-1" cast no obligation upon him and can avail the defendant nothing, because the money of Mr. Sutter on deposit with the defendant was his money, and he could pay it where and when and to whom he chose, and it did not lie within the power of the defendant to compel him to indemnify it against the non-payment of this check. The holder's recourse was against Mr. Sutter.

20 Notice of the Court is directed to the fact that this indemnity was conditioned only upon loss or damage to the Trust Company by reason of compliance in stopping payment, and does not apply to loss or damage resulting from payment.

II.

Was Mr. Mack a bona fide holder for value in due course, without notice of any infirmity in the check?

30 The only defense interposed by the defendant was its claim that it had the right to pay Mr. Mack, as a bona fide holder, &c.

The reading of the testimony of Mr. Mack (pp. 32, 45) clearly shows that he knew from Mrs. Sutter of the trouble between the complainant and her concerning the check, and that he merely acted for her in *collecting* the money on the check, and that he was in no sense a bona fide holder for value in due course

without notice of the failure of consideration for the check.

The learned Vice Chancellor's finding of fact, on this point, that he was not a bona fide holder, &c., is overwhelmingly sustained by the facts and should be affirmed.

III.

DAMAGES.

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There was no proof submitted by the defendant or claim made by it that the complainant was not damaged by the payment of the amount of the check.

The complainant proved that he gave the check to his wife, as part of their separation agreement; that in violation of her agreement (pp. 23,24) she moved from his home in the *night time* certain "things" that she had promised to leave there (meaning no doubt household furniture); the removal of these "things" was a loss to him because the check was given to his wife in consideration of her leaving them in the home, and the payment of the check caused him a loss or damage of \$1,000, besides the loss and damage of the value of the "things" that the wife secretly and fraudulently removed from the home. 20

Was such damage merely nominal?

Nominal damages may be recovered where a legal wrong is shown, although it is shown that there were no actual damages. 30

Marquardt vs Hudson Co. Gas Co. (Sup.) 59 A 1054. (Not reported).

Where both the wrong and the damages resulting therefrom are established, plaintiff is entitled to recover substantial damages, and an award of nominal damages only is erroneous.

17 Corpus Juris 725, Section 62-E,
Duggan vs Baltimore, &c., R. Co. 159 Pa. 248,
Baker vs Drake 53 N.Y. 211.

Where defendant, after signing an acknowledgment that script had been lodged in his hands by plaintiff, and was to be delivered to him on request, wrongfully detained the script for a considerable time so that its market value had been much diminished, and did not redeliver it until after action brought, it was held that plaintiff was entitled to more than nominal damages.

17 Corpus Juris, 726 note 82 (c).

In an action of damages for loss or destruction of a bond, it is only necessary to prove the value of the bond on the day of loss to establish the damages.

Zimmermann vs Timmermann, 193 N. Y. 486;
86 N.E. 540.

“As to damages it seem to me that the payment of \$250 of plaintiff’s money without authority to a third person is concrete damages sufficient to sustain a verdict.”

Schoen vs Security Bank 142 N.Y. Sup. 310.

It is respectfully submitted that the learned Vice Chancellor erred in holding that the complainant sustained no damages under the facts and law in this cause, and that the decree should be reversed, and a decree entered in favor of Daniel Sutter, Jr., against the Security Trust Company for the sum of \$1,000, with interest from April 3, 1922 (the date on which the check was paid).

Respectfully submitted,

WILLIAM J. KRAFT,
Of Counsel with Appellant.

ADDENDA.

In the recent case of the New Jersey Textile Machinery Company, a corporation, plaintiff-appellee, vs United States Trust Company, a corporation, defendant-appellant, decided December 21, 1923, not officially reported as yet, but reported in New Jersey Advance Reports and Weekly Law Review, Volume 11 No. 1, (New Jersey Miscellaneous Reports), page one. Justices Kalisch and Katzenbach for the New Jersey Supreme Court cite as per curiam: "The agreed state of facts show that the plaintiff below was a depositor of the defendant bank. It made out a check payable to Gordon Yarn Company, of the city of New York, for the sum of \$450, and after having had the check certified by the defendant bank delivered it to the Gordon Yarn Company, who endorsed it and deposited it, and it was sent through exchanges to the defendant bank for payment, and was there paid. Prior to the payment of the check by the bank, it had been duly notified by the plaintiff, the maker of the check, not to pay the check; but the bank refused to heed the notice.

"We think the facts of this case fall within the control of Times Square Auto Co. vs Rutherford National Bank, 77 N.J.L. 649, where it was held that when a check of a depositor is certified at the request of the maker he is not discharged thereby and may stop payment and the bank must give heed to such notice, for in such a circumstance both the drawer of the check and the bank are entitled to set up that the check was procured by fraud. To the same effect is Watson vs Merchants' and Manufacturers' Bank, 1 N. J. Adv. Rep. (No. 5) 104."

Respectfully submitted,

WILLIAM J. KRAFT,

Of Counsel with Plaintiff—Appellant.

