(10) 1080

INDEX

	PAGE
Bill of Complaint	1
Verifying Affidavit	16
Order to Show Cause	21
Notice of Motion to Vacate Restraint	23
Order Modifying Restraint and Order of Adjournment	24
Notice to Amend Bill of Complaint	26
Affidavit—Michael Pecora	29
Affidavit—Oswald Elmer	35
Affidavit—John Warren	36
Affidavit—Joseph B. Payton	48
Affidavit—Michael J. Sexton	58
Replying Affidavit—Nicholas W. D'Elia	64
Supplemental Affidavit—Nicholas W. D'Elia	67
Supplemental Affidavit—Michael J. Sexton	70
Affidavit—James Billington	73
Affidavit—Ray A. Weissenborn	76
Affidavit—Benjamin Heilbrunn	78
Affidavit—William Sullivan	80
Affidavit—Andrew Muro	82
Affidavit—Robert V. Kinkead	84
Affidavit—Thomas F. Shiels	86
Affidavit—John Warren	89
Affidavit—Michael Pecora	112
Affidavit—Harold W. Taylor	121
Affidavit—R. P. Schenck	123
Affidavit—Thomas J. Stanton	127
Affidavit—James P. Meehan	134
Affidavit—Joseph B. Payton	137
Affidavit—William Neumann	139
Affidavit—Harry J. Max	141
Affidavit—Thomas F. Shiels	142
Supplemental Affidavit—Michael J. Sexton	145
Affidavit—Nicholas W. D'Elia	151
Affidavit—Joseph B. Payton	153

New Jersey State Library

PAGE
Opinion 157
Second Amendment to Bill of Complaint.... 169
Notice of Motion for Re-Argument..... 174
Opinion on Re-Argument..... 178
Order Dismissing Bill of Complaint As Against Guardian Securities Company.. 182
Notice of Motion to Modify Restraint As to Guardian Trust Co..... 183
Affidavit—Clarence G. Appleton..... 185
Affidavit—John Warren..... 190
Opinion 195
Order 199
Answer of John Warren to Bill of Complaint As Amended..... 202
Answer of Guardian Trust Company..... 212
Answer of Defendant, Journal Square National Bank of Jersey City..... 217
Notice of Appeal..... 222
Petition of Appeal..... 224
Notice of Appeal on Behalf of Defendant, Guardian Trust Company..... 227
Petition of Appeal..... 229
Answer of Guardian Trust Company to Petition of Appeal of John Warren..... 232
Substitution 234

Exhibits

Exhibit "A"..... 6
Exhibit—John Warren..... 191

In Chancery of New Jersey

Bill of Complaint

Filed January 11, 1928

TO THE HONORABLE
EDWIN ROBERT WALKER,
CHANCELLOR OF THE STATE OF NEW JERSEY.

The complainants, NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, both residing in Jersey City, County of Hudson and State of New Jersey, respectfully show that,

1. On or about the 9th day of September, 1925, the complainants, together with Joseph B. Payton, James Billington and John Warren, did enter into a certain agreement, a copy of which is hereto annexed, marked Schedule "A" and made a part hereof, wherein and whereby each of the parties thereto did agree with the other, that none of the individuals mentioned in said agreement will at any time sell, give or bequeath, certain shares of the capital stock of the Journal Square National Bank, or any part thereof, or any interest therein, without offering the same for sale to the other parties to the agreement in the form and manner as in said agreement set forth, and until after the refusal of the other parties thereto, to purchase within the time limited in accordance with the terms of said agreement.

2. Said agreement further provided that any party to the agreement, desiring to sell any or all of the stock which now or in the future may be affected by the agreement, should offer the same for sale in writing to the other parties to the agreement, which offer is to be made by regis-

tered mail, and addressed to the other parties at the addresses written after their signatures in the agreement, and said agreement further sets forth in substance, that the other parties to the agreement, to whom the offer is made, in case they desire to purchase the stock so offered for sale, shall within thirty days, notify the person offering to sell the stock of their desire to purchase the same or the part thereof to which they are entitled to purchase under the terms of the agreement, and the parties desiring to purchase the stock affected by the agreement shall have the right to purchase such proportion of such stock, as is offered for sale, as the number of shares of stock in their hands bears to the number of shares then affected by this agreement, and further in the event of such offer being made and accepted, the price to be paid to the person offering his stock for sale, shall be Two Hundred ($200.00) Dollars per share, or book value according to the last published statement of the Bank as of the next preceding July 1st or January 1st.

3. The name of the BERGEN NATIONAL BANK OF JERSEY CITY, mentioned in said agreement, has been changed to the "JOURNAL SQUARE NATIONAL BANK OF JERSEY CITY."

4. The thirteenth paragraph of said agreement, marked Schedule "A" and hereto annexed, provides as follows:

> "Thirteenth: All new stock hereafter to be issued by the Bergen National Bank of Jersey City which shall become owned by

any of the parties to this agreement, shall be added to the number of shares they then own, which are affected by this agreement, and such new stock will become affected by this agreement in the same manner as the shares now owned by the parties hereto and mentioned in this agreement are affected hereby."

5. The total number of shares of stock, held by the parties to the aforesaid agreement, marked Schedule "A" and hereto annexed, is Five Hundred and Seventy-eight Shares which has since been increased by an increase in the capitalization of the Journal Square National Bank of Jersey City, the exact amount of which is unknown to the complainants herein, but the complainants charge that John Warren, one of the defendants herein, by reason of the increased capitalization of the Bank, procured Two Thousand and Fifty-five (2,055) shares of the Capital Stock of the Journal Square National Bank of Jersey City, in addition to the Three Hundred and Nineteen (319) shares, set forth in the agreement, marked Schedule "A," and which said Two Thousand and Fifty-five (2,055) shares of additional stock is subject to and affected by the terms of said agreement, marked Schedule "A."

6. The complainants charge that the defendant, John Warren, in violation of the agreement, marked Schedule "A" hereto annexed, and without any notice to the complainants herein, and without any knowledge on their part, and with the intent to secure a greater benefit and advan-

tage to himself, and contrary to the terms of said agreement, during the months of December, 1927, and January, 1928, did give to one Edward I. Edwards, and the New Jersey Bankers Securities Co., and Harry H. Weinberger, and the Guardian Trust Co. of Newark, the option to purchase all of the shares of capital stock of the Journal Square National Bank of Jersey City, standing in the name of or controlled by the said defendant, John Warren, as complainants are informed and believe to be true, at the purchase price of Three Hundred and Fifty ($350.00) Dollars per share, and the said option to purchase can be exercised by the said Edward I. Edwards, and the New Jersey Bankers Securities Co. and Harry H. Weinberger, and the Guardian Trust Co. of Newark, at any time prior to May 15th, 1928, and said complainants further charge that under said option agreement, said defendant, John Warren did receive from the aforesaid Edward I. Edwards, and the New Jersey Securities Co. and Harry H. Weinberger, and the Guardian Trust Co. of Newark, a down payment of Fifty Thousand ($50,000.00) Dollars.

7. James Billington and Joseph B. Payton, the other parties to the agreement, marked Schedule "A" have refused to join as complainants and are therefore, made defendants herein.

8. Complainants further charge and show that if the said John Warren, Edward I. Edwards, New Jersey Bankers Securities Co., and the Guardian Trust Co. of Newark, their agents, representatives or attorneys, are permitted to consummate the said option to purchase, mentioned aforesaid,

that complainants herein will lose large sums of money and profits which they would have made, and to which they are justly entitled, if the terms of said agreement, marked Schedule "A" hereto annexed, were fully carried out by the said John Warren, and unless this Honorable Court intervenes in the premises, and enjoins the consummation of said option to purchase, said complainants herein will be without remedy and suffer great financial loss.

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

1. That John Warren, Joseph B. Payton, James Billington, Edward I. Edwards, New Jersey Bankers Securities Co., Harry H. Weinberger, and the Guardian Trust Co. of Newark, and the Journal Square National Bank of Jersey City, who are the defendants to this suit, may answer this bill of complaint and each statement therein contained.

2. That an Injunction may issue out of this Honorable Court, perpetually enjoining and restraining the said defendants, or any of them, individually, jointly, severally or in concert, from violating the terms of the agreement set forth in Schedule "A" hereto annexed and from consummating the option to purchase of the capital stock of the Journal Square National Bank of Jersey City, referred to in this bill of complaint.

3. That the defendants may be perpetually enjoined and restrained from transferring or attempting to transfer any shares of the capital stock of the Journal Square National Bank of Jersey City.

Exhibit A

4. That a writ of subpoena may issue out of this Honorable Court, commanding said defendants to answer this bill of complaint and to abide by the Order of the Court in the premises.

DANIEL D. LOEB,

Solicitor and of Counsel with Complainants.

Exhibit "A"

THIS AGREEMENT made and entered into this Ninth day of September, Nineteen Hundred and Twenty-five, BETWEEN Joseph B. Payton, John Warren, Nicholas W. D'Elia, Michael J. Sexton, and James Billington, all of the City of Jersey City, in the County of Hudson and State of New Jersey:

WITNESSETH, Whereas, the parties hereto are the owners of five hundred and seventy-eight certain shares of stock of the Bergen National Bank of Jersey City, held as follows:

In the name of Joseph B. Payton:	
Certificate 191	50 shares
In the name of John Warren:	
Certificate 348	10 shares
Certificate 258	90 shares
Certificate 351	25 shares
Certificate 365	94 shares
Certificate 370	10 shares
Certificate 379	70 shares
Certificate 381	20 shares
Total	319 shares

Exhibit A

In the name of Nicholas W. D'Elia:		
Certificate 296	20	shares
Certificate 279	20	shares
Certificate 298	20	shares
Certificate 299	20	shares
Certificate 300	10	shares
Certificate 301	10	shares
Certificate 317	21	shares
Total	121	shares
In the name of Michael J. Sexton:		
Certificate 188	20	shares
Certificate 345	5	shares
Total	25	shares
In the name of James Billington:		
Certificate 96	50	shares
Certificate 286	13	shares
Total	63	shares

AND WHEREAS, they are all original stockholders and directors of the said Bank; and WHEREAS they are desirous of obtaining permanent management and to prevent changes in management of said Bank in the interest of themselves and all other stockholders of the said Bank and are desirous of co-operating to increase the value of their stock holdings in the said Bank and to insure the ownership by one or more of the parties hereto of all of the stock affected by this agreement;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) by each of the parties

hereto in hand paid to the others, the receipt whereof is hereby acknowledged, each of the parties hereto does agree to and with the others as follows:

FIRST: Each of the parties hereto does agree to consult with the other parties hereto at any time with reference to the affairs of the said Bank and to lend his aid in an endeavor to successfully prosecute the business thereof and to increase the value of the stock affected by this agreement.

SECOND: Each of the parties hereto agree to hold in his own name and right, the certificates of stock hereinabove set forth as owned by him and does agree that he will not at any time sell, give or bequeath the said stock or any part thereof or any interest therein without offering the same for sale to the other parties to this agreement in the manner hereinafter set forth and only after the refusal of the other parties hereto to purchase within the time hereinafter limited for the acceptance of such offer.

THIRD: Any person desiring to sell all or any part of the stock which now or in the future may be affected by this agreement, shall offer the same for sale in writing to the other parties hereto, which said offer shall be made by registered mail addressed to the other parties at their addresses written after their signatures appended to this agreement. The other parties hereto, to whom the offer of sale is made, in case they desire to purchase the stock so offered for sale, shall within thirty days notify the person offering to sell the stock of their desire to purchase the same or the part thereof to which they are entitled to

purchase as hereinafter set forth. The parties desiring to purchase any stock affected by this agreement offered for sale shall have the right to purchase such proportion of such stock in their hands bears to the number of shares then affected by this agreement owned by the parties hereto desiring to purchase. In the event of such offer being made and accepted, the price to be paid to the person offering his stock for sale shall be Two Hundred Dollars ($200.00) per share, or book value according to the last published statement of the Bank as of the next preceding July 1st or January 1st.

FOURTH: Immediately after the expiration of the thirty days succeeding the date that the said offer for sale is made, the person offering said stock for sale shall notify the parties desiring to purchase the same of the number of shares they are entitled to purchase and will set the time and place, within the City of Jersey City, not less than ten or more than fifteen days after the date of such notice, for the delivery of the stock and the payment of the purchase price thereof.

FIFTH: In the event that within thirty days after the offer for sale is sent by registered mail, as hereinabove provided, none of the parties to this agreement notify the person offering to sell his stock that he desires to purchase the same, then the party so offering said stock shall have the right to sell such stock to any other person or persons free from any rights of the other parties hereto to purchase the same.

SIXTH: In the event of the death of any party to this agreement, the surviving parties hereto

will have the right within six months after the appointment of an Executor or Administrator to administer the Estate of the person so dying, to purchase the stock of the person so dying at Two Hundred Dollars ($200.00) per share, or book value according to the last published statement of the Bank as of the next preceding July 1st or January 1st, whichever sum shall be the greater, in the proportion that the number of shares of stock which he owns bears to the total number of shares of stock affected by this agreement owned by the parties hereto desiring to purchase the stock of the one so dying.

SEVENTH: Nothing herein contained is to prevent the parties hereto from using such stock as collateral for loans, but in such event the party pledging such stock as collateral will notify the other parties hereto of the name of the person or corporation holding said stock as collateral and further agrees to notify the person or corporation holding such stock as collateral, of the terms and conditions of this agreement, and to require of the pledgee that in the event that the said collateral is at any time offered for sale, that he or it will notify the parties hereto in writing ten days before such sale of the time and place of the same. Any person pledging his aforesaid stock as collateral shall promptly notify the other parties hereto in the event that his loan or loans is or are called or the stock is by the pledgee offered for sale. In the event that any such loan is called or any such collateral is offered for sale, any one of the parties hereto will have the right to pay to the pledgee of such collateral the sum of Two

Exhibit A

Hundred Dollars ($200.00) per share, or book value according to the last published statement of the Bank as of the next preceding July 1st or January 1st, whichever sum is the greater, in which event, the person so pledging said stock as collateral will have the right to redeem the same from the other party by paying to the party so making payment to the former pledgee of the moneys advanced by such other parties plus interest at the rate of 6 per cent. per annum. In the event that such payment is not made within thirty days to the party making payment to the original pledgee by the party pledging such collateral, then he shall notify the other parties to this agreement by registered mail addressed to them at the addresses written after their signatures affixed hereto, who will then have the right within thirty (30) days thereafter to purchase such proportion of such stock (at $200.00 per share plus interest at 6 per cent. from the time payment to the pledgee), as the number of shares then owned by them and affected by this agreement bears to the total number of shares affected by this agreement owned by the parties desiring to purchase such stock, which notification will set the time and place within the City of Jersey City not less than ten or more than fifteen days after the date of such notice for the delivery of the stock and the payment of the purchase price thereof, in which event the said stock shall then be owned by the parties purchasing the same, free and clear of any claim or rights of ownership or interest on the part of the party hereto originally pledging such stock, but such stock will continue to be affected by this agreement.

Exhibit A

EIGHTH: Any party to this agreement to whom stock in the future is transferred on the books of said Bank may have said stock added to the stock now owned by him in his name as hereinabove set forth and affected in every respect by this agreement, by notifying the other parties hereto by registered mail addressed to them at the addresses written after their signatures affixed hereto.

NINTH: Nothing in this agreement is to prevent the sale of the stock affected by this agreement or its exchange for other stock, provided that the parties hereto unanimously agree to such sale or exchange, and further provided that in the event of such exchange that the stock exchanged for the stock affected by this agreement shall be substituted for the stock of the Bergen National Bank of Jersey City affected by this agreement and will itself become affected thereby and subject to all the terms and conditions of this agreement.

TENTH: All of the parties hereto do agree to use every effort to increase and make profitable the business of the aforesaid Bank.

ELEVENTH: Ten (10) days before every stockholders' meeting, the parties hereto will confer together and discuss the questions to come before such stockholders' meetings and how their stock votes shall be recorded, and at such meetings held prior to the annual meetings of such Bank will discuss the qualifications of the men suggested as Directors of said Bank and do agree that they will attend all meetings of the stockholders and vote their stock in accordance with the decision of such conferences and that they will give to the person or persons named by the

conference their proxies to vote such stock in the event that through illness or other sufficient cause they are unable to attend the stockholders' meetings. Such holders of such proxy are by such conference to be directed as to how such stock shall be voted in the event that the person owning such stock is not present at such meeting. At all conferences of the parties hereto, each person shall have one vote for each share of stock then owned by him and affected by this agreement and a majority of the votes cast at such conferences shall decide all questions before such conferences.

TWELFTH: In the event that the stockholders of the Bergen National Bank of Jersey City vote to increase the capital stock of said bank, then in such case, then the parties hereto will at least fifteen days prior to the date set for the payment of such increased capital stock, notify all of the other parties hereto as to his or their intention in the matter of the purchase of such new stock. In the event that any party to this agreement does not desire to subscribe and pay for any new stock to which he shall be entitled, then in such event he shall at least fifteen days prior to the time set for the payment of such new stock, notify all of the parties hereto by registered mail at the addresses written under their signatures affixed to this agreement, of his intention not to subscribe and pay for such new stock to which he may become entitled, in which event any of the other parties hereto may by notice similarly sent to such person not desiring to pay for such new stock, notify him of his desire to subscribe for and pay for such new stock. The parties desiring to sub-

scribe and pay for the new stock, to which the said signer of this agreement will become entitled to subscribe and pay for but not desire so to do, may subscribe and pay for the same in the proportion that the number of shares then owned by them and affected by this agreement bears to the number of shares then affected by this agreement and owned by the other parties hereto, notifying the one not desiring to pay for such new stock of their desire to pay for the new stock to which such persons will become entitled to subscribe and pay for. Not less than five days prior to the date set for the payment of such new stock, the party not desiring to subscribe for and pay for the stock, shall notify the other parties hereto desiring to subscribe and pay for the new stock to which he would become entitled to subscribe and pay for, of the number of shares under this agreement they will become entitled to subscribe and pay for, and fixing the time and place within the City of Jersey City not less than 24 hours prior to the time set for payment of such new stock, at which time he will assign to such other parties hereto their proportionate shares of his rights to subscribe for such new stock, at which time they shall pay to him for each share, the right to subscribe for which is assigned, an amount equal to the capital, surplus and undivided profits shown by the semi-annual statement of the said Bank as of the next preceding July or January 1st, plus the amount to be paid for the new stock issue, divided by the number of shares which will be outstanding after the new stock is issued, less the amount to be paid for a share of stock.

Exhibit A

THIRTEENTH: All new stock hereafter to be issued by the Bergen National Bank of Jersey City which shall become owned by any of the parties to this agreement, shall be added to the number of shares they then own, which are affected by this agreement, and such new stock will become affected by this agreement in the same manner as the shares now owned by the parties hereto and mentioned in this agreement are affected hereby.

FOURTEENTH: This agreement shall bind the parties hereto, their heirs, executors, and administrators, and the assigns of any such stock who holds the same as collateral.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals and written the addresses to which notices under this agreement shall be sent, the day and year first above written.

Signed, sealed and delivered
in the presence of:

JOHN WARREN (L.S.)
921 Bergen Ave., Jersey City, N. J.
JOSEPH B. PAYTON (L.S.)
218 Harrison Ave.
NICHOLAS W. D'ELIA (L.S.)
994 West Side Ave.
MICHAEL J. SEXTON, (L.S.)
960 Newark Ave., J. C.
JAMES BILLINGTON (L.S.)
2614 Boulevard

Verifying Affidavit

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants.* AND JOHN WARREN, JOSEPH B. PAYTON, JAMES BILLINGTON, EDWARD I. EDWARDS, NEW JERSEY BANKERS SECURITIES CO., HARRY H. WEINBERGER, AND GUARDIAN TRUST CO. OF NEWARK, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS:

NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, being duly and severally sworn, upon their respective oaths, do depose and say:

1. We are the complainants in the foregoing bill of complaint named; we have read the bill of complaint, and the matters and things therein contained are true; particularly is it true that on or about the 9th day of September 1925, we, together with Joseph B. Payton, James Billington and John Warren, did enter into a certain agreement, a copy of which is hereto annexed, marked Schedule "A" and made a part hereof, wherein and whereby each of the parties thereto did agree with the other, that none of the individuals mentioned in said agreement will at any time sell, give

or bequeath, certain shares of the capital stock of the Journal Square National Bank of Jersey City, or any part thereof, or any interest therein, without offering the same for sale to the other parties to the agreement in the form and manner as in said agreement, set forth, and until after the refusal of the other parties thereto, to purchase within the time limited in accordance with the terms of said agreement.

2. Said agreement further provided that any party to the agreement, desiring to sell any or all of the stock which now or in the future may be affected by the agreement should offer the same for sale in writing to the other parties to the agreement, which offer is to be made by registered mail, and addressed to the other parties at the addresses written after their signatures in the agreement, and said agreement further sets forth in substance, that the other parties to the agreement, to whom the offer is made, in case they desire to purchase the stock so offered for sale, shall within thirty days, notify the person offering to sell the stock of their desire to purchase the same, or the part thereof to which they are entitled to purchase under the terms of agreement, and the parties desiring to purchase the stock affected by the agreement shall have the right to purchase such proportion of such stock, as is offered for sale, as the number of shares of stock in their hands bears to the number of shares then affected by this agreement, and further in the event of such offer being made and accepted, the price to be paid to the person offering his stock for sale, shall be Two Hundred ($200.00) Dollars per share, or

book value according to the last published statement of the Bank as of the next preceding July 1st or January 1st.

3. The name of the BERGEN NATIONAL BANK OF JERSEY CITY, mentioned in the said agreement, has been changed to the "JOURNAL SQUARE NATIONAL BANK OF JERSEY CITY."

4. The thirteenth paragraph of said agreement, marked "Schedule 'A'" and hereto annexed, provides as follows:

> "Thirteenth: All new stock hereafter to be issued by the Bergen National Bank of Jersey City which shall become owned by any of the parties to this agreement, shall be added to the number of shares they then own which are affected by this agreement, and such new stock will become affected by this agreement in the same manner as the shares now owned by the parties hereto and mentioned in this agreement are affected hereby."

5. The total number of shares of stock, held by the parties to the aforesaid agreement, marked Schedule "A" and hereto annexed, is Five Hundred and Seventy-eight shares, which has since been increased by an increase in the capitalization of the Journal Square National Bank of Jersey City, the exact amount of which is unknown to us, but we charge that John Warren, one of the defendants herein, by reason of the increased capitalization of the Bank, procured Two Thousand and Fifty-five (2055) Shares of the Capital Stock

of the Journal Square National Bank of Jersey City, in addition to the Three Hundred and Nineteen (319) Shares set forth in the agreement, marked Schedule "A", and which said Two Thousand and Fifty-five (2055) Shares of additional stock is subject to and affected by the terms of said agreement, marked Schedule "A."

6. We further charge that the defendant John Warren, in violation of the agreement, marked Schedule "A" hereto annexed, and without any notice to us, and without any knowledge on our part, and with the intent to secure a greater benefit and advantage to himself, and contrary to the terms of said agreement, during the months of December, 1927, and January, 1928, did give to one Edward I. Edwards, and the New Jersey Bankers Securities Co., and Harry H. Weinberger, and the Guardian Trust Co. of Newark, the option to purchase all of the shares of capital stock of the Journal Square National Bank of Jersey City standing in the name of or controlled by the said defendant, John Warren, as we are informed and believe to be true, at the purchase price of Three Hundred and Fifty ($350.00) Dollars per share, and the said option to purchase can be exercised by the said Edward I. Edwards, and the New Jersey Bankers Securities Co. and Harry H. Weinberger, and the Guardian Trust Co. of Newark, at any time prior to May 15th, 1928, and we further charge that under said option agreement, said defendant, John Warren, did receive from the aforesaid Edward I. Edwards, and the New Jersey Bankers Securities Co. and Harry H. Weinberger, and the Guardian Trust Co. of New-

ark, a down payment of Fifty Thousand ($50,000.00) Dollars.

7. James Billington and Joseph B. Payton, the other parties to the agreement, marked Schedule "A", have refused to join as complainants and they are therefore made defendants herein.

8. We further charge and show that if the said John Warren, Edward I. Edwards, New Jersey Bankers Securities Co., and the Guardian Trust Co. of Newark, their agents, representatives or attorneys, are permitted to consummate the said option to purchase, mentioned aforesaid, we will lose large sums of money and profits which we would have made, and to which we are justly entitled if the terms of said agreement, marked Schedule "A" hereto annexed, were fully carried out by the said John Warren, and unless this Honorable Court intervenes in the premises, and enjoins the consummation of said option to purchase, we will be without remedy and suffer great financial loss.

Sworn and subscribed to
before me this 11 day of
January, 1928.

NICHOLAS W. D'ELIA
MICHAEL J. SEXTON

LOUIS BRENNER
Attorney at Law of New Jersey

Order to Show Cause

Filed January 12, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

On reading and filing the duly verified bill of complainant herein,

It is on this 11th day of January, 1928, on Motion of DANIEL D. LOEB, Solicitor for and of Counsel with Complainants,

ORDERED: That the defendants, John Warren, Joseph B. Payton, James Billington, Edward I. Edwards, New Jersey Bankers Securities Co., Harry H. Weinberger, and Guardian Trust Co. of Newark, show cause before the Chancellor at the Chancery Chambers, 1 Exchange Place, Jersey City, N. J., on Monday, the 30th day of January, 1928, at 10 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, why they and each of them should not be enjoined and restrained in accordance with the prayer contained in the bill, and it is further

ORDERED: That in the meantime and until the further Order of the Court in the premises,

the said defendants, John Warren, Joseph B. Payton, James Billington, Edward I. Edwards, New Jersey Bankers Securities Co., Harry H. Weinberger, and Guardian Trust Co. of Newark, their agents, attorneys and representatives, and they and each of them be and they are hereby restrained from

1. Violating the terms of the agreement set forth in Schedule "A," annexed to the bill of complaint and from consummating the option to purchase of the capital stock of the Journal Square National Bank of Jersey City, referred to in the said bill of complaint,

2. Transferring or attempting to transfer any shares of the capital stock of the Journal Square National Bank of Jersey City.

AND IT IS FURTHER ORDERED: That a copy of this Order to Show Cause, together with a copy of the verified bill of complaint upon which it is founded, certified by Complainants' Solicitor as a true copy, be served upon each of the defendants, or their officers, within three days from the date hereof.

Application to modify or vacate on two days' notice.

Respectfully advised,

JOHN BENTLEY,

V. C.

EDWIN ROBERT WALKER,

C.

Notice of Motion to Vacate Restraint

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* and JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Motion to Vacate Restraint

SIR:

PLEASE TAKE NOTICE that on Monday, January 16th, 1928, at ten o'clock in the forenoon, I will move before the Chancellor, at Chancery Chambers, in the City of Jersey City, to vacate the restraint contained in the orders to show cause made in the above entitled cause on January 11th, 1928, and for such other relief as the circumstances may warrant and the Court deem proper.

Yours respectfully,

MERRITT LANE

Solicitor for and of Counsel with John Warren, Journal Square National Bank of Jersey City and Guardian Trust Company of New Jersey.

TO: DANIEL D. LOEB, ESQ.,
Solicitor for Complainants.

Order Modifying Restraint and Order of Adjournment

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA, et als, *Complainants,* and JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

This motion being opened to the Court by John Warren, appearing in person, in the presence of Thomas J. Brogan and Daniel D. Loeb, of Counsel with Complainants, it is on this 16th day of January, 1928,

ORDERED that the restraint contained in the order to show cause be modified so that it restrains the Journal Square National Bank of Jersey City from transferring the stock standing in the name of the defendants or any of them or held in trust for any of them only; and it is further

ORDERED that the defendants moving to vacate may serve additional affidavits before twelve o'clock noon January 18, 1928, and that the complainants shall serve such answering affidavits to those already served by defendants as they intend to read in opposition to the motion, before 12 o'clock noon, January 18th, 1928, and that any

party may before 2:00 o'clock P. M. Thursday, January 19th, 1928, serve answering affidavits to those served between January 16th, 1928 and 12 o'clock noon, January 18th, 1928, and it is further

ORDERED that the motion to vacate be adjourned to Friday, January 20, 1928, at 10 o'clock in the forenoon at Chancery Chambers, Jersey City.

Respectfully advised,

E. R. WALKER, *Chancellor.*

JOHN BENTLEY, *Vice Chancellor.*

Consent is herewith given to the making of the foregoing order.

D. D. LOEB,
Solicitor of Complainants.

Notice of Motion to Amend Bill of Compla..

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

Between

NICHOLAS W. D'ELIA AND
MICHAEL J. SEXTON,
Complainants,

and

JOHN WARREN, et als,
Defendants.

On Bill, etc.

TO: Merritt Lane, Esq., Solicitor for and of Counsel with John Warren.
Journal Square National Bank, Jersey City, N. J.
Guardian Trust Company, Newark, N. J.
TO: New Jersey Bankers' Securities Company.
TO: Harry W. Weinberger.
TO: Joseph B. Payton, Jersey City, N. J.
TO: Edward I. Edwards, Jersey City, N. J.
TO: James Billington, Jersey City, N. J.

SIRS:

Please take notice that on Friday, January 20th, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, I will apply before the Chancellor at Chancery Chambers, in the City of Jersey City, to amend the bill of complaint filed in this cause in the manner following:

8a. That the said Warren at the time he had

issued in his name the stock certificates of the Journal Square National Bank representing two thousand and fifty-seven (2057) shares, was in fact the agent of the bank, and of its board of directors, and that he, then and there, fraudulantly represented through the agency of Michael Pecora, Cashier, to Michael J. Sexton, one of the complainants herein, that the said stock was to be placed as collateral for a loan with the Guardian Trust Company at Newark, N. J., in order that said stock might in that manner be issued in accordance with the direction of the Comptroller of the Currency; that he further through the same agency, fraudulently represented that the said stock might thereafter, from time to time, be absorbed by the directors and stockholders of the bank, and that the said Warren thus procured the issue of the said stock in his own name, this complainant avers on information and belief, then represented to the intending purchaser, Edward I. Edwards, that he was the owner of the said stock individually, and in his own name and right.

8b. The said Warren further in violation of the above mentioned 1925 agreement so-called, surreptitiously and secretly, and in the manner above set forth had the said stock issued in his own name, when in fact, this or any other stock acquired by him was subject to the covenants and agreements of the said 1925 contract, which was executed for the benefit of the signers of the said agreement, and any acquisition of stock, particularly re-capitalization stock, so acquired was obtained for the benefit of those parties, as well as himself, and not in his own behalf solely.

8c. That the said Warren surreptitiously and with fraudulent intent, well knowing his obligation towards the said stockholders by virtue of the agreement before mentioned, and other verbal understandings between the parties, entered into an agreement to dispose of said stock, which the said Warren had thus acquired as above described, attempted to dispose of the same to the said Edwards, without the knowledge or consent of said stockholders or directors, or parties to the 1925 agreement so-called, as a result of which the said Warren attempted to dispose of said stock for a large sum of money, intending all the while to convert the proceeds of this transaction to his own use, without apprising said stockholders, directors or signers of the said agreement.

8d. The said Warren is an attorney and counsellor at law, and also the chief executive of the said bank, and its chief fiduciary agent, and is a member of the firm that is counsel to the said bank, thus representing the board of directors and all of the stockholders, and these complainants charge that all of the matters and things done in connection with the aforesaid transaction, were done by him as such representative, and in a representative and fiduciary capacity; and that said conduct on his part in attempting to profit personally by the aforesaid transaction was a breach of trust and a violation of his duty as such representative and fiduciary agent.

DANIEL LOEB,
Solicitor of Complainant.

Affidavit—Michael Pecora

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Order.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

MICHAEL PECORA, of full age, being duly sworn on his oath, deposes and says that:

1. I am a Vice President of the Journal Square National Bank of Jersey City and held the office of Cashier of such bank from March 1, 1924, until January 10, 1928, and during my service as cashier, I served as secretary of all meetings of the shareholders and board of directors, including the meeting of the shareholders held January 10th, 1928, with the exception of a shareholders' meeting held March 1, 1926.

2. Since September 9th, 1925, there have been three annual meetings of the shareholders and two special meetings of the shareholders.

3. At the annual meeting held January 12th, 1926, Joseph B. Payton, Michael J. Sexton, Nicho-

las W. D'Elia, James Billington and John Warren were present and voted.

4. On August 2nd, 1926, a special election of the shareholders to elect directors was held, at which the aforesaid Messrs. D'Elia, Warren Payton and Sexton were present, Mr. Billington being absent and voting by proxy.

5. At the annual meeting held January 11th, 1927, Messrs. Warren, Sexton and Payton were present and voted and Messrs. D'Elia and Billington were absent and voted by proxy. At this meeting a resolution was passed to increase the capital stock of the bank from 2,500 shares to 5,000 shares, this resolution being passed unanimously and at this meeting a motion was also unaimously passed suggesting to the board of directors that the additional 2,500 shares of capital stock be issued at $250.00 per share. At the board of directors' meeting, held January 11, 1927, immediately after the shareholders' meeting, Messrs. Warren, D'Elia, Sexton, Billington and Payton were present. At this meeting a motion was unanimously passed, providing that the new stock, consisting of 2,500 shares be issued at $250.00 per share. At the board of directors' meeting held January 31st, 1927, all of the aforenamed men were present with the exception of John Warren, who was excused, he being on a vacation. At this meeting I reported:

> "I discussed today with Mr. Reeves, Chief National Bank Examiner, the issuance of the stock warrants for the increase of capital stock. He suggested that the war-

rants be sent out about the middle of February, providing for the subscriptions to be in not later than the first day of April, and that payment be made in equal instalments on May 1st and June 1st. Stock warrants should plainly show that stockholders forfeit their rights if their subscription is not filled on or before April 1st.

"In such cases where stockholders send in their subscriptions in time and make a first payment on May 1st, but fail to make final payment on or before June 1st, the stock warrants should state plainly that such stockholders forfeit their rights and the part payment made May 1st will be refunded."

Thereupon, at said meeting, the officers, by a unanimous vote, were authorized to proceed with the issuance of the increased capital stock in accordance with the suggestions made by Mr. Reeves.

6. Section 12 of the By-Laws of said bank reads as follows:

"Sec. 12. Whenever an increase of stock shall be determined upon in accordance with law, it shall be the duty of the board to notify all of the shareholders of the same and to cause a subscription to be opened for such increase of capital. In the increase of capital, each shareholder shall have the privilege of subscribing for such number of shares of the new stock as he

may be entitled to subscribe for, according to his existing stock in the bank. If any shareholder fails to subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing to such unsubscribed stock."

7. At a meeting of the board of directors, held April 11th, 1927, at which the aforesaid Messrs. Warren, Payton, Sexton, Billington and D'Elia were present, a resolution was unanimously passed:

"forfeiting the rights of all stockholders who had not filed their subscriptions for the increased capital stock on or before April 1st and these rights are to be turned over to President Warren to do with as he sees fit without any consideration for the rights."

8. At the annual meeting of the shareholders held January 10th, 1928, all of the aforesaid persons, except Mr. D'Elia, were present, he being absent and voting by proxy.

9. The said Michael J. Sexton, though entitled to subscribe for twenty-five shares of the new stock, did not subscribe and his rights were forfeited by the resolution of April 11th, 1927.

10. The said Nicholas W. D'Elia, being entitled to subscribe for one hundred and thirty-seven shares of the increased capital stock prior to April 1, 1927, subscribed for 10 shares and

assigned to another his right to subscribe to 127 shares. The assignee did not exercise the rights and the rights of such assignee to subscribe were forfeited by virtue of the resolution of April 11th, 1927. Said Nicholas W. D'Elia has never paid for the said ten shares for which he subscribed.

11. Michael J. Sexton is a Vice President of said bank and was first elected as a Vice President at the organization meeting of the board on January 12th, 1926. He has been re-elected as a Vice President at the organization meetings of the boards of directors held January 11th, 1927, and January 10th, 1928.

12. The number of unsubscribed shares which by the aforesaid resolution were turned over to the said John Warren, were 2,277 and after the passage of said resolution, the said Warren reported to the board on several occasions that he had difficulty in arranging financing to pay for said shares and asked the members of the board at board meetings on several occasions at which the said Michael J. Sexton and said Nicholas W. D'Elia were present, if they would not purchase and pay for some of the unsubscribed shares which had been turned over to him, as he found it a difficult matter to finance them. At these times no objection was made upon the part of Mr. Sexton and Mr. D'Elia to Mr. Warren's request that other directors purchase some of the stock. At one of the meetings one of the directors, Payton, stated that a friend of his whom he thought would become a good customer of the bank, would like to buy twenty-five shares of the new stock and Mr. Warren said, of course, that he could do so.

The director brought the said prospective shareholder in and the money was paid to the bank through me without the said John Warren being acquainted at all with him. Because of Mr. Warren's announced desire to be relieved of the burden of paying for all the unsubscribed stock, I arranged for the sale of additional shares to two other shareholders, one purchasing ten shares and one five shares.

13. This left a total of 2,057 shares unsubscribed for and unsold by Mr. Warren and for which he paid in cash the sum of $514,250.00. When the stock certificates for such 2,057 shares made out to John Warren were ready for signature, he was confined to his house through illness and the said Michael J. Sexton signed all of the said certificates for 2,057 shares of the increased capital stock made out to the order of John Warren.

MICHAEL PECORA.

Subscribed and sworn to before
me this 14th day of January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.

Affidavit—Oswald Elmer

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

OSWALD ELMER, of full age, being duly sworn on his oath, deposes and says, that:

1. I am the Cashier of the Journal Square National Bank of Jersey City and have been elected to such position on January 10th, 1928.

2. On March 1, 1926, I was Assistant Cashier of said bank and acted as Secretary of the special meeting of the shareholders of said bank held on said date. Said meeting was called for the purpose of passing on the proposition of changing the name of the bank so that the name of the bank would be changed from Bergen National Bank of Jersey City to Journal Square National Bank of Jersey City. Among those present were John Warren, Joseph B. Payton and Michael J. Sexton. Messrs. James Billington and Nicholas W. D'Elia were not present at said meeting, but voted by proxy.

OSWALD ELMER.

Sworn and subscribed to before
me this 14th day of January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.

Affidavit—John Warren

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

JOHN WARREN, of full age, being duly sworn on his oath, deposes and says that:

1. I am one of the defendants in the foregoing entitled cause of action and am one of the signers of the agreement mentioned in the bill of complaint. The purpose of said agreement primarily was to insure the election of the signers thereof as directors of the said bank at the annual meeting to be held on January 12th, 1926, and to continue the same proportionate voting interest that the signers had at said time through their then ownership of stock or through an increase in stock to which they would be entitled by virtue of their ownership of the said stock mentioned in said agreement.

2. On January 6th, 1926, the parties to said agreement executed another agreement, agreeing to sell their said stock with the exception of ten shares each, to a corporation. This agreement has never been performed.

3. After the execution of said 1925 agreement, it was never recognized by act of the parties thereto except by the execution of the aforesaid 1926 agreement which, as before set forth, has never been performed. The said 1925 agreement in paragraph 7, permits the pledging of the stock affected thereby as collateral for loans, but requires the party so pledging such stock to notify the other parties to said agreement of the name of the person or corporation holding such stock as collateral. I pledged stock affected by the

agreement as did Mr. D'Elia and at least one other signer, but no notice was given by anybody to the agreement to the other parties to the agreement of the pledging of said stock. Said paragraph 7 further provides that the signer pledging such stock will notify the person or corporation holding such stock of the terms and conditions of the said agreement and to require the pledgee in the event that the said collateral is at any time offered for sale, to notify the parties to said agreement in writing, ten days before such sale of the time and place. None of the parties to said agreement notified the pledgees of the said stock of the terms and conditions of the said agreement or required them to agree to notify the other signers of the agreement in the event that said stock was to be sold.

4. Paragraph 8 of said agreement provides that any party to said agreement, to whom after the date of the said agreement, stock is assigned, may have the said stock added to the stock then owned by him and affected in every respect by said agreement and notify the other parties hereto, by registered mail addressed to them at the addresses written after their signatures affixed to said agreement. Three parties to the agreement, including said Nicholas W. D'Elia, purchased stock after the date of said agreement and did not notify the other parties thereto of their desire to have same affected by said agreement.

5. Paragraph 11 of said agreement provides that ten days before every stockholders' meeting, the parties to said agreement would confer with reference to questions to come before such stock-

holders' meetings and how their stock votes should be recorded and the qualifications of men suggested as directors, agreeing that they would attend all meetings of the stockholders and vote their stock in accordance with the decisions of such conferences and that they would give such person or persons named at such conferences, the proxy to vote their stock in the event that they are unable to attend such stockholders' meeting and that at such conferences, each person would have one vote for each share of stock then owned by him and affected by the said agreement, a majority of the votes cast at such conferences to decide all questions before such conferences, including how such stock should be voted. Under said agreement, inasmuch as no additional stock purchased by any of the signers thereto, was ever through notification by others, added to the stock owned by and affected by the agreement aforesaid, I had a majority vote in the event that any such conferences were held. Said agreement, however, in this respect was never recognized and although since the date of said agreement, there have been held three annual shareholders' meetings and two special shareholders' meetings, no conference was ever held as required by said paragraph 11 of said agreement.

6. Paragraph 12 of said agreement provides that in the event of an increase of the capital stock of said bank, that the parties thereto would, fifteen days prior to the date set for payment, notify all the other parties as to his or their intention as to the matter of the purchase of such new stock and requiring any party to the agree-

ment not desiring to subscribe and pay for such new stock to which he would be entitled, to notify the other parties to the agreement by registered mail fifteen days before the time set for the payment of such new stock, of his intention not to subscribe, in which event the other parties to the agreement would notify him of their desire, if any, to subscribe and pay for such new stock.

7. The capital stock of said Journal Square National Bank was increased from 2,500 shares to 5,000 shares. Mr. Billington and Mr. Sexton did not subscribe for the increased capital stock, Mr. D'Elia subscribed but did not pay for ten shares and assigned his right to subscribe for 127 shares, Mr. Payton subscribed and paid for 10 shares and assigned his rights to subscribe for 45 shares, but none of the parties to said agreement ever notified the other parties thereto of their intention as to whether or not they would subscribe or not subscribe to the new stock, or where they did not subscribe to the new stock, of the fact that they would not subscribe, the said paragraph 12 fixing the value of the rights under said agreement, in the event that a person not subscribing gave to the other subscribers his right to subscribe.

8. It was the intention of the parties, in the execution of the agreement, that paragraph 13 apply only to new stock purchased by the parties to said agreement, which they were entitled to purchase as a result of their ownership of stock affected by said agreement or rights to subscribe to which they procured under the machinery provided in paragraph 12.

9. Paragraph 14 of the agreement provided that it should bind the assignee of stock who held same as collateral, but no assignee of stock who held same as collateral was ever notified of said agreement.

10. The said James Billington, not recognizing said agreement, sold some of his stock mentioned in said agreement to me.

11. The stock of the Journal Square National Bank was originally issued at $130.00 per share. In 1925 and at the time of the execution of the aforesaid agreement, the officials of another bank were purchasing stock of the said Journal Square National Bank of Jersey City, in an endeavor to obtain control. The desires of said officials to obtain control were opposed by the signers of the said agreement and it was because of this that said agreement was executed. It was desirable to purchase additional stock but outside of 16 shares of stock purchased by Nicholas W. D'Elia, the five shares of stock purchased by Joseph B. Payton, no stock was purchased in the year 1925, after the execution of the said agreement, by the parties to the agreement except by myself who purchased 39 shares.

12. In the month of December, 1926, the officials of said bank, who had in 1925 been purchasing stock of said Journal Square National Bank, offered the same for sale and I purchased their holdings consisting of 532 shares at $195.50 a share, the purchase price amounting to $104,006.00. The purchase price of this stock was largely in excess of the then market price.

13. At the meeting of the Journal Square National Bank which was held December 27th, which was attended by Michael J. Sexton, I notified all of the directors present of the fact that I had made such purchase in the interests of the bank because it was detrimental to our bank to have officials of another bank, who were in competition with us, hold more than 20 per cent. of our stock and I offered to sell any portion of such stock to the other directors at the price for which I paid, stating that it was inconvenient for me to carry so much stock. The complainant, Michael J. Sexton, was present at said meeting. None of the directors present would take any of the said stock off my hands. Later on I made the same offer to Nicholas W. D'Elia, who also refused the opportunity. A number of the directors at said meeting expressed their opinion that I had paid too much for such stock and that they could buy it cheaper on the market and that, therefore, they did not desire to purchase from me any of the stock for the price at which I had purchased it.

14. The increase in capital stock from 2500 to 5000 shares was made necessary by reason of the acquisition and alteration for banking purposes of the former Lerner Building, now known as the Journal Square Bank Building, title to which was taken by the Journal Square Bank Building Company in October, 1926, all the stock of which said last mentioned Company was and is owned by the Journal Square National Bank of Jersey City. When, during the month of March, it became apparent that the increase was not being substan-

tially supported by our shareholders and that less than 250 shares would be subscribed and paid for and knowing that all directors together would only pay for 30 shares and that I could not look to them to take up the unsubscribed shares, I conceived the idea of welding our depositors to our institution thru the creation of a trust estate which would sell shares for $25.00 and with the proceeds purchase the increased capital of the said bank and in such plan I had the active co-operation and approval of the entire Board of Directors with whom the matter was discussed at meetings. On the day that the rights of those who had not subscribed were forfeited, which was on April 11th, 1927, the aforesaid trust agreement was signed by the trustees, three of whom were signers of the said 1925 agreement, viz: Joseph B. Payton, Nicholas W. D'Elia and myself.

15. A circular letter to the depositors of the Journal Square National Bank, offering to them the opportunity of obtaining an interest in the stock of said bank through the purchase of trust estate shares, was prepared and by the Chairman of the meeting of the Board of Directors held on April 18th, 1927, read to the Board and unanimously approved. I was not present at such meeting but the minute book shows that Messrs. Sexton, D'Elia, Payton and Billington were present.

16. The trust estate, through the sale of its shares, secured funds to purchase only 180 shares of the increased stock which, after the sale of 40 shares to three other persons, left 2057 shares which I had been unable to sell and for which payment had not been received. At a number of

meetings of the Board of Directors, I told them of the difficulty I had in the sale of the stock and that it would be more of a burden than I could carry to purchase additional 2057 shares and at various times stated that it was impossible for me to make payment for same within the time provided by the Board and requested the members of the Board on several occasions, when both Messrs. D'Elia and Sexton were present, to purchase some of the stock. The members of the board refused to purchase any more than they had, a number of them stating that the price of issue was too high. The board, in consideration of my difficulties in financing the payment of such increased stock, extended the time for payment from time to time.

17. Messrs. Sexton and D'Elia, on several occasions, told me that they would not pay $250 for the new stock when they could buy stock on the market for less and on one occasion, Mr. D'Elia told me that he had purchased 21 shares of stock at $215 a share which he gave to his wife and that he would be foolish to pay $250 a share when he could buy stock for $215. The stock ledger shows that the said 21 shares of stock were transferred to his wife on June 27th, 1927.

18. Towards the latter part of 1927, I talked on many occasions with Messrs. Sexton, D'Elia and Payton with reference to the difficulties of financing the purchase of the unsold portion of the new stock and told them that even if I could finance such purchase, that I could not afford to carry such stock and that, therefore, I intended to sell a substantial portion of my stock, including said 2057 shares of new stock not yet paid for.

19. During the month of December, 1927, I had negotiations with several people with reference to the sale of a controlling interest in the Journal Square National Bank, which negotiations, if concluded, would have provided for the payment by the purchaser of the unissued shares of increased capital. Mr. D'Elia and Mr. Sexton were very much interested in the proposed sale and Mr. D'Elia, in an endeavor to arrange a sale, told a banker of the fact that I was negotiating and sent the banker to me. Mr. Sexton was daily inquiring as to the progress of negotiations and asked if I would sell to a banker whom he knew. I told him that I would do so if we could arrange a sale and he made an endeavor to interest such banker. Neither negotiations conducted by Mr. D'Elia and Mr. Sexton resulted in any offer.

20. Being unable to arrange for any deal whereby the purchaser of stock would pay for the increased capital before December 31st, I arranged to finance the purchase myself and on December 30th paid into the bank the sum of $514,250 being the issue price of 2057 shares, being all of the stock unsubscribed and unsold.

21. It was known by Messrs. D'Elia and Sexton that I could not afford to purchase and carry the additional 2057 shares of stock. They at no time in the past two years, have ever mentioned to me the 1925 agreement and since the execution of the 1926 agreement all of the parties thereto have dealt with their stock as though said agreement did not exist. When they voted to increase the capital stock at $250 a share, when they voted to forfeit the rights to the unsubscribed capital stock

and give them to me to do with as I saw fit, without consideration; when I asked the directors, including themselves, to purchase some of the shares, when I was endeavoring to arrange in December, 1927, for some purchaser to pay for such shares, when I told them that I had arranged the financing on December 29th, to purchase and pay for such 2057 shares on December 30th, when Mr. D'Elia talked with me about the possibility of my making a sale to the banker whom he sent to me, when Mr. Sexton asked about his negotiations to sell my stock to his banker friend and after I had discussed with them the agreement which Senator Edwards signed on January 3rd, 1928, neither mentioned the said 1925 agreement or that the 2057 shares of stock which I was purchasing at $250.00 a share, would be affected by the 1925 agreement and that in the event that I desired to sell the same, that I would have to offer them to the signers of said agreement at $200.00 a share. I acquainted them with the details of the agreement that Senator Edwards had signed and from their conversation, I believed that they were thoroughly satisfied, Mr. Sexton advising me that he would sell all of his stock to Senator Edwards and Mr. D'Elia advising me that he would sell only enough stock to pay off his collateral loans.

22. Prior to the service of the copy of the bill of complaint and order to show cause in this suit, Mr. Sexton and Mr. D'Elia were fully cognizant of the contract I had entered into with Senator Edwards, but made no claim to me that their rights were being violated by virtue of said agreement, that the 1925 agreement was in force or that they were at all dissatisfied with the Edwards agreement.

23. As a result of the purchase of the increased stock, I am now the owner of 3250 shares of the stock of the Journal Square National Bank, of which 191 are in the name of Joseph B. Payton, Trustee. Most of this stock was purchased in excess of $200 a share. Michael J. Sexton is the owner of only 25 shares of stock, 20 of which he purchased at $130 a share and five at $140 a share. Nicholas W. D'Elia is the owner of 137 shares of stock, 100 of which he purchased at $130 a share and the balance under $200 a share. Mr. Sexton's investment is $3300, Mr. D'Elia's investment is less than $20,000 and mine is in excess of $700,000.

24. I arranged the financing, using the new stock in part as collateral and entered into the agreement with Senator Edwards, without any knowledge of any claim of either of complainants as asserted in the bill of complaint and I negotiated for the sale of such stock the with full knowledge of both complainants.

25. At the present time, the said 2057 shares have been deposited with the Guardian Trust Company of New Jersey whose only interest therein is to hold the same in part as security for a loan made by said Trust Company to me and for the purpose of delivery to Senator Edwards upon the payment of the purchase price of said stock. If I am prevented by the order of this court from performing my contract with Senator Edwards, I will not only lose the value of my contract but will be liable to him in damages. A continuance of the restraint would mean irreparable damage to me, whereas, a dismissal of the restraint would

result in no loss to the complainants as I am financially responsible for any damages that they may recover either in this court or in the court of law.

JOHN WARREN.

Sworn and subscribed to
before me this 14th day of
January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.
(Seal)

Affidavit—Joseph B. Payton

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	}	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss.

JOSEPH B. PAYTON, of full age, being duly sworn according to law, on his oath, deposes and says that:

1. I am a Vice President of the Journal Square National Bank of Jersey City and one of the defendants in the foregoing entitled cause of action, and one of the signers of the agreement mentioned in the bill of complaint. The purpose of said agreement primarily was to insure the election of the signers thereof as directors of the said bank at the annual meeting to be held on January 12th, 1926, and to continue the same proportionate voting interest that the signers had at said time through their then ownership of stock or through an increase in stock to which they would be entitled by virtue of their ownership of the said stock mentioned in said agreement.

2. On January 6th, 1926, the parties to said agreement executed another agreement, agreeing to sell their said stock with the exception of ten shares each, to a corporation. This agreement has never been performed.

3. After the execution of said 1925 agreement, it was never recognized by act of the parties hereto, except by the execution of the aforesaid 1926 agreement, which as before set forth, has never been performed. The said 1925 agreement in paragraph 7 permits the pledging of the stock affected thereby as collateral for loans, but requires the party so pledging such stock to notify the other parties to said agreement of the name of the person or corporation holding such stock as collateral. No notice was given by anybody to the other parties of the agreement of the pledging of stock affected by the agreement. Said paragraph 7 further provides that the signer pledging such stock will notify the person or corporation holding such stock of the terms and conditions of the said agreement, and to require the pledgee, in the event that the said collateral is at any time offered for sale, to notify the parties to said agreement, in writing, ten days before such sale of the time and place. None of the parties to said agreement notified the pledgees of the said stock of the terms and conditions of the said agreement or required them to agree to notify the other signers of the agreement in the event that said stock was to be sold.

4. Paragraph 8 of said agreement provides that any party to said agreement, to whom after the date of the said agreement, stock is

assigned, may have the said stock added to the stock then owned by him and affected in every respect by said agreement and notify the other parties thereto, by registered mail addressed to them at the addresses written after their signatures affixed to said agreement. Three parties to the agreement, including said Nicholas W. D'Elia, purchased stock after the date of said agreement and did not notify the other parties thereto of their desire to have same affected by said agreement.

5. Paragraph 11 of said agreement provides that ten days before every stockholders' meeting, the parties to said agreement would confer with reference to questions to come before such stockholders' meeting and how their stock votes should be recorded and the qualifications of men suggested as directors, agreeing that they would attend all meetings of the stockholders and vote their stock in accordance with the decisions of such conferences and that they would give such person or persons named at such conferences, the proxy to vote their stock in the event that they were unable to attend such stockholders' meeting, and that at such conference each person would have one vote for each share of stock then owned by him and affected by the said agreement, a majority of the votes cast at such conferences to decide all questions before such conferences, including how such stock should be voted. Under said agreement, inasmuch as no additional stock purchased by any of the signers thereto was ever, through notification by others, added to the stock owned by and affected by the agreement aforesaid, John Warren

had a majority vote in the event that any such conferences were held. Said agreement, however, in this respect was never recognized and although since the date of said agreement, there have been held three annual shareholders' meetings and two special shareholders' meetings, no conference was ever held as required by said paragraph 11 of said agreement.

6. Paragraph 12 of said agreement provides that in the event of an increase of the capital stock of said bank, that the parties would, fifteen days prior to the date set for payment, notify all the other parties as to his or their intention as to the matter of the purchase of such new stock and requiring any party to the agreement not desiring to subscribe and pay for such new stock to which he would be entitled, to notify the other parties to the agreement by registered mail fifteen days before the time set for the payment of such new stock, of his intentions not to subscribe, in which event the other parties to the agreement would notify him of their desire, if any, to subscribe and pay for such new stock.

7. The capital stock of said Journal Square National Bank was increased from 2500 shares to 5000 shares. I subscribed and paid for ten shares and assigned my rights to subscribe for forty-five shares, but none of the parties to said agreement ever notified the other parties thereto of their intention as to whether or not they would subscribe or not subscribe to the new stock, or where they did not subscribe to the new stock, of the fact that they would not subscribe, the said paragraph 12 fixing the value of the rights under

said agreement, in the event that a person not subscribing gave to the other subscribers his right to subscribe.

8. It was the intention of the parties, in the execution of the agreement, that paragraph 13 apply only to new stock purchased by the parties to said agreement, which they were entitled to purchase as a result of their ownership of stock affected by said agreement or rights to subscribe to which they procured under the machinery provided in paragraph 12.

9. The stock of the Journal Square National Bank was originally issued at $130 per share. In 1925 and at the time of the execution of the aforesaid agreement, the officials of another bank were purchasing the stock of the said Journal Square National Bank of Jersey City in an endeavor to obtain control. The desires of said officials to obtain control were opposed by the signers of this agreement and it was because of this that said agreement was executed. It was desired to purchase additional stock, and in 1925, after the execution of said agreement, I purchased five shares of stock.

10. In the month of December, 1926, at a meeting of the board of directors of the Journal Square National Bank, John Warren notified the board that he had purchased from the officials of the aforesaid bank, who had been purchasing stock of said Journal Square National Bank, their holdings, consisting of 532 shares at a price of $195.50 per share, and that he had done so for the best interests of the bank because it was detrimental to our bank to have officials of another bank, who

were in competition with us, to hold more than 20 per cent of our stock, and at such meeting he offered to sell any portion of said stock to the other directors at the price at which he had bought it, stating that he did not want to own so much stock. None of the directors present would purchase any of the stock at that price, and some of the directors expressed the opinion that he had paid too much for the stock and that it could be bought cheaper on the market.

11. The increase in capital stock from 2500 to 5000 shares was made necessary by reason of the acquisition and alteration for banking purposes of the former Lerner Building, now known as the Journal Square Bank Building, title to which was taken by the Journal Square Bank Building Company in October, 1926; all of the stock of which said last mentioned company was and is now owned by the Journal Square National Bank of Jersey City. In the month of March, it was apparent that subscriptions for the increased stock were not being received and that less than 250 shares would be subscribed, including approximately thirty shares by directors. Mr. Warren conceived the idea of holding our depositors and interesting them in procuring business for the bank through a depositor-ownership plan, whereby a trust estate should be created which would sell shares to the depositors at $25 and with the proceeds, purchase the increased capital stock of the bank. Such plan was discussed by all of the directors at meetings and it had the approval of the entire board, and at one of the meetings of the board, I read the proposed trust agreement

to the board. The trust agreement was executed on April 11, 1927, and of the four trustees, three were signers of the agreement, namely, myself, Nicholas W. D'Elia and John Warren.

12. A circular letter to the depositors of the Journal Square National Bank, offering to them the opportunity of purchasing an interest in the bank by the purchase of trust estate shares was prepared and was read by me to the board of directors at the meeting held April 18, 1927, and unanimously approved.

13. John Warren was elected president of the trust estate and Nicholas W. D'Elia was elected treasurer of the trust estate, and said trust estate purchased 180 shares of the increased stock, with the knowledge of all of the directors of the bank, including directors Sexton and D'Elia. At a number of the meetings of the board of directors, Mr. Warren told of the difficulty he had in the sale of the increased capital stock, as a result of which, at a directors' meeting, I asked if a person not then a shareholder, but whom I believed would become a good depositor in the event that he had a stock interest in the bank, could purchase 25 shares. Mr. Warren, in the presence of the board, stated that he could, although the said proposed shareholder was unknown to him at that time. The proposed shareholder did pay for his stock, through Mr. Pecora, the cashier, and Mr. Pecora arranged the sale of fifteen additional shares to people who were already shareholders. At various meetings of the Board, Mr. Warren, stated that it was impossible for him to make payment for the unsubscribed capital stock, amounting to

over 2000 shares within the time provided by the board, and requested the members of the board to purchase some of the stock and to extend his time for payment. For the reasons stated, the board did extend Mr. Warren's time for payment on several occasions, but none of the directors would purchase any more of the stock than that for which they had already subscribed; Mr. Sexton and Mr. D'Elia, amongst others, on several occasions stating that the price was too high and they could purchase it for less money on the open market.

14. It was deemed necessary that the increased capital be paid for and issued before December 31st, and this was discussed at the board meetings. In the month of December, Mr. Warren stated that he thought it would be impossible for him to finance the purchase of such stock and stated that he could see no way out of the difficulty except to sell a controlling interest in the bank to somebody who would provide the funds for the increased capital. I was desirous of selling some of my stock holdings in the Journal Square National Bank and so stated to Mr. Warren. He advised me of negotiations that he was conducting for the sale of such stock and anticipated the successful conclusion of at least one of such negotiations. Mr. D'Elia and Mr. Sexton knew of the attempt by Mr. Warren to sell a controlling interest in the bank, because of the necessity for providing additional capital, and discussed the matter with me on several occasions during the month of December, 1927.

15. Mr. Warren, on December 29th, informed

me that he, himself, had arranged to obtain the money to purchase the 2,057 shares of stock of the new issue, which he subsequently paid for on December 20th. Messrs. Sexton and D'Elia and myself did not think Mr. Warren could personally finance the purchase of such a large amount of stock at a purchase price amounting to $514,250.00 and did not see how he could carry such stock in addition to his other holdings in the event that he was able to purchase it, the stock of the Journal Square National Bank not as yet having been paid a dividend. During the time that Messrs. D'Elia, Sexton, Warren and myself were discussing the possible sale of the controlling interest in the bank or the financing by Mr. Warren of the 2,057 shares of increased capital, including the unsold portion of the new issue, neither Mr. Sexton, Mr. D'Elia nor myself at any time claimed that if Mr. Warren purchased such increased stock, that it would be subject to the terms of the agreement of September, 1925. Since the execution of the 1926 agreement, which was not performed, there has never been any claim made by Messrs. Billington, D'Elia, Sexton, Warren or myself, nor any of us, to my knowledge, that the 1925 agreement was in force and that any of the increased stock which we might purchase at $250.00 would be subject to the terms of said agreement, which provided that a signer desiring to sell would be required to offer it to the other signers at $200.00 or book value, whichever would be the greater, book value of the stock on December 31st being slightly in excess of $200.00. No such claim was made until about a week ago, at the time when Mr. Warren was home ill, which was after he had

paid for such increased stock, such claim being made to me by Mr. Sexton, at which time I informed him that I did not agree with his contention. In the early part of the month of January, Mr. Warren acquainted me with the fact that he had made an agreement with Senator Edwards which would include the sale of any portion of the stock which I owned which I desired to sell, and I was satisfied with said arrangements and so informed him. Neither Mr. Sexton nor Mr. D'Elia informed me that they intended to institute an action against Mr. Warren and they did not ask me to join with them in such action.

16. During the two fights for the control of the bank, Mr. Sexton bought no stock and Mr. D'Elia bought but a few shares. Mr. Warren and myself jointly purchased 393 shares and Mr. Warren purchased additional shares. The stock which we purchased cost us $200.00 per share, 382 shares of which are in my name as trustee, in which Mr. Warren has one-half interest. When I talked with Mr. Warren, Mr. Sexton and Mr. D'Elia with reference to the sale of a controlling interest in the stock of the Journal Square National Bank, in the month of December, 1927, the agreement was never mentioned, and I understood, as did all the others, that they could sell their stock for more than $200.00 a share to anybody who would pay for it, without any consideration of the 1925 agreement, of which I, for one, did not even think.

JOSEPH B, PAYTON.

Sworn and subscribed to before
me this 14th day of January, 1928.

HENRY R. SALVI,
Notary Public of N. J.

Affidavit—Michael J. Sexton

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

MICHAEL J. SEXTON, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a director and vice president of the Journal Square National Bank of Jersey City, and have been such a director since the inception of the institution, and have been elected vice president in 1926, 1927 and 1928 at the annual meeting on January of each year.

2. I have read the contents of the affidavit made by the said John Warren, one of the defendents in this cause, and the substantial and material parts of said affidavit are not in accordance with the facts in paragraph 18 of said affidavit. He avers that he talked with myself, Mr. D'Elia and Mr. Payton about the difficulty of financing the purchase of the unsold portion of the new stock, and further that he told us that he could not afford to carry it, and further that he intended to sell a substantial portion of his stock,

including the stock unsubscribed for and lying in the treasury. This I deny emphatically. No such conversation ever took place while I was present, but to the contrary on January 5th, 1928, when Mr. Pecora presented certificates for my signature as Vice President, of the capital stock of the Journal Square National Bank, I understood specifically from Mr. Pecora that Warren had raised a loan, the proceeds of which went into the treasury of the Journal Square National Bank, and that the stock certificates, which I then and there signed, were to be hypothecated with the Guardian Trust Company of Newark until such time as the stockholders on the Board of Directors, and the stockholders generally subscribed their proportionate share of said stock, when they were ready so to do. I now understand, and understood when I filed this bill that prior to the issuance of this stock the said Warren had contracted to sell to Edward I. Edwards this block of over 2,000 shares of stock, which had laid in the treasury up to that time, and in order to consummate his deal it was necessary for him to have this stock issued in his name at $250.00 a share, although the contract just mentioned had previously, and before the stock was issued, been arranged with Senator Edwards at a price, which I am informed is $350.00 a share. By this deal the bank lost the advantage of the higher price, and Mr. Warren in violation of his duty as the chief executive personally profited to the amount of $200,000, or thereabouts on this block of stock.

3. In accordance with the agreement of 1925 if the Warren purchases so-called, were bonafide,

the signatories to the 1925 agreement had an absolute option to purchase this block of stock before anyone else legally could become entitled thereto, as far as Warren's obligation on his agreement went. It further violated the agreement of 1925, because by this sale he deprived the parties to the 1925 agreement of the advantages of the contract, which meant election to office and to the board of directors and control of the management of the bank, into which the signers of the agreement had induced their friends to invest.

4. Further answering the said affidavit I declare that the agreement of 1925 so-called, which is known as exhibit "A," was always adhered to by me, none of its provisions were ever violated by me, nor by any one else to my knowledge, until the said Warren violated it as above set forth.

5. The allegation in paragraph 2 of the Warren affidavit about the 1926 agreement is not correct because the 1926 agreement was never executed by the other party to it, to wit, the Gibraltar Bonds, Inc. Furthermore, if the said agreement of 1926 had any efficacy, it was by resolution regularly rescinded, and had never been performed in any manner. The allegations of paragraph 5 of Warren's affidavit that paragraph 11 of the 1925 agreement was never adhered to by the signers thereof is not true, because the parties to the agreement did confer prior to the stockholders' meeting when Mr. Warren would announce to us that the board would be elected as usual, and if there were any changes to be made, he would announce that fact as well.

I repeat at this point that the time within which the stock subscriptions could be taken up was extended to December 15th, 1927, and not extended further. That no resolution was ever passed permitting the said Warren to do as he might desire with the so-called Treasury stock, and when the said Warren attempted to take up the said so-called treasury stock, he did so without warrant or authorization of the board of directors, and had no more right to take up the said stock and sell it to a third party than any stranger to the Journal Square National Bank.

6. I deny the allegations in paragraph 13 wherein the said Warren alleges that after his purchase of 532 shares of stock which was held by another banking institution, that he offered to sell the said stock or any part of it to any one of the board while I was present.

7. In regard to the allegation in paragraph 10, that the said James Billington did not recognize the agreement, I have learned on January 9th, that the said Billington was forced to this position because the said Warren called a loan upon which Mr. Billington was an endorser in the sum of $30,000.00 and threatened Billington with suit. I further learned that when the said Warren obtained fifty shares of stock from the said Billington, he then and there extended the loan without the same being reduced in any amount, but on the mere payment of interest. If the said Billington violated the agreement by so doing, it was at the intimidation of Warren, who first violated this agreement, which was of his own draftsmanship.

8. After the time of the recapitalization, I never found that John Warren encouraged any one to take any of the stock, and know that Mr.

Weissenborn and myself at a meeting of the board charged Warren with refusing to permit us to sell stock to our friends, to which charge he made no reply. On January 9th and 10th, 1928, during our bank meetings I asked Mr. Warren whether it was true that a controlling interest in the bank had been sold, and he emphatically said no, and further stated that after these meetings the whole idea of selling the bank would be forgotten, as the public would realize that by the election of the same board, would indicate the fact that there had been no change of control.

9. Referring to paragraph 7 of the affidavit of Michael Pecora, which affidavit recites that on April 11th, 1927, at a meeting of the directors, at which I was present, a resolution was unanimously passed "forfeiting the rights of all stockholders who had not filed their subscriptions for the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren to do with as he sees fit, without any consideration for the rights," I hereby depose and say that never to my knowledge was any such resolution passed at that or any other meeting of the Board of Directors, nor was that proposition above quoted ever discussed.

10. Referring to paragraph 9 of the said affidavit, wherein it is recited that the rights of said Michael J. Sexton "were forfeited by the resolution of April 11th, 1927," this I also deny, and beg leave to refer to the minutes of the directors' meeting wherein it will appear that the right to pick up the stock to which each of the stockholders were entitled when the capitalization of the bank

was increased, was from time to time extended down to December 16th, 1927. I further say, in this connection, that I was ready and willing to take up my additional stock, and so stated to President Warren and the deponent Pecora. Warren discouraged the taking up of the stock, and put it off from time to time.

11. At this point I respectfully urge that there were several friends of mine who desired to subscribe for some of the stock of the bank which at this time was lying in the bank's treasury, and Mr. Warren discouraged the sale of any of the stock to any outsiders.

12. In reference to paragraph 12 of the Pecora affidavit, it is true that the said Warren reported to the board that he had difficulty in arranging his finances, but this applied only to his own stock, and not at all to the stock which was unsubscribed for and in the treasury. All during this time Warren was indebted to me on account of a loan which I advanced to him in August, 1926, in the amount of $25,000.00. He was also indebted to Nicholas D'Elia, who is a member of my family, in the sum of $27,500.00, which obligations are still undischarged. He cut down my note in the amount of $5,000.00, but the balance of $20,000.00, together with interest is still unpaid, and when the said Warren complained about finances, I understood that he was talking about his personal finances, and the several amounts just mentioned, which he owes.

MICHAEL J. SEXTON,

Sworn and subscribed to before
me this 15th day of January, 1928.

HARRY A. STILES,
Master in Chancery of New Jersey.

Replying Affidavit—Nicholas W. D'Elia

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

NICHOLAS W. D'ELIA, being duly sworn according to law, on his oath deposes and says:

The allegations and statements made herein in this affidavit are in reply to the affidavit filed in this cause by Michael Pecora.

1. I deny that at a meeting of the board of directors on April 11th, 1927, which is particularly mentioned in paragraph 7 of the affidavit of said Pecora, that any resolution was ever discussed or passed "forfeiting the rights of all stockholders who had not filed their subscriptions to the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren to do with as he sees fit, without any consideration for the rights"; but on the contrary I say that at the meetings of the directors, which meetings were held weekly, resolutions

were passed from time to time extending the time within which stock subscriptions might be filed, notwithstanding the time limit fixed by the original resolution for the taking up of those subscriptions.

2. By way of specific answer to the allegations of paragraph 10 of said affidavit, it is true that I was entitled to subscribe for 137 shares of the increased capital stock; and I called upon the President of the bank, John Warren, to take up these shares under my right of subscription. Mr. Warren informed me that I was not entitled to 137 shares, but only to ten shares, and that under our written agreement, which I will call the Gibraltar Bond Agreement, 127 shares of the stock were to be turned over to Gibraltar Bonds, Inc., by having that company subscribe for said 127 shares. This conversation between John Warren and myself took place prior to April 1st, 1927.

About two weeks ago, when the so-called Gibralter Bond Agreement was rescinded, I called upon John Warren and told him that since the Gibraltar Bond Agreement had been abrogated by the directors of Gibraltar Bonds, Inc., I became entitled to the 127 shares which Gibraltar Bonds, Inc., had subscribed for. Mr. Warren told me to forget it. His conduct on this occasion, and his conversation, did not at all deny that I was right in my demand, but he treated my demand as being something of a trifling nature.

It is true that the 10 shares which I subscribed for are not paid for, but this was with the acquiescence of Mr. Warren, who told me that when it was necessary to make payment for these shares he would let me know.

The affairs of the bank, as well as the affairs of Gibraltar Bonds, Inc., were handled by Mr. Warren in whatever manner he desired. The directors and officers of the bank at all times implicitly trusted him in his conduct of the affairs of both institutions.

Both of these agreements, the one of 1925, upon which my claim to relief as a complainant in this court is predicated, and the agreement of 1926, were drafted by Mr. Warren, and neither I nor my co-complainant, nor any of the signatories to said agreement, at any time had the benefit of independent counsel and advice. John Warren is a member of the Bar of the State of New Jersey, and it was never denied that these agreements were his sole and exclusive work.

As a further evidence of the fact that the time limit for payment of subscriptions to stock was extended, the said Warren did not pay for the said 2,277 shares mentioned in paragraph 12 of the Pecora affidavit until a day or so after New Year's Day, 1928. The time limit for taking up these subscriptions, as I said before, had been extended from time to time, and there was no extender of time beyond December 15, 1927. This statement is made by me on the representatio of Mr. Pecora, Vice President and Cashier of this bank, who gave me this information in answer to my question, at which time he called my attention to the fact that Michael J. Sexton, who is also Vice President of the bank, had not signed the stock certificate for John Warren until about a day or two after the advent of the new year.

Replying Affidavit—Nicholas W. D'Elia

3. The statement in paragraph 12 of the Pecora affidavit, that the members of the Board were invited to purchase some of this unissued stock, is not true; because never, to my knowledge or information, did Mr. Warren, at any meeting of the Board, make any such proposition. The exact contrary is true, because I know of several customers for the stock that were willing, through Mr. Sexton and myself, to purchase stock from the bank, and John Warren refused absolutely to sell the stock.

4. Mr. Warren, in his affidavit, says that the 1925 agreement, upon which the complainants in this suit rely, is abrogated by implication, or by the conduct of the parties. This is not true, as will appear from an examination of the agreement, under its terms, except by consent of all of the parties thereto.

It is a fact that within the past two months Mr. Warren called a meeting, for another purpose, at which I was present, and having to do with the formation of a national bank in downtown Jersey City. At that meeting, in discussing ways and means of retaining control of the bank, Mr. Warren said publicly, in the presence of a dozen others who attended that meeting, that the thing for this collection of individuals to do was to sign an agreement for their own protection similar to an agreement now existing in the Journal Square National Bank, where the stockholders and directors must sell to each other.

NICHOLAS W. D'ELIA.

Subscribed and sworn to before
me this 16th day of January, 1928.

HARRY A. STILES,
Master in Chancery of New Jersey.

Supplemental Affidavit—Nicholas W. D'Elia

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

NICHOLAS W. D'ELIA, being duly sworn according to law, upon his oath, deposes and says:

1. On January 6th, 1928, I went to John Warren's home in Englewood at his request. I was given to understand that he was ill, but when I saw him at his home he had no appearance of illness. I asked him how he felt and he said, "I feel fine." After a few words concerning his health, the conversation was turned to the bank. He said, "Nick, I am going to tell you something, but you must keep it quiet. I have contracted to sell the bank to Edwards, and the deal is to be closed between now and May 15th." I said, "What about this Weinberger crowd? Don't you think there may be some agreement." He turned to me and said, "that agreement is no good." I said, "what agreement," and he said, "that agreement of ours is no good, and Payton agrees with me that the agreement is no good." I replied that I do not know about that agreement of ours

not being good. He said, "do not worry, I am going to take care of you." He then told me that it was his purpose to buy stock now in the open market, and that if I was going to buy stock it would be better for us to work together in order that the price might not be advanced. I said, "I am not going to buy any stock." He pulled out a list from his pocket showing the names of the stockholders and the amount of stock held by each, and he said that starting tomorrow morning he was sending Armbruster out to buy all the stock he could. This was the first knowledge I had that control of the bank was passing. I kept this information to myself until the following Tuesday, the information having been given to me on Friday, January 6th, 1928. I did not divulge the information because I wanted to make sure of my own re-election on the board of directors of the bank so that I would be in a position to protect my interest and the interests of my friends. On the morning following, which was January 11th, 1928, I at once consulted counsel and instructed him to take such steps as were necessary to protect my rights. I deny paragraph 18 of Mr. Warren's affidavit.

NICHOLAS D'ELIA.

Sworn and subscribed to before
me this 15th day of January, 1928.

HARRY A. STILES,
Master in Chancery of New Jersey.

Supplemental Affidavit—Michael J. Sexton

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

MICHAEL J. SEXTON, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. As Vice President of the Journal Square National Bank, I executed the stock certificates which placed in the name of John Warren the two thousand and fifty-seven (2,057) shares of the capital stock of the bank mentioned in the bill of complaint. At the time of signing these several certificates which made up this amount of stock, I questioned Michael Pecora, cashier of the said bank, and he informed me that the matter was perfectly all right, and that the stock was to be placed with the Guardian Trust Company of Newark for a loan, and that the proceeds of said loan was to be placed to the credit of the bank, which I believed was done. At no time did I know or

was it represented to me that the said stock was issued to the said Warren in violation of the 1925 agreement, but it was represented to me by Warren, through the agency of Pecora, that the stock would be absorbed in time to come by the Board of Directors or other stockholders, or whomever might desire to purchase the stock of this bank. I am now informed and believe that at the time that this stock was issued by me in the name of Warren that he had a week prior or on December 30th, 1927, entered into an agreement to dispose of the majority of the stock of the said bank issued and outstanding, which meant control, to Edward I. Edwards, and that the Guardian Trust Company had on the same date, December 30th, 1927, made a loan to the said Warren in a large amount. The news that the bank and its control had passed to outside interests appeared in the public press some days later. Mr. Warren denied in articles that appeared in the public press, and they were attributed to him, that the bank had been so sold. He denied it to the board of directors on Tuesday, January 10th, 1928. The board of directors met on January 3rd for its weekly meeting and at that time no statement was made by Warren, its President, that control of the bank had passed. Warren was not present at the meeting and no letter of information came from him to that effect.

2. The annual meeting of the board took place on January 10th, and at that meeting when he was asked whether or not the bank had been sold and control was passed, he denied that it had been sold and had so passed to outsiders, and all the

time he was obligated by his agreement of December 30th, 1927, and had, in fact, pledged the stock with the Guardian Trust Company, as I am informed and believe, in order to carry out the terms of the contract. At the directors' meeting which took place on January 9th, he denied that the bank had been sold or that control had passed. The reason that Mr. Warren was questioned as to whether or not the bank had been sold was because of the statements attributed to Harry Weinberger, which appeared in the public press, the said Weinberger being one of the defendants herein, that the New Jersey Bankers Securities Company had acquired control of the said Journal Square National Bank.

3. At the directors' meeting of January 3rd, Joseph Payton, whom I believe to be secretly supporting the said Warren in this scheme, and whom I believe to be in agreement, and in total accord with all his actions herein complained of, represented to the board of directors that control of the bank had not been sold, and that the said Warren was a very sick man.

MICHAEL J. SEXTON.

Subscribed and sworn to before
me this 17th day of January, 1928.

STEPHEN P. PIGA,
Attorney-at-Law of New Jersey.

Affidavit—James Billington

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* and JOHN WARREN, et als, *Defendants.*	On Bill, etc.

JAMES BILLINGTON, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a director of the Journal Square National Bank, formerly the Bergen National Bank, of Jersey City. Replying specifically to paragraph seven (7) of the affidavit filed in this cause by Michael Pecora, in which he alleges a resolution was unanimously passed "offering the rights of all stockholders, who had not filed their subscriptions for the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren, to do with as he sees fit, without any consideration for the rights," which resolution, it is alleged was read at a meeting held April 11th, 1927, wherein it is recited that I was present, I positively declare that no such resolution was read in my hearing or voted upon by the Board of Directors.

2. I am one of the signatories to the 1925 agreement mentioned in the bill of complaint, and the

purpose of that agreement was, as I understand, to mutually agree and give to each of the signatories of that agreement, the option to purchase the stock of any party to that agreement, if said stock was to be sold. It is true as alleged by John Warren in his affidavit, paragraph ten (10), that I sold fifty (50) shares of my stock to him, but I call attention to the fact that the said stock was in fact transferred to Warren, who was one of the parties to the agreement, and that in accordance with his agreement he is in a position to permit the other parties to the said agreement to subscribe proportionately as their interests may be to the said fifty (50) shares, or any part thereof.

3. The facts surrounding my transfer of the stock to Warren were as follows: I was an endorser of a note in the principal sum of thirty thousand ($30,000.00) Dollars, which on January 9th, 1928, was past due. Warren for some reason or other, although I was not the maker of the note, and there were six endorsers, selected me as his target, and demanded payment constantly. On the day in question I was in the bank, and he called me into his office, and told me he was about to start suit against me for the principal and interest on the unpaid and past due note. I told him that my money was tied up in work, and I had no available cash to either pay the interest or discharge the note in full, or in part. I told him the only ready asset that I had available was my shares in the bank stock, and he said to me "if you want to sell the stock, I will buy it." I asked him what price, and he said two hundred and forty ($240.00) Dollars, and I said I would take it. He

gave me the money, and I effectuated the transfer of the stock to him. When this transaction was finished I paid him the interest only on the thirty thousand ($30,000.00) Dollar note, which amounted to seventeen hundred ($1700.00) odd dollars, and he renewed the said note for three months more. He then said "you have some other shares, do you want to sell them," and I said yes. He said "Very well, come in this afternoon, and I will take them from you at the same figure."

4. Mr. Warren at no time discussed with the Board of Directors the fact that he was negotiating, if he was, to sell the bank. I believe that neither Warren or any other individual could sell the bank or control thereof, at least without the consent of the signers of the 1925 agreement. When this agreement was presented to me for my signature Mr. Warren said that he had prepared the agreement, which would be for our mutual protection, I relied upon what he said, and signed the agreement without the benefit of independent counsel and advice, and believed, and still believe that the agreement protects the signers of it to the extent that control of the capital stock of this bank could not be transferred by any of the signers to any one without the unanimous consent of us all.

JAMES BILLINGTON.

Subscribed and sworn to before
me this 16th day of January, 1928.

SAUL NEMSER,
Master in Chancery of New Jersey.

Affidavit—Ray A. Weissenborn

IN CHANCERY OF NEW JERSEY

Between
NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants.

and

JOHN WARREN, et als,
Defendants.

On Bill, etc.

RAY A. WEISSENBORN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a director of the Journal Square National Bank, formerly the Bergen National Bank, of Jersey City. After the time of the recapitalization I never found that John Warren encouraged any one to take any of the stock, and know that Mr. Sexton and myself, at a meeting of the Board charged Warren with refusing to permit them to sell stock to their friends, to which he made no reply. I understood and knew that a resolution was passed, which extended the right to subscribe for stock until December 15th, 1927.

2. On January 9th and 10th, 1928, during our bank meetings, I asked Mr. Warren whether it was true that a controlling interest in the bank has been sold, and he said no, and further stated that after these meetings the whole idea of selling the bank would be forgotten, as the public would

realize that by the election of the same board, would indicate the fact that there had been no change of control.

RAY A. WEISSENBORN.

Subscribed and sworn to
before me this 16th
day of January, 1928.
HARRY A. STILES,
Master in Chancery of New Jersey.

Affidavit—Benjamin Heilbrunn

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* and JOHN WARREN, et als, *Defendants.*	On Bill, etc.

BENJAMIN HEILBRUNN being duly sworn, according to law, upon his oath, deposes and says:

1. I am a director of the Journal Square National Bank, formerly the Bergen National Bank, of Jersey City. Replying specifically to paragraph seven (7) of the affidavit filed in this cause by Michael Pecora, in which he alleges a resolution was unanimously passed "offering the rights of 11 stockholders, who had not filled their subscriptions for the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren, to do with as he sees fit, without any consideration for the rights," which resolution, it is alleged was read at a meeting held April 11th, 1927, wherein it is recited that I was present, I positively declare that no such resolution was read in my hearing or voted upon by the Board of Directors.

2. After the time of the recapitalization I never found that John Warren encouraged any one to

take any of the stock, I understood and knew that a resolution was passed, which extended the right to subscribe for stock until December, 1927.

3. On January 9th and 10th, 1928, during our bank meetings, I asked Mr. Warren whether it was true that a controlling interest in the bank had been sold, and he said "NO," and further stated that after these meetings the whole idea of selling the bank would be forgotten, as the public would realize that by the election of the same Board, would indicate the fact that there had been no change of control.

BENJAMIN HEILBRUNN.

Subscribed and sworn to before
me this 15th day of January, 1928.

HARRY A STILES,
Master in Chancery of New Jersey.

Affidavit—William Sullivan

IN CHANCERY OF NEW JERSEY

Between
NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants,
and
JOHN WARREN, et als,
Defendants.
On Bill, etc.

STATE OF NEW JERSEY:
COUNTY OF HUDSON } ss.

WILLIAM SULLIVAN, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am one of the organizers of the proposed Downtown National Bank; that at an Organization Meeting held within the past two months at the Carteret Club in Jersey City, John Warren, another one of the organizers and one of the main factors in said Organization, said publicly to all of the organization members present, "I have had several stock fights at the Journal Square National Bank, and we don't want any trouble arising with this organization, so that I would propose that we all sign an agreement along the same lines as the agreement we now have at the Journal

Square National Bank, under which we agree not to sell to any outsiders, but to each other."

WILLIAM SULLIVAN.

Sworn and subscribed to
before me this 16th day of
January, 1928.

SAUL NEMSER,
Master in Chancery of New Jersey.

Affidavit—Andrew Muro

IN CHANCERY OF NEW JERSEY

Between
NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants.

and

JOHN WARREN, et als,
Defendants.

On Bill, etc.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss.

ANDREW MURO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the organizers of the proposed Downtown National Bank; that at an Organization Meeting held within the past two months at the Carteret Club in Jersey City, John Warren, another one of the organizers and one of the main factors in said Organization, said publicly to all of the organization members present, "I have had several stock fights at the Journal Square National Bank, and we don't want any trouble arising with this organization, so that I would propose that we all sign an agreement along the same lines as the agreement we now have at the Journal

Square National Bank, under which we agree not to sell to any outsiders, but to each other.''

ANDREW MURO.

Sworn and subscribed to
before me this 15th day
of January, 1928.

HARRY A. STILES,
Master in Chancery of New Jersey.

Affidavit—Robert V. Kinkead

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY, COUNTY OF HUDSON } ss:

ROBERT V. KINKEAD, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am a director of the Journal Square National Bank and have been so for more than a year last past. At one of the meetings of the board of directors during the month of December, 1927, Michael J. Sexton, one of the complainants in this cause, taxed John Warren with the fact that he, Sexton, had offered, personally and through friends, to take up a portion of the unsubscribed stock. This discussion arose because the said Warren stated at one of the said meetings in December that the unsubscribed stock was, in fact, open to the public to purchase whenever they so desire. The said Sexton took issue with Warren at that time, and said that he personally had

brought several persons to subscribe for some of the stock of the Journal Square National Bank, and that his offer and others, so to do, had been rejected. Then and there and in my presence and hearing, Ray Weissenborn, another of the directors of the Journal Square National Bank, stated at the meeting and to Mr. Warren that he had been ready and willing to take up part of the issue, but that he had not been encouraged so to do, and there the discussion ended.

2. At the board of directors' meeting of January 9th, a statement having previously appeared in the columns of the public press that control of the bank had been sold, and several of the directors having asked Mr. Warren if that was so, he then and there denied it and said it was all poppycock.

ROBERT V. KINKEAD.

Sworn and subscribed to before me
this 19th day of January, 1928.

STEPHEN P. PIGA,
Attorney-at-Law of N. J.

Affidavit—Thomas F. Shiels

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

THOMAS F. SHIELS, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a director of the Journal Square National Bank and have been such for a year last past. My attention is directed to a statement in the affidavit of Michael Pecora, wherein he says that on April 11th, 1927, a resolution was passed "forfeiting the rights of stockholders who have not filed their subscription to the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren to do with as he sees fit, without any consideration for the rights," such resolution was never passed at any such meeting. I do not remember the resolution being even discussed and so far as my knowledge goes, same was never adopted by the board of directors.

2. Furthermore, the time limit within which stock subscriptions might be picked up by stockholders was from time to time extended, the end of the last extender being December 15th, 1927. After that date, the stock, according to my understanding and of the members of the board of directors with whom this matter was generally discussed from time to time, the stock was to be treasury stock and was not to be issued without the consent of the board, or without laying the same before the board for discussion and action.

3. I am informed that a contract was entered into between the said John Warren and Edward I. Edwards, to sell to the said Edwards the controlling interest in this bank. This information appeared in the public press. At the directors' meeting of January 9th, this year, the directors asked Mr. Warren whether this was the fact. Mr. Warren pooh-poohed the idea and said it was all poppycock. At the stockholders' meeting of January 10th, Mr. Warren again denied that control of the bank had passed to any one or was in contemplation. Furthermore, at the said meeting of January 9th, Michael J. Sexton, one of the directors of the bank, stated publicly to the said Warren that he had from time to time endeavored to subscribe for additional stock as had Nicholas W. D'Elia, who was the son-in-law of the said Sexton, and furthermore, at that very meeting the said Sexton said that he was even at that late date ready to subscribe for additional stock. The said Warren, in answer to this, made no reply whatever. At the said meeting, Mr. Weissenborn, who is a member of the board of directors of this

bank, also asserted he had signed his subscription for additional shares of the capital stock of the Journal Square National Bank, but that he received no further information from Mr. Warren or any other official of the bank as to when the stock might be received by him, although he was ready and willing to take up his stock upon notice.

THOMAS F. SHIELS.

Subscribed and sworn to before me
this 18th day of January, 1928.

STEPHEN P. PIGA,
Attorney-at-Law of N. J.

Affidavit—John Warren

Filed January 20, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

JOHN WARREN, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. Answering paragraph 4 of the said affidavit, the said 1925 agreement was amended by the agreement of 1926 entered between the other signers of the 1925 agreement and myself, which was never performed by the complainants, the 1925 agreement being made a part of the 1926 agreement.

2. Answering paragraph 5 of said affidavit, the only parties to the 1926 agreement were the parties to the 1925 agreement, the other parties to the agreement agreeing with me to exchange their stock and said agreement was fully executed by

all of the parties thereto. The company whose stock was to be exchanged for the stock affected by said 1925 agreement, agreeing to all of the conditions provided in said 1926 agreement, it drawing stock certificates for delivery to the parties to the 1926 agreement. The reason the said 1926 agreement was not performed was that the complainant, Nicholas W. D'Elia, informed me that he could not pay off his collateral loans against the Journal Square National Bank stock and that he could not arrange to substitute with the bank that had loaned him money, the stock which he was to receive in exchange for his bank stock. He was a member of the board of said company. Because of the inability of Mr. D'Elia to perform his agreement, it has never been carried out and because said agreement which modified the 1925 agreement was not carried out by the complainants, it was never performed by the other parties thereto.

3. Answering paragraph 8 of the said affidavit, I do not recollect that at any meeting of the board of directors, except January 9th, 1928, either Mr. Weissenborn or Mr. Sexton charged me with refusing to permit them to sell stock to their friends. If such charge had been made, I would have denied the charge because it was not true. At the meeting of the board held on January 9th, 1928, Mr. Weissenborn and Mr. Sexton, the latter of whom then knew of the contract entered into with Senator Edwards, stated that they had been willing to subscribe for stock. Mr. Weissenborn stated that he had subscribed but had not paid. This was untrue and I made Mr. Weissenborn admit that

at the time the rights to subscribe existed that he was not the owner of any of the stock of the Journal Square National Bank, but that I had arranged to put ten shares of stock in his name to qualify him as a director, for which stock he had not paid and had not purchased any additional stock until the month of October, 1927, when I insisted that he purchase qualifying shares and that he had assigned his subscription to the true owner rather than having subscribed himself. Mr. Sexton admitted that he had not subscribed but said that his son had assigned his rights to subscribe to ten shares to his daughter, who had subscribed but that she had not paid either before or after December 15th, 1927. It is not true that Mr. Sexton asked me on January 9th and 10th, 1928, during the bank meetings whether it was true that a controlling interest in the bank had been sold and that I said no and that after these meetings the whole idea of selling the bank would be forgotten, the truth of the matter being that on the morning of January 9th, I told Mr. Sexton of the agreement entered into with Senator Edwards and he was familiar with the details thereof prior to the meetings of January 9th and 10th, 1928. He apparently was satisfied because he did not in any way object thereto and said he thought that he would sell all his stock and did not at that time or at any other time, say to me that I had no right to sell such stock because of the 1925 agreement.

4. Answering paragraph 9, not only was Mr. Sexton present at the meeting of April 11th, 1927, at which the resolution forfeiting the rights and

turning them over to me was passed unanimously, but he was also present at the meeting of the board of directors held April 18th, 1927, at which the minutes of the meeting of April 11th, including the resolution aforesaid, were read, which minutes were unanimously approved as read.

5. Answering paragrapjh 10 of said affidavit, Mr. Sexton never stated, until the meeting of January 9th, 1928, which was after he knew of the agreement entered into with Senator Edwards, that he was willing to take up additional stock that at that meeting I said that he had not subscribed although he had an opportunity to do so. I never, at any time, discouraged the taking up of the stock, although I had to put off from time to time the payment for such stock which was left upon my hands by the lack of support of the board of directors especially and the stockholders generally. At the time that the rights were turned over to me on April 11th, 1927, I believed that I was in a position to sell a substantial amount of the stock to the Journal Square National Bank Trust Estate and that I was financially in a position to take up any unsold part of the increase. As stated in my former affidavit, only 180 shares of stock were sold to the Trust Estate and while the effort to sell Trust Estate shares was being prosecuted, I paid the sum of $300,000 for the entire capital stock of the proposed Downtown National Bank of Jersey City and in order to do this, I had to borrow a large sum of money. When I raised this money and made such payment, it was upon the representation of the then attorney for the organizers that a certificate of authority to do busi-

ness would be procured within a couple of days. He was not able to procure such certificate and the question as to whether or not the certificate would be issued was put off from time to time until the month of January, 1928, and from May 18th, 1927, until January 5th, 1928, I was carrying the loan which enabled me to pay for such stock. On the last-mentioned date, I paid off my loans by a surrender of a portion of the stock with the exception of 140 shares. On December 29th, 1927, I made new financial arrangements which would enable me to pay for the 2,057 shares of the capital stock upon the following day. In order to do this it was necessary that I make arrangements to pay off my other loan in connection with the aforesaid Downtown National Bank and I had to repay such loan in order to arrange the new financing to pay for the Journal Square National Bank stock. My loss in connection with the said Downtown National Bank financing was in excess of $11,500.00. Mr. D'Elia was one of the organizers of the Downtown National Bank and knew of my financing of the payment of the capital of that bank and that it prevented me from paying for the capital stock of the Journal Square National Bank.

6. Answering paragraph 11 of said affidavit, I knew of only one friend of Mr. Sexton's who desired to purchase any of the increased stock of the bank and I did not discourage such sale. In the Spring of last year and after the passage of the resolution of April 11th, 1927, forfeiting the rights and turning the the stock over to me, Mr. Sexton told me that a Mr. Frank Madden, who was a de-

positor and who had business with other banks, would like to buy 100 shares of the stock and would bring all of his business to our bank; that as a depositor he had received notice of the sale of shares of the Journal Square National Bank Trust Estate and did not desire to purchase such shares but wanted the bank stock itself. I told him that he could do so and to send Mr. Madden to me. At a later date, Mr. Sexton told me that he had seen Mr. Madden and had told him of our conversation and that Mr. Madden would come to see me. Mr. Madden later called at the bank and inquired from me as to whether or not he could buy 100 shares of stock and I told him that he could. He told me that he would take the stock and pay for it later. Mr. Madden did not do anything further about the matter and before I had paid for the increased capital stock, I spoke to Mr. Sexton about the matter and he told me that Mr. Madden had decided to buy some stock which was paying dividends rather than to invest in stock of this bank which has not yet paid a dividend.

7. Answering paragraph 12 of said affidavit, I say that at the board meetings I never referred to any financial difficulty of mine, but only the financial difficulty of arranging to raise over a half million dollars to pay for the increased capital stock which I then had on my hands and at the board meetings mentioned the amount of money which I had to pay for such stock and of my inability to do so pending the settlement of the Downtown National Bank charter matter. Mr. Sexton has at no time loaned me any money. In

the month of August, 1926, Mr. Sexton agreed to invest $25,000 in the stock of a company and at the last moment decided that he did not want to purchase the stock but said that he would advance the money because his agreement to advance the same had been relied upon by others, provided that I would personally give him a note for that amount of money, suggesting that I take the stock in my name and when the stock was disposed of, to pay him the note. The stock has not been disposed of and in the month of December, 1926, he told me he needed $5,000.00 and I gave it to him out of my own funds. Not until January 13th, 1928, did he demand payment of the balance to which, by the terms of our agreement he was not entitled. I caused word to be sent to him to present his note before six o'clock on that day. He did not appear with the note and I saw him the following day when I offered to pay him, but he refused to take my uncertified check. I arranged to give him a certified check on January 16th, 1928. He went to the bank upon which it was drawn with the person to whom I had given my check, to have it certified. It was certified, but Mr. Sexton refused to take it and deliver the note, insisting that the check be cashed before the note be delivered. This was done and he got his cash. It is not true that during the time set forth in said paragraph 12, that I owed Mr. D'Elia $27,500.00. When he called at my house on the sixth, instant, he asked me if I would purchase for $15,000.00 three-fifths of the stock he held in a company. I told him that I would be unable to do so at once but could do so after May 15th, 1928, when I received payment

from Mr. Edwards. He said that this would be satisfactory to him and asked me if I would give him a note if he would assign the stock, as he wanted to have the matter settled and I told him I would do so. On Monday, the ninth, instant, when I called at the bank, Mr. D'Elia was waiting for me and he had two notes, one for $10,000.00 and one for $15,000.00 and he asked me to purchase all of his stock. I told him that I would do so upon the same terms. He already had the notes made out dated January 3rd and payable June 3rd, 1928. The reason that he had dated them at the beginning of the year was because the dividends on the stock were paid to December 31st. Outside of an undetermined amount of indebtedness, I owed Mr. D'Elia no money whatsoever prior to January 9th, 1928, the amount of such indebtedness about $2,500.00, being determined on January 9th, at which time I added ten per cent. to the amount of his bill in order to give him a proper profit on the work he had done.

8. I have read the supplemental affidavit of Mr. Sexton. I never told Mr. Pecora to represent nor did I ever say to Mr. Pecora that the increased capital stock which I had purchased would be absorbed in time to come by the board of directors, other stockholders or whomever might desire to purchase the stock of the bank.

9. On December 29th, 1927, as aforesaid, I made arrangements for financing the payment for the increased capital stock. For a few days prior to this and with the knowledge of both complainants, I had been negotiating for the sale of a controlling interest in the bank, including the in-

creased capital stock, in order that the increase may be effectuated prior to the publication of our statement of December 31st, 1927. As stated in my previous affidavit, one of the complainants negotiated with a proposed buyer and the other sent a proposed buyer to me and both discussed with me at various times the possibility of sale and the price to be obtained as both desired the increase in stock to be in our statement of December 31st, 1927. These conversations with Mr. Sexton and Mr. D'Elia were after December 23rd and prior to December 30th, 1927. On December 30th, immediately after payment for the capital stock, I left the city to spend the New Years and did not return until the afternoon of January 2nd. In this time I did not see any of the directors of the bank. I was ill in bed at my home on January 3rd, upon which date the agreement with Senator Edwards was signed. On January 4th I told Directors Payton, D'Elia, Stanton, Schlossberg and Max. I was ill at my home on January 5th, 6th, 7th and 8th; I returned on the morning of January 9th, on the morning of which day I told Mr. Sexton of the agreement with Senator Edwards and the details thereof. Directors Pecora and Elmer also knew of the sale prior to the meeting of January 9th. I did not feel that either Directors Billington or Weissenborn would keep confidential any information pertaining to such sale and it was the desire of Senator Edwards and myself that it be kept confidential until consummated. Immediately after the meeting on January 9th, I informed Mr. Schenck of the sale. From that time until the institution of the suit, I did not have the opportunity of talk-

ing confidentially with either Messrs. Shiel, Heilbrunn or Kinkead, the remaining directors. Nine out of the fifteen directors, including both complainants, knew about the sale when they attended the meeting on January 9th and Mr. Sexton was present at the meeting on January 10th, 1928. Neither Mr. Sexton nor Mr. D'Elia objected to keeping the information confidential from certain directors and they did not speak of the sale at either of said meetings. Three of the directors to whom I did not impart the information as to the sale of stock, either through design or lack of opportunity, held only ten shares of stock apiece, one held twenty shares and the other sixty-three shares out of a total issue of 5,000 shares.

10. I have read the replying affidavit of Mr. D'Elia. Not only was Mr. D'Elia present at the meeting of April 11th, 1927, at which the resolution forfeiting the rights to subscribe to the new stock and turning over the stock to me was passed, but he was also present at the meeting of April 18th, 1927, at which the minutes of the meeting of April 11th, 1927, were read and unanimously approved as read. It is not true that resolutions were passed from time to time extending the time in which stock subscriptions might be filed notwithstanding the time limit fixed by the original resolution for the taking up of those subscriptions. The time limit for me to pay for the new stock which had been turned over to me and which I was forced to take because of my position, was extended from time to time.

11. It is not true, as stated in the second paragraph of said affidavit, that he called upon me to

take up 127 shares under his right of subscription. There was no necessity for him to discuss with me his right to subscribe to any shares for which he was free to subscribe. He did see me about assigning his right to subscribe. The agreement of January, 1926, was not before us at the time and our recollection was different as to the number of shares which he had agreed by such agreement, to assign to the Company therein mentioned.

12. It is not true that about two weeks ago Mr. D'Elia called upon me and stated that he was entitled to 127 shares. After the meeting of January 9th aforesaid and while a number were still around the directors' room discussing many things, he called to me across the room and said that he should have received five dollars a share for the rights which he had assigned and that inasmuch as eventually I had paid for that stock, that I should pay him five dollars a right for 127 rights. I told him that those rights had been forfeited because the assignee had not subscribed and that I thought that I had been put to enough trouble, worry and expense in connection with this financing. He did not say anything more to me about the matter and both of us were smiling at the time. He did not claim on that or on any other time that he was entitled to purchase 127 shares of stock and the day the bill and order were served upon me, I talked to him on the phone and asked him what was the matter and he said that I owed him five dollars a share for 127 rights. I asked him to come to the bank to see me to talk about the matter and he said that he would do so. When he did come he said that that was not what

he was fighting about, but that he could not tell what he expected to accomplish thru the suit.

13. It is not true that I told him that when it was necessary for him to make payments for the shares that I would let him know. He knew that it was necessary that all the increased stock be paid for before the publication of our statement of December 31st, 1927. He was in daily conversation with me about the matter of paying for the increase or selling a controlling interest to some other banking interest in order to obtain the money to pay for the stock.

14. Whether or not Mr. D'Elia had the benefit of independent counsel or advice I do not know. I do know that he has been a law student since 1925 and that he refused to sign either the 1925 or 1926 agreement until he could show them to his lawyer. Before he signed them, he told me in each case, that he had seen his lawyer and that he had been advised that they were all right.

15. I did not pay for 2277 shares of the increased capital but did pay for 2057 shares, the difference being made up by 180 shares of the stock purchased by the Trust Estate aforesaid, of which Mr. D'Elia was one of the Trustees and Treasurer, 25 shares sold to a friend of Director Payton, 15 shares sold to two other shareholders. It is not true that I did not pay for the 2057 shares until a day or so after New Years, the payment being as before alleged, on December 30th, 1927.

16. It may be true, as stated in the affidavit of Mr. D'Elia, that he knew of several customers for the stock that were willing, thru Mr. Sexton and himself to purchase stock from the bank, but

neither he nor Mr. Sexton acquainted me with any of such proposed customers except Mr. Frank Madden and Mr. Andrew Muro. Mr. D'Elia desired to have Mr. Muro elected to our Board of Directors and in the month of May, I talked with Mr. Muro and told him that I would sell him stock as he did not then own any. .Almost immediately afterwards, Mr. Muro became identified with the Downtown National Bank where he thought he would make a more valuable director and for that reason did not purchase stock in our bank.

17. It is not true, as stated in the affidavits of Messrs. D'Elia, Sullivan and Muro that at the meeting of the organizers of the Downtown National Bank, I stated that the thing for said organizers to do was to sign an agreement similar to the one then existing in the Journal Square National Bank, where stockholders and directors must sell to each other. At that meeting we were discussing solely the purchase of at least one half of the stock by the directors and providing for each director to be obligated to offer his stock to the other directors in the event that he desired to sell, the price to be at the best price obtainable from an outsider. There never has been an agreement affecting the majority stock of the Journal Square National Bank or any agreement executed by all of the directors.

18. It is not true that I told Mr. D'Elia that I would let him know when it was necessary for him to make payment for the ten shares of the increased capital stock.

19. I have read the supplemental affidavit of Mr. D'Elia, which refers to a visit which he made

to me at my home on January 6th. The conversation which is related in said affidavit pertaining to giving him information as to the contract I had made with Senator Edwards did not take place. Mr. D'Elia knew about the contract aforesaid on January 4th, when I told him about it, discussed with him the price of stock that he was to receive and in which conversation he told me that everything was all right as far as he was concerned, that he thought he would sell enough stock to Senator Edwards to pay his collateral loans and keep the balance and remain as a director. Mr. D'Elia called on me at my request for the purpose of having him intervene to prevent action against a friend of his who at that time was withholding stock of mine in another bank and against whom I had the preceding day threatened to take action.

20. I have read the affidavit of James Billington. I have looked at the minutes of the meeting of April 11th, 1927, at which the resolution mentioned in his affidavit was passed and find that he attended said meeting and said minutes note that he was present at said meeting and the minutes of the meeting of April 18th, 1927, at which the minutes of the meeting of April 11th, 1927, were read and approved was, according to the minutes, also attended by Director Billington.

21. The facts in connection with the sale of Mr. Billington's stock to me and the renewal of the note upon which he is endorser, are as follows: It is true that the said note was past due on January 9th, 1928, and for some time prior thereto. Mr. Billington originally arranged for the loan and because he was a director, I put it up to him

that he should see to it that the note was renewed. For some time and with the knowledge of the Directors, I was insisting that he obtain a renewal of the note in full with a payment of interest, upon Mr. Billington's belief that it was impossible to cut the note. The reason that the note was not renewed was because I would not accept a renewal unless the renewal note was endorsed by all of the previous endorsers and one of the endorsers was in disagreement with Mr. Billington and refused to endorse the renewal note because Mr. Billington owed him money. On January 4th, I telephoned to Mr. Billington and asked him to come to the bank. He did and I told him that the note had to be renewed and taken out of the past due paper and that we did not want to push him but that we had to have it made alive. He told me that when a building he was erecting was finished and a second mortgage could be procured, that then the note would be paid. He also stated that it was difficult to collect interest from some of the endorsers. I told him to tell the man who refused to endorse that he was liable on the old protested note and that unless he did endorse promptly, that the bank would institute action against all of the makers and endorsers and that he would be liable to have a judgment entered against him and I told him to tell this to the said endorser in no uncertain terms. On January 9th, 1928, when I was at the bank, I found that the note had been left here endorsed by the man who Mr. Billington was told to see but that it had not been renewed because the interest and discount had not been paid. He said that he could secure the said

endorsement because he had lately paid the man a large sum of money on an old indebtedness. I again called Mr. Billington and had him come to the bank and told him that he should collect from each endorser his share of the interest and discount. He said that that was hard to do, that if he had the money he would pay it himself and told me of all his financial troubles. He told me that he would like to sell his stock in the bank. I told him if it would help him out I would buy it, but that I would not like to see him get out. He asked me how many shares he could sell and still remain as a director and I told him he had to keep ten shares. He asked me the price that I would pay and I told him that the last sale that I knew of was $240.00 per share. He told me that he would take that price for 61 shares of stock which were owned by himself and a member of his family and with the money he would pay the interest and discount and renew the note which was made out for the original amount. I gave him two checks on that day, aggregating $12,000 and he delivered to me fifty shares of stock. He did not, at the time of the above transaction say anything about the 1925 agreement or any other agreement.

22. After this suit was instituted and on January 13th, I telephoned to Mr. Billington, but could not reach him. I got him on the phone on the 14th and he came to the bank and I told him that I had not felt that I could tell him about the agreement that I had entered with Mr. Edwards, that my purchase was in order to help him out and was in the nature of a loan and I did not tell him of the sale to Mr. Edwards because he had been un-

friendly to me for some time past and that he told all his business affairs to a man who was a director in a rival bank, but that in the agreement with Mr. Edwards I had provided for the purchase of stock of an amount which would include his, for which he could receive $300 a share on May 15th; that I wanted him to take back his stock as I intended at the time that I paid him for same merely to help him out and return the stock to him when Mr. Edwards paid for the controlling interest in the bank. He told me that he did not want it back. I urged him not to be foolish and lose money and he said that he had spent the money that I had paid to him. I told him that he could have thirty days in which to pay for the stock and he could have it back again. This was two days before he made his affidavit in this cause.

23. On the 14th, when I talked with him I said that at no time, even the time when I gave him the money, did I ever think of the 1925 agreement that was mentioned in this suit and he told me that he had not done so, that he thought that was a thing of the past and that there was no such agreement as would prevent him from getting $240 for his stock and have to sell it to anybody else for $200.

24. I have read the supplemental affidavit of Mr. Sexton made January 19th, 1928. Mr. Sexton never told me that he was ready and willing, as were friends of his whom he procured, to subscribe for part of the unissued stock of the Journal Squal National Bank, except Frank Madden, heretofore mentioned. I did not decline to sell stock in small lots to outsiders excepting Trust

Estate shares, which he undoubtedly refers to in his said affidavit. As a matter of fact the last effort to sell Trust Estate shares was in the early part of June, 1927. It is not true that I made no reply at the meeting of January 9th to him when he said that he had been willing to subscribe for some of the increased capital stock and had others who were willing to do so. At that time, in a conversation before the Board, I made him admit that he had not subscribed himself for any of the stock and that a member of his family, who had an assignment of the right to subscribe, had not paid therefor and stated that at no time was I unwilling to sell stock. At no time prior thereto, at any meetings of the Board or at any other time was such charge made to me or in my presence.

25. I admit that a letter such as quoted in said affidavit, was sent out on or about April 22nd, 1927. I was not present at the meeting of the Board on April 18th, 1927, but the minutes show that this letter was read to the Board by the Vice President and approved and that Messrs. Sexton and D'Elia were both present at the meeting and that neither objected to the approval of the letter. It is not true that the entire capital stock had not been subscribed for at that time, the fact being that it had been entirely subscribed for through subscriptions of other stockholders and my agreement to take up and pay for the balance of the issue.

26. I never informed Mr. Pecora or told him to inform Mr. Sexton or any one else that 2057 shares of the increased capital which I purchased, was to be placed as collateral for a loan with the Guardian Trust Company at Newark, for the ben-

efit of the bank, in order that the stock might be issued in accordance with the direction of the Comptroller of the Currency, the fact being that the Comptroller of the Currency had approved the issue of the stock on December 30th, 1927, Mr. Sexton signing the stock certificates on January 5th, 1928. I never gave Mr. Pecora or anybody else to understand, nor did I direct him to say anything which would give anybody else to understand that such stock might thereafter be absorbed by the directors and stockholders of the bank, and that the loan had been thus procured on this issue for the benefit of the bank, so that the stockholders when ready, might pay for the stock at $250, and in that manner discharge the loan pro rata.

27. Mr. Payton was not, as charged in the said affidavit, either a secret or public partner of mine in the matter of the sale of the stock. I did not and he did not, to my knowledge, do anything whereby either he or I would secretly profit or could hope to secretly profit at the expense of the stockholders and of the bank. Mr. Sexton did violate the 1926 agreement which was entered into with me and a part of which was the 1925 agreement because he never performed the same. I did nothing which was a fraud upon the stockholders and the signers of the 1925 agreement as alleged in paragraph 3 of said affidavit and did not know of any verbal understandings from time to time entered into as therein alleged.

28. I discussed the proposed sale of the bank with directors other than the signers of the 1925 agreement, such as Messrs. Stanton, Elmer and Pecora and this before the agreement with Senator

Edwards was entered into. Mr. Payton is not my partner in an attempt to sell a controlling interest in the bank, or in an endeavor, in violation of our duties to this bank, to seek profit by putting thru the sale with Senator Edwards at the expense of the institution and the stockholders, nor have I violated any obligation that I owe to the bank, to the stockholders, to the signers of the said agreement or to the depositors.

29. Other than the twenty shares of increased capital stock which I sold after I paid therefor, and since the acquisition of the 532 shares purchased from the officials of another bank as aforesaid. On December 27th, 1926, I sold ten shares, on the same date I sold ten more, on December 29th, 1926, ten shares, on January 10th, 1927, ten shares, on March 9th, ten shares, on the same date another ten shares, all of which fifty shares were of the lot purchased from said officials and on November 29th, 1927, twenty-five shares. The said twenty-five shares were sold to a person under the following circumstances: One of the directors of the bank said that he had a customer who would become a depositor if he could purchase stock. At that time, we could not deliver certificates for new stock and I told said director that I would sell twenty-five shares of the stock I then owned because they would be replaced when I paid for the new stock. This was done, he introduced his customer who purchased said stock and opened a good account in our bank.

30. I have read the affidavit of Robert V. Kinkead and say that the meeting to which he refers as having taken place in the month of December,

1927, was in fact the meeting of January 9th, 1928, about which I have already disposed.

31. I have read the affidavit of Thomas F. Shiels. Neither Mr. Shiels nor any other member of the Board of Directors discussed with me that the increased capital stock was to be treasury stock and was not to be issued without the consent of the Board, or without laying the same before the Board for discussion and action, the fact being that the members of the Board were very anxious to have the stock paid for and I am informed that on January 3rd, 1928, at the meeting of the Board they were all delighted that I had paid for the stock, but felt sorry that they had unloaded such a heavy burden upon me and discussed relieving me of part of the burden.

32. On December 30th, 1927, Senator Edwards was in Washington. An agreement between him and myself was drawn and signed by me and by his attorney on his behalf and on that date, the said attorney paid to me the sum of $50,000. On January 3rd, 1928, Mr. Edwards called at my house where I was ill in bed and a new agreement was drawn, slightly modifying the one executed by his attorney on December 30, 1927, and dated back to December 30th, 1927.

33. In entering into the agreement with Senator Edwards, I believed and still believe that I was entering into an agreement which would be of benefit to all of the stockholders of this bank who might desire to retain their stock after the change of interest. As evidence of this, the market of the stock of this bank is higher today than it has ever been in its history and rose sharply after

newspaper stories that Senator Edwards was to become President of the bank. I believed and still believe that within six months after the introduction of Mr. Edwards as President of this bank, that the deposits of the bank will be increased by several millions of dollars. This will result in better earning capacity for the stock and an increase in the market value thereof.

34. Neither Senator Edwards nor any one else would purchase 2057 shares out of 5000 in this bank for $250 per share or any other sum. Senator Edwards did not agree to buy the 2057 shares of the increased capital stock which I paid for on December 30th. He agreed to buy a controlling interest in this bank without regard as to what shares of stock were to be delivered to him. He was not interested in whether it was old stock or increased capital stock and he would not consider purchasing any amount of stock less than a controlling interest. Under the agreement, Senator Edwards agreed to buy stock in addition to control, if it was offered to him, this being inserted in the contract at my request, to enable any director who desired to sell his stock, to be able to do so at a good profit.

35. I am not obligated in any way, under my contract to deliver to Senator Edwards 2057 shares of the increased capital stock. I am the owner of 3250 shares, 191 of which are in the name of Joseph B. Payton, Trustee.

36. After performing my contract with Mr. Edwards, I shall still own more stock than the complainants and hope to remain as a director and be-

come a vice president. I have agreed with him to remain and co-operate with him in the management of the bank.

37. I made no attempt to sell my stock until after December 23rd, 1927, when I was denied a loan which would have enabled me to pay for the said 2057 shares.

JOHN WARREN.

Sworn and subscribed to before me
this 20th day of January, 1928.
JOSEPHINE R. WILSON,
Notary Public of N. J.

Affidavit—Michael Pecora

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

MICHAEL PECORA, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I have read the affidavit of Benjamin Heilbrunn. The minutes of the meeting of April 11th, 1927, on which day the resolution mentioned in his affidavit was passed, show that Mr. Heilbrunn was not present at any time during the meeting and so could not have heard the resolution read at that meeting.

2. The records of the minutes of the following meeting held on April 18th, 1927, show that the minutes of the meeting of April 11th were read and approved as read and that Mr. Heilbrunn was present at the meeting of April 18th, 1927. Mr. Heilbrunn often came in late to meetings and whether or not he was present at the

time the minutes of the previous meeting were read, I cannot say.

3. It is not true that the right to subscribe for stock was extended by the board until December 15th, 1927. The right to pay for the stock was extended to that date. The records of the meetings of the board of directors show that out of thirty-seven meetings of the board of directors held from and including April 11th, 1927, to and including December 27th, 1927, Mr. Heilbrunn was absent from twenty-one meetings.

4. With reference to the statement in paragraph 10 of Mr. Sexton's affidavit that he was ready and willing to take up his additional stock and so stated to me, I have to say that Mr. Sexton did state to me that he was willing to buy 25 shares of the increased stock but this was after January 3rd, 1928. He at no time prior to the time that Mr. Warren paid for the stock, had made such a statement to me or indicated to me in any way that he was willing to buy increased stock and pay $250.00 a share therefor.

5. There was no stock in the treasury of the bank at any time. That stock about which Mr. Sexton speaks in paragraph 12 of his affidavits was part of the authorized increase for which payment had not been made.

6. With reference to his statement in paragraph 12 of Mr. Sexton's affidavit, I have to say that when Mr. Warren mentioned at board meetings that he was unable to pay for his stock, he mentioned that he had to pay over $500,000.00 for the stock and that because of his financing in connection with the payment by him of the

$300,000 capital of the Downtown National Bank, that he was unable to raise such a large sum of money, that he expected that to be settled and when it was he would be in a position to finance the payment of the 2,057 shares for which he had to pay.

7. I also read the supplemental affidavit of Mr. Sexton. I did not tell him that the stock was to be placed with the Guardian Trust Company of Newark for a loan and that the proceeds of said loan was to be placed to the credit of the bank. The stock certificates for the 2,057 shares were signed on January 5th, 1928. On January 3rd, 1928, Mr. Sexton was attending a meeting of the board of directors at which each director was given a copy of the statement of the bank as of the close of business December 31st, 1927. This statement had been previously published in the newspapers of January 3rd, 1928. This statement showed that the capital stock of the bank had been increased, was then $500,000.00 with a surplus of $350,000.00 and undivided profits of $152,980.63. At the preceding meeting of the board of directors, held December 27th, 1927, statements were distributed to the directors, including Mr. Sexton, showing the condition of the bank as of the close of business December 24th, 1927, which statement showed that on December 24th, the capital stock was $250,000.00, surplus $50,000.00, and the undivided profits $24,917.01.

8. At the meeting of the board of directors held on January 3rd, 1928, which meeting Mr. Warren did not attend, due to illness (I had been to Mr. Warren's home on that morning to see him

and found him very ill and apparently suffering from pain and under the effects of an opiate and so reported to the board), I told the members of the board that Mr. Warren had paid for the stock on December 30th, 1927, and that we had received our certificate of approval of the increase from the Comptroller of the Currency on that date and that the increased capitalization was put through our books on said date.

9. Somebody asked how Mr. Warren had been able to finance the payment of such a large sum of money and I answered that he had arranged a loan in the Guardian Trust Company of New Jersey. One director asked how much stock Mr. Warren pledged and I thought that it was over 3,000 shares. Mr. Sexton was present during all of this conversation.

10. At this meeting, Mr. Payton, who presided, said that the board had placed an awful burden upon Mr. Warren in leaving to him the purchase of such a large amount of the increased stock, that they had not done their duty, and that they ought to relieve him of the burden and agree to buy some of the stock themselves and stated that the payment of interest alone on the money he must have borrowed to make such payment would be a very heavy financial burden upon him.

11. I have never stated to Mr. Sexton or to any other person that the 2,057 shares of the increased capital stock purchased by Mr. Warren would be absorbed in time to come by the board of directors or other stockholders, or whomever might desire to purchase the stock of this bank.

12. I have also read the replying affidavit of

Mr. D'Elia and say that the rights of the then existing stockholders to subscribe to the increased capital stock of the Journal Square National Bank of Jersey City were forfeited by the resolution of the board of directors passed at this meeting held on that date, as set forth in my former affidavit and no resolutions were passed by the board extending the time for the filing of stock subscriptions beyond April 1st, 1927.

13. It is not true as stated in the said affidavit of Mr. D'Elia that Mr. Warren paid for 2,277 shares of the increased capital stock a day or so after New Year's day, 1928. Mr. Warren paid for 2,057 shares of the increased stock, which completed the payments of all of the increased stock on December 30th, 1927.

14. I also have read the supplemental affidavit of Mr. D'Elia. I went to Mr. Warren's house with Mr. D'Elia on January 6th, 1928, at Mr. Warren's request, not for the purpose of having Mr. D'Elia discuss the affairs of the Journal Square National Bank, but because Mr. Warren, that morning, asked me to bring Mr. D'Elia to his home that afternoon in order that he might discuss with Mr. D'Elia the possibility of him intervening to obtain some stock of another bank which belonged to Mr. Warren, which was in the possession of a friend of Mr. D'Elia. I had been out there in the morning of January 6th, 1928, and found Mr. Warren in bed and while I was there, the doctor called and Mr. Copeland and I left the room while the doctor was at Mr. Warren's bedside. In the afternoon, when I called with Mr. D'Elia, Mr. Warren was still in bed

and when Mr. D'Elia asked how he felt, he said that he felt better and that he had no pain that day, but that the doctor had recommended that he go to the hospital for observation and catheterization, but that he had decided not to do so until he could have another x-ray taken when he was able to go out or when had had physical evidence of the necessity of so doing.

15. He did not tell Mr. D'Elia that he was going to tell him something which he must keep quiet and that he had contracted to sell the bank to Mr. Edwards. Mr. D'Elia knew about the agreement with Senator Edwards before he went to Mr. Warren's home on that day as Mr. Warren told him about it in my presence at the bank on January 4th, 1928. At that time, Mr. D'Elia said that he thought that he would like to remain as a director if Senator Edwards were going to be the president and sell enough stock to pay off only his collateral loans. While talking to Mr. Warren, Mr. D'Elia asked him if he would buy $15,000.00 worth of stock in a company. Mr. Warren stated that he was willing to buy it but could not do so at this time but would be able to do so after he received his payment from Senator Edwards on May 15th, 1928. Mr. D'Elia said that that would be satisfactory to him and suggested that Mr. Warren give him a five months note and that if he would do so, he would assign the stock to him.

16. I was present at the meeting of December 27th, 1926, when Mr. Warren informed the board of directors that he had purchased 532 shares of stock which had been purchased in the previous

year by officials of another bank which had sought to obtain control of the Journal Square National Bank. On that occasion, he told the directors that any of them who desired could purchase some of the stock at the price he paid for it and asked if they wanted to do so. None offered at that time to do so, some of them stating that he had paid too much for the stock.

17. I never stated to Mr. Sexton, as stated in his first affidavit filed in reply, that the stock certificates which I signed for the 2,057 shares of increased capital stock were to be hypothecated with the Guardian Trust Company of Newark, until such time as the board of directors or stockholders generally subscribed their proportionate share of stock when they were ready to do so. On December 30th, when Mr. Warren paid for the increased capital stock, I executed and delivered to him certificates for such payment for 2,057 shares of the increased capital stock, showing that he would be entitled to receive that number of shares of stock upon the approval of the increase by the Comptroller of the Currency, which certificates to the amount of 2,057 shares were deposited by him with the Guardian Trust Company of New Jersey as collateral on a loan and the certificates for the 2,057 shares signed by Mr. Sexton were for the shares called for by the before-mentioned certificates and certificates of stock for 2,057 shares were substituted as collateral for the temporary certificates as aforesaid.

18. I have read the affidavit of Mr. Sexton made on January 19th, 1928. It is true, as stated in paragraph 1 thereof that a letter as stated

therein, was sent to the depositors of the bank. His allegation that the entire issue of stock has not been subscribed is entirely false, the fact being that on the date of the said letter, agreements to purchase the entire increased capital stock had been entered into with the bank. The above-mentioned letter was read at a meeting of the board of directors held April 18th, 1927, at which Mr. Sexton and Mr. D'Elia were present. The minutes with reference thereto read as follows:

> "Vice President Payton read to the board a circular letter proposed to be sent to all of the depositors of the Journal Square National Bank offering them the opportunity to become stockholders of this institution through the Journal Square National Bank Trust Estate. This letter was approved."

There were no objections to the approval of such letter. The minutes of said meeting of April 18th, 1927, were read at the meeting of April 25th, 1927, the said portion of the minutes as above-quoted, being read at the meeting of April 25th, 1927, aforesaid and the minutes of the aforesaid meeting of April 18th, were, at the meeting of April 25th approved as read, no objections to such approval being made or noted. At the meeting Messrs. Sexton and D'Elia were present.

19. I did not represent to Mr. Sexton that the increased capital stock issued in the name of Mr. Warren, viz.: 2,057 shares, was to be placed as collateral for a loan with the Guardian Trust Company at Newark, for the benefit of the bank,

in order that the stock might be issued in accordance with the direction of the Comptroller of the Currency. Both Mr. Sexton and I knew that the Comptroller of the Currency had no power to give any directions as to the issuance of the stock, he having approved the increase on December 30th, 1927. I said nothing to the effect of or which would give Mr. Sexton an understanding that the said stock might thereafter be absorbed by the directors and stockholders of the bank and that the loan had been thus procured on this issue for the benefit of the bank, so that the stockholders, when ready, might pay for the stock at $250.00, and in that manner discharge the loan pro rata, nor did I have any such understanding or thought.

MICHAEL PECORA.

Sworn and subscribed to before
me this 20th day of January, 1928.

OSWALD ELMER,
Notary Public of N. J.

Affidavit—Harold W. Taylor

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

STATE OF NEW JERSEY } SS:
COUNTY OF HUDSON }

HAROLD W. TAYLOR, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I am a doctor of medicine, practicing my profession at No. 92 East Palisade Avenue, in the City of Englewood, County of Bergen, and State of New Jersey; that on December 19th, 1927, I was called to the home of John Warren, 235 Engle Street, Englewood, New Jersey, and found him suffering from kidney cholic. He has been under my care from that date until the present time, the stone not as yet having passed.

2. He was confined to his home with a severe attack on January 3rd, 1928, on which date I attended him. I also attended him on January 4th, 5th, 6th and 7th. I arranged with the Englewood Hospital to have an x-ray picture taken of Mr.

Warren on the morning of January 5th after which, under my orders, he went to bed and stayed until Sunday, January 8th, on which day he was up for a little while but very weak. He suffered severe pains and was given opiates for his relief on the 5th, instant, and was weak and in no condition to go to work on the sixth and seventh.

3. On the sixth, instant, when I attended Mr. Warren, I recommended that he take a room in the hospital and stay there for observation and recommended catheterization. He said that he did not want to do it and would let the matter open until the next day when it was decided that he could remain at his home.

HAROLD W. TAYLOR.

Sworn and subscribed to before me this 19th day of January, 1928.

MORELL BIRTWHISTLE,
Notary Public for N. J.

Affidavit—R. P. Schenck

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

R. P. SCHENCK, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I am one of the directors of the Journal Square National Bank of Jersey City. I was present at the meeting of the board of directors held on December 27th, 1926, when John Warren told the board that he had purchased 532 shares of stock which had been held by officials of another bank and at that meeting he offered to sell any part of the stock to any of the directors at the price for which he paid for it. At this meeting some of the directors stated that they thought he paid too much for this stock and none of them offered to purchase any of it.

2. Outside of the meeting, I told Mr. Warren that I would buy ten shares and this I did and he transferred ten shares of said stock to me on December 29th, 1926.

3. When the stock warrants of the new issue of stock were issued, I subscribed for all the stock to which I was entitled to subscribe and paid the sum of $250.000 per share. I had knowledge that the board, by resolution, forfeited the rights of those who had not subscribed and turned over such rights to John Warren. At that time, it was understood that the Journal Square National Bank Trust Estate would offer its shares to the depositors of the bank and that with its capital purchase the increased stock of the said bank. Only 180 shares of stock were so purchased by the Trust Estate, leaving over 2,000 shares of stock for which the directors looked to Mr. Warren for payment. The time for payment of same was extended from time to time and the ability of Mr. Warren to pay therefor before December 31st, 1927, in order to have the increase go through before our financial statement was published, was discussed at board meetings. Mr. Warren in May, informed the board that he had paid in $300,000.00 as capital of the Downtown National Bank, expecting that this would be temporary and not interfere with his payment for the increased capital stock. Thereafter, on several occasions, Mr. Warren informed the board that the application of the charter for the Downtown National Bank was still pending and that it would be impossible for him to make payment for the increased capital stock until he could withdraw his money substantially from that proposition, it being stated by Mr. Warren at board meetings, that it was a difficult thing to finance a payment of over $500,000.00.

4. Mr. Warren did not attend the meeting of the board held on January 3rd, 1928. Mr. Sexton and Mr. D'Elia were present. At this meeting, each director had a financial statement as of December 31st, 1927, showing that the capital had been increased. Mr. Pecora reported that this had happened on December 30th, that Mr. Warren had paid in over $500,000.00 for over 2,000 shares of the increased capital stock. It was asked how Mr. Warren was able to do it, some of the directors saying that they did not think it was possible. Mr. Pecora informed us that he had obtained a loan from the Guardian Trust Company of the City of Newark and I inquired as to how much stock had been pledged. Mr. Pecora said he thought it was over 3,000 shares.

5. At the meeting of the board held on January 3rd, 1928, Mr. Payton, who presided, stated that the board had placed a big burden upon Mr. Warren in leaving to him the purchase of such a large amount of stock and that they ought to relieve him of the burden and buy some of the stock themselves, stating that the payment of interest on the money he must have borrowed to make such payment would be a heavy burden upon him and that he did not see how he could carry the stock.

6. I know that 180 shares of the increased capital stock were sold to the Trust Estate aforesaid and that other shares were sold to other people. Mr. Warren, on several occasions, suggested that the obligation to pay over a half million dollars was a very heavy one and that the directors could and should buy more stock, most

of the directors not having purchased any of the increase at all.

7. I was under the impression that Mr. Warren did not want to carry such a heavy load and was willing to sell the increased stock to the directors or others in order that he might be relieved from the obligation of paying therefor.

8. I asked John Warren, in the month of March, 1927, to sell ten shares of stock and he agreed to do so, making such sale on March 9th, 1927.

R. P. SCHENCK.

Sworn and subscribed to before
me this 19th day of January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.

Affidavit—Thomas J. Stanton

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

COUNTY OF HUDSON
STATE OF NEW JERSEY } SS:

THOMAS J. STANTON, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I am one of the directors of the Journal Square National Bank of Jersey City and have been since January 13th, 1925. I was present at the meetings of the board of directors of said bank held on April 11th, 1927, and April 18th, 1927. At the first-mentioned meeting, the resolution mentioned in the first affidavit of Michael Pecora was discussed and passed and at the following meeting held April 18th, 1927, the minutes of the previous meeting were approved as read and the resolution aforesaid, forfeiting the rights to subscribe was read as a part of the minutes which were approved. During the discussion in connection with the resolution aforesaid, Mr. War-

ren stated in effect, that he was sorry that the stock had not been subscribed in greater amounts, that he hoped that through the Journal Square National Bank Trust Estate, a large number of depositors would become interested in the bank and that the said Estate would take a large number of shares of the unsubscribed stock, but that the increase had to go through and that he would pay for all stock unsubscribed or for which payments would not be made. It was upon this understanding that the aforesaid resolution was passed and from that time on all of the directors looked to Mr. Warren to pay for the unsubscribed or unpaid for increased capital stock.

2. Mr. Warren informed the board that he had acquired control of the application for the charter of the Downtown National Bank of Jersey City and had paid in the capital of $300,000.00, that his investment would be for only a short time as he expected the certificate of authority to do business to be issued shortly and that then the stock would be distributed and that this being so, it would not stand in his way of raising the money necessary to pay for the increase of stock. Mr. Warren stated from time to time that the Downtown National Bank matter was still pending, that his money was still invested and that he had to borrow so much money for that investment that it made it impossible for him to finance the payment of over a half million dollars to pay for the increased capital stock which was unsubscribed and unpaid for. The matter of paying for this increased capital stock was discussed on several meetings as well as Mr. Warren's then inability to

raise the necessary money. On several occasions, directors asked Mr. Warren if he was certain that he would be able to raise the large amount of money required to take over this stock. On all these occasions he assured the directors most emphatically that he would be able to do so and he cited his ability to raise large sums when needed heretofore as, for instance, when officials of another bank in Jersey City attempted to acquire control of this stock and also the time when he bought 532 shares from officials of another bank. Mr. Warren, on all these occasions, said that the one thing that was holding him up was the Downtown National Bank situation.

3. I discussed with other directors, on numerous occasions, the increase of the capital stock question and among these were Messrs. Sexton and D'Elia. None of these ever suggested or intimated that Mr. Warren was not acting solely in his own behalf in subscribing for the shares of the increased capital stock. In these discussions, the question of the price of the new stock was discussed and most of the directors felt that the issue price of $250.00 was too high and they stated that it was for that reason that they did not subscribe for any of the new stock. I remember one occasion, at a meeting of the board which took place several months ago, when this matter of new stock was being discussed as well as the price of the same, Mr. D'Elia said before the whole board that he would not pay $250.00 a share for the stock when he could go out in the open market and buy it for much less. It was then mentioned that the market price of the stock was about

$230.00. Mr. D'Elia said that only a few days before that he had bought some stock for $215.00.

4. I was present at the meeting of the board of directors held on December 27th, 1926, at which time Mr. Warren announced that he had purchased from the officials of a certain bank in Jersey City 532 shares of stock of this bank which was then held by them. Mr. Warren stated that he had paid $195.50 per share for the stock and that he was willing to let any member of the board participate in that purchase at the above price. No member of the board offered to take any of the stock at that time or at any other time to my knowledge. Several members of the board, at that meeting, expressed the opinion that Mr. Warren had paid a high price for that stock. I remember particularly that Director Max said that he had an opportunity to buy the same block of stock at a lesser price. Mr. Warren said that perhaps he had paid more for it than it was then worth but that it was not only expedient but necessary to take this substantial block of stock out of the hands of officials of a competing bank in Jersey City and for that reason he was willing to pay more than the then market value of this stock.

5. I was present at the meeting of the board of directors held on January 3rd, 1928. Mr. Warren was ill and confined to his home on this day and Vice President Payton presided at the meeting. In the course of the meeting, reference was made to the fact that it had been rumored in the past day or two that it had appeared in the newspapers of that date that the controlling interest of stock

in the bank had been sold. In the course of this discussion, it was adverted to that Mr. Warren had, in the past week, paid for the balance of the increased capital stock for which he had subscribed. Some member of the board inquired as to the manner in which he had financed this payment and it was brought out that Mr. Warren had arranged for a loan at the Guardian Trust Company. Some director inquired of the cashier as to how many shares of stock were issued in the name of Mr. Warren and the cashier gave an exact number of shares which was in excess of 3,200. A member of the board calculated the carrying charge of his stock to Mr. Warren, including the increased stock which he had paid for and it was estimated that it would cost him in excess of $40,000.00 a year to carry it. This subject was discussed for more than an hour and a half in my hearing and during that time, several directors expressed the opinion that this was too much of a burden for Mr. Warren to be carrying and if possible, the directors should relieve him of some of the burden that he was laboring under. Different directors suggested that they were willing to purchase some of the stock from him and to endeavor to sell some more of it among their friends. Mr. Weissenborn and Mr. Sexton were among the leaders in this discussion and they repeated on several occasions that they could dispose of a substantial part of this stock which Mr. Warren held. Several other directors stated that all directors previously had an opportunity to buy some of this new stock at the price of $250.00 a share and that they should have volunteered at

that time to purchase the stock and not at this late date. One director stated that the reason why he did not subscribe for any of this new issue was that the issue price of $250.00 was in his opinion too high a price. At no time during this discussion did any director state or intimate that the increased capital stock for which Mr. Warren had paid during the previous week was not his own absolute property. At this meeting, no director stated that he would offer to purchase from Mr. Warren any particular number of shares. All statements were general ones, several directors stating that they would be willing to purchase some of the stock from Mr. Warren and to seek buyers for more of the stock. Mr. Sexton, during the conversation, stated that he felt sure that if a campaign were started that within the course of a couple of months, a fair distribution of stock could be made among the directors and their friends, if Mr. Warren were willing to part with any of his stock. At no time during said meeting, or at any other time in my presence, did Mr. Sexton or Mr. D'Elia state that Mr. Warren was acting as a fiduciary for the bank and neither of them objected to the proposition that Mr. Warren sell the stock which he had purchased to other directors or to the friends of such director. This meeting started shortly after three o'clock and I remained at it until a few minutes before five o'clock. Our meetings customarily adjourned between four and four-thirty and I had several appointments made at my office between four-thirty and five-thirty on this day and I asked to be excused just before five.

6. During this meeting, I sat immediately next to Mr. Sexton. As the discussion of lightening Mr. Warren's burden of carrying said stock continued at such great length, I remarked to Mr. Sexton that the subject was being discussed at such great length and regardless of what length of time we discussed it we could not get any place because we were talking about purchasing stock from a man who was not present, that no matter what we said at this meeting that we could do nothing unless Mr. Warren agreed to it. I stated that a discussion at such great length was useless without Mr. Warren being present to partake in it. Mr. Sexton replied, in effect, that it was a good thing to discuss these things and that it did not do any harm.

THOMAS J. STANTON,

Sworn and subscribed to before
me this 20th day of January, 1928.

OSWALD ELMER,
Notary Public of N. J.

Affidavit—James P. Meehan

IN CHANCERY OF NEW JERSEY

Between Nicholas W. D'Elia and Michael J. Sexton, *Complainants,* and John Warren, et als, *Defendants.*		On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

State of New Jersey
County of Hudson } ss:

JAMES P. MEEHAN, of full age, being duly sworn, upon his oath, deposes and says:

1. I have read the affidavits of Andrew Muro and William Sullivan, filed in this cause.

2. I also was one of the organizers of the proposed Downtown National Bank and some months ago, at a meeting of the organizers, held at the Carteret Club in Jersey City, John Warren, also one of the organizers, said that there were 10,000 shares of stock to be issued; that 5,000 were to be paid for by the directors and 5,000 sold to the public. Mr. Warren said that while he had paid for all of the stock, that he did not want to "hog it" and suggested that the fairest thing would be for every director, including himself, to own an equal amount of the said 5,000 shares. Most of the directors present agreed to take such amount of stock. Mr. Warren also said that there had been

several stock fights for the control of the Journal Square National Bank and that he did not want to go through it again, and that it was only fair that the organizers, who had helped to build up the bank in its early days would be able to remain as part of the controlling interest if they so desired, and that there should be an agreement by the majority stockholders, meaning the board of directors that in the event that they wanted to sell any of their stock, that they should first offer it to the other members of the board, at whatever price they could obtain for it in the open market. Mr. Nicholas W. D'Elia, who was present, then said, "That's the way it should be in our bank." I asked him the meaning of the words "our bank," and he said, looking at John Warren, "the Journal Square National Bank." Mr. Warren replied, saying "with what mistakes we made there, Nick, we will profit in this bank."

3. Neither at this meeting, nor any other meeting did Mr. Warren propose that the organizers sign an agreement along the same lines as "the agreement which we now have at the Journal Square National Bank under which we agree not to sell to any outsiders but to each other," nor did he at any time refer to any agreement then existing between any of the stockholders of the Journal Square National Bank.

4. From the conversation aforesaid, I understood that Mr. D'Elia regretted that the directors of the Journal Square National Bank of Jersey City did not own and have tied up under a buy-and-sell agreement, the majority of the stock of said bank. The only thing which we discussed

at said meeting was an agreement affecting the majority stock.

JAMES P. MEEHAN.

Sworn and subscribed to before
me this 19th day of January, 1928.

JOSEPHINE WILSON,
Notary Public of N. J.

Affidavit—Joseph B. Payton

IN CHANCERY OF NEW JERSEY

Between

NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants,

AND

JOHN WARREN, et als,
Defendants.

On Bill, etc.
On Order to Show Cause.
On Motion to Vacate Restraint

STATE OF NEW JERSEY
COUNTY OF HUDSON } SS:

JOSEPH B. PAYTON, of full age, being duly sworn upon his oath, deposes and says that:

1. I have read the affidavits of Andrew Muro and William Sullivan made in this cause and dated respectively January 15th, 1928, and January 16th, 1928.

2. About the month of September, 1927, I was present at the meeting of the organizers of the Downtown National Bank of Jersey City, mentioned in the said affidavits. I remember John Warren stating in effect, that there had been several fights for control in the Journal Square National Bank and that he would not participate in the organization of another bank unless the board of directors owned at least fifty per cent of the stock and that he recommended that the fifty per cent of the stock be divided equally amongst the directors of the Downtown National Bank and that

they enter into an agreement requiring them to offer the stock for sale to the other directors, in the event that they wanted to sell, for the same price for which they would receive any bona fide offer and that this should be done in order that those who would organize and develop the bank would be enabled to continue in office, if they so desired, and which would prevent the absorption of the bank by another institution with the result that those who had built the bank would not be thrown out of control.

3. I have no recollection at all of Mr. Warren having mentioned any agreement affecting the stock of the Journal Square National Bank.

JOSEPH B. PAYTON.

Sworn and subscribed to before
me this 18th day of January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.

Affidavit—William Neumann

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint

STATE OF NEW JERSEY:
COUNTY OF HUDSON: } ss.

WILLIAM NEUMANN, of full age, being duly sworn, on his oath, deposes and says:

1. I am a depositor of the Journal Square National Bank of Jersey City, and an architect by profession, and was the architect in the alteration of the Journal Square Bank Building, which work was done during the year 1927.

2. Because of this professional engagement, I saw a great deal of Mr. Warren during the entire year. Some time in the spring, he spoke to me about purchasing some of the increased capital stock of the Journal Square National Bank at $250.00 per share. I was not a stockholder, but told him that I would consider the matter, and on three or four occasions during that spring and the following summer, he spoke to me about the

matter, urging me to purchase some of such increased stock, but I decided not to do so.

WILLIAM NEUMANN.

Subscribed and sworn to before me.

JOSEPHINE R. WILSON,

Notary Public of N. J.

Affidavit—Harry J. Max

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Motion to Vacate Restraint

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss.

HARRY J. MAX, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. One day during the early part of the summer of 1927, while at the Journal Square National Bank with William F. Moore, discussing a banking matter with John Warren, the President of the bank, Mr. Moore asked Mr. Warren if I could buy twenty shares of the increased capital stock at $250 per share. Mr. Warren said that I could do so and would be glad to have me as a shareholder but I decided not to buy. I could have had the stock if I wanted to, but did not want it.

HARRY J. MAX.

Sworn and subscribed to before me
this 17th day of January, 1928.
ROSE BELINKOFF,
Notary Public of N. J.

Affidavit—Thomas F. Shiels

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA and MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.

THOMAS F. SHIELS, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I recollect that at one or more meetings of the Board of Directors of the Journal Square National Bank of Jersey City, John Warren said in effect, that he had borrowed money in order to pay in the $300,000 capital of the Downtown National Bank, that he was expecting this to be a temporary matter, that it was not cleaned up quickly and that this prevented him from arranging further loans which would enable him to pay in the more than $500,000 which he had to pay for the increased capital stock of the Journal Square National Bank and asked for extensions of time from time to time for such payment.

THOMAS F. SHIELS.

Sworn and subscribed to before me this 19th day of January, 1928.

ROSE BELINKOFF,
Notary Public of N. J.

Supplemental Affidavit—Michael J. Sexton

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY } ss:
COUNTY OF HUDSON }

MICHAEL J. SEXTON, of full age, being duly sworn, on his oath according to law, deposes and says:

1. I am one of the complainants herein and I repeat that I was ready and willing, and so were others whom I procured, to subscribe for part of the unissued increased capital stock of the Journal Square National Bank, but that I was never able so to do because when the question was raised by me from time to time, I could get no satisfaction whatever from Mr. Warren, who continually evaded that issue. When I spoke to him about selling some stock in small lots to outsiders, he absolutely declined so to do, except on a unit system whereby parties could subscribe for one-tenth of one share, if they became or were depositors. At the meeting of the board of directors on Janu-

ary 9th, 1928, in the presence of the board, I charged Warren that I had offered to take up some stock, and had others who were willing to take up some stock, to which he made no reply. The same charge was made by me at other meetings prior to this date and by others, who were in the board. Under date of April 22nd, 1927, the said Warren, president of the bank sent out a circular letter to the depositors of the Journal Square National Bank, in which the following language appears, "as you know, our bank has voted to increase its stock by 2,500 shares, to which the present stockholders were entitled to subscribe; the entire issue has been subscribed, but in order to establish depositor ownership, a few other large stockholders have co-operated with me and have given to the Journal Square National Bank 'trust estate,' options to subscribe for a substantial portion of the new stock in their place, which will, when issued, be deposited in the Trust Department of our bank, and there held for the benefit of the shareholders of the trust estate." The statement that the entire issue has been subscribed is entirely false, such was not the fact at that time, and never was the fact until the said Warren, as charged in the bill, secretly and fraudulently attempted to issue the said stock to himself.

2. At the time the stock was issued in the name of the said Warren, he, Warren, represented to me through the agency of Pecora, cashier, that the stock issued at that time, viz.: 2,057 shares was to be placed as collateral for a loan with the Guardian Trust Company at Newark, N. J., for the benefit of the bank, in order that the stock might

be issued in accordance with the direction of the Comptroller of the Currency. When this was done, it was my understanding through the said Pecora, that the said stock might thereafter be absorbed by the directors and stockholders of the bank, and that the loan had been thus procured on this issue for the benefit of the bank, so that the stockholders, when ready, might pay for the stock at $250.00, and in that manner discharge the loan pro-rata. All the time this complainant charges that the said Warren was in agreement with Edward I. Edwards to deliver up the controlling interest in the bank, said agreement having been made, as I am informed and verily believe on December 30th, 1927. This complainant further says that this stock, like the existing holdings of stock, of the said Warren in this bank, were subject to the 1925 agreement, which agreement was violated by the said Warren, but never by me. I relied upon the said agreement and adhered to the covenants thereof.

3. The said Warren is a member of the bar of the State of New Jersey, is chief executive officer of the bank and its chief fiduciary agent, and is a member of the firm that is counsel to the bank as well. He conducted the affairs of the bank in whatever manner his own judgment dictated, and the board of directors supported him, believing as they had the right to believe, that he would not in this fashion secretly attempt to profit because of the position of trust which he held. This complainant charges that his action in so doing, as has been herein outlined, was a fraud upon the stockholders and the signers of the 1925 agree-

ment, because of the provisions of the said agreement, and other verbal understandings from time to time entered into.

4. The above quotation from the circular letter of the said Warren to the depositors, which was sent out on April 22nd, 1927, is a verbatim copy of that particular paragraph of the letter, which this complainant will produce at the hearing on this motion to vacate.

5. I have read an affidavit made by Joseph B. Payton wherein he said the increased capital stock had to be issued and paid for before December 31st, and that this was discussed at board meetings; this is not the fact, the last time limit fixed for the issuance of stock being December 15th, 1927. The further statement in paragraph 14 of the Payton affidavit that Warren said he could see no way out of the difficulty except to sell a controlling interest in the bank to someone, who would provide the funds for the increased capital, is not true. Such a statement was never made at any meeting of the board. Whether or not such a statement was made to Mr. Payton I do not know, but I charge Payton is the secret partner of Warren in this whole transaction, and he, too, at the expense of the stockholders and in violation of his duties as an officer of this bank hoped secretly to profit at the expense of the stockholders and the institution. The said Payton is signatory to the 1925 agreement, and whether or not he has violated that agreement is something that I do not know, but I repeat that I have not violated it or any of its covenants. His further statement in paragraph 14 of his affidavit that Mr. Sexton "knew of the attempt by Mr. Warren to sell a controlling inter-

est in the bank'' is absolutely without foundation and fact. In the Payton affidavit, paragraph 15, wherein he says ''Messrs. Sexton * * * and myself did not think that Mr. Warren could personally finance the purchase of such a large amount of stock at a price amounting to $514,250.00'' is untrue, because I never discussed this purchase of the stock by Mr. Warren with Mr. Payton at any time. Further in paragraph 15, the statement ''during the time that Messrs. D'Elia, Sexton, Warren and myself were discussing the possible sale of the controlling interest in the bank or the financing by Mr. Warren of the 2,057 shares of increased capital,'' I say that such a discussion never took place between the parties mentioned, nor did I ever discuss the proposition with any of them singly or with any person. It appears by paragraph 15 of the said affidavit that Mr. Warren acquainted Payton with the facts of the agreement made with Edward I. Edwards, and that that agreement would also include the Payton holdings, and I now repeat and charge that the said Payton was secretly a partner to the fraudulent scheme concocted by Warren to profit because of their fiduciary capacity at the expense of the banking institution, and at the expense of the stockholders in violation of the 1925 agreement, and in violation of the other verbal understandings from time to time agreed upon. In paragraph 16 of the Payton affidavit, he reiterates that he talked with me in reference to the sale of the controlling interest in the bank in the month of December, 1927. This statement is absolutely unfounded in fact. The alleged conversation never occurred between me

and Payton and Warren, or anyone else where I was present.

MICHAEL J. SEXTON.

Subscribed and sworn to before me
this 19th day of January, 1928.

HARRY A. STILES,
Master in Chancery of N. J.

Affidavit—Nicholas W. D'Elia

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

NICHOLAS W. D'ELIA, of full age, being duly sworn according to law, upon his oath deposes and says:

1. In paragraph 14 of the Payton affidavit there is a recital that Mr. Warren stated that "it would be impossible for him to finance the purchase of such stock, and stated that he could see no way out of the difficulty except to sell a controlling interest in the bank, etc.," this statement is untrue; such statement was never made by Mr. Warren in my presence. The further statement that "Messrs. Sexton and D'Elia knew of the attempt by Warren to sell a controlling interest in the bank," and that the matter was discussed with me on several occasions in December, 1927, is likewise untrue. Such conferences or conversations never occurred. The statement in paragraph 15 of the Payton affidavit "that Messrs.

Sexton and D'Elia and myself did not think Warren could personally finance the purchase of such a large amount of stock" is likewise untrue. Such conversation never took place.

2. The further statement that "Messrs. Warren, Sexton, D'Elia and myself were discussing the sale of a controlling interest in the bank," is likewise untrue. It is very significant that the parties mentioned by the said Payton in his affidavit wherein he alleges the sale or control of the bank was discussed, is had with the parties signatory to the 1925 agreement with the exception of Billington, who was the other party signatory, the said Billington for several months, last past, not having been on friendly terms with the said Warren, and who had previously tendered his resignation as a director of the board which resignation was not accepted. It may be true that the said Warren told Payton about his attempt to sell a controlling interest in the bank, but I charge that the said Payton is secretly the partner of Warren in an endeavor, in violation of their duty as directors of this bank, to secretly profit by putting through this transaction at the expense of the institution and its stockholders. The allegation in paragraph 16 of the Payton affidavit that Payton talked with Warren, Sexton and D'Elia with reference to the sale of the controlling interest in the bank in the month of December, 1927, is untrue, the said Payton never talked with me about selling a controlling interest in the bank.

NICHOLAS W. D'ELIA.

Subscribed and sworn to before me
this 19th day of January, 1928.

HARRY A. STILES,
Master in Chancery of N. J.

Affidavit—Joseph B. Payton

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. On Order to Show Cause. On Motion to Vacate Restraint.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

JOSEPH B. PAYTON, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. It is true, as stated in paragraph 1 of the affidavit of Mr. Sexton made in this cause on January 19th, 1928, that a letter such as therein mentioned was sent to the depositors of the bank. The entire capital stock of the bank had been subscribed on the day and date of the letter and on the day and date of April 18th, 1927, upon which date a meeting of the board of directors was held, at which I presided in the absence of the president and which was attended by Messrs. Sexton and D'Elia, as shown by the minutes. At this meeting, I read the aforesaid letter which was later dated April 22nd, 1927, to the board of directors and which said letter was approved by the entire board. The minutes of the meeting with reference thereto read as follows:

"Vice President Payton read to the board a circular letter proposed to be sent to all of the depositors of the Journal Square National Bank offering them the opportunity to become stockholders of this institution through the Journal Square National Bank Trust Estate. This letter was approved."

I have examined the minutes of the next meeting of the board of directors held April 25th, 1927. The minutes show that at this meeting the minutes of the previous meeting, to wit, April 18th, 1927, were approved as read and as read they included that portion of the minutes above set forth. The minutes of the meeting of April 25th, 1927, show that Messrs. Sexton and D'Elia were present. The minutes of the meeting of April 18th, 1927, do not show any objection to the approval of the letter and the minutes of April 25th, 1927, do not show any objection to the approval of the minutes of the previous meeting.

2. The fact is that I always understood that the entire capital had been subscribed and that John Warren agreed to take and pay for the amount of unsubscribed and unpaid increased capital stock. Mr. Warren stated several times at board meetings that he had paid in the sum of $300,000.00 in payment of the capital stock of the Downtown National Bank and had arranged loans to do so with the understanding that the certificate of authority to do business would be procured within a few days after he had paid in the capital and that his money would be tied

up for only a short time, but the charter had not been approved in Washington and that because of his loans in connection with the Downtown National Bank matter that he could not at that time, raise the half million dollars that he had to pay for the unsubscribed or unpaid-for increased capital stock. This resulted in extensions from time to time for him to pay for the stock.

3. As a vice president of the bank, I was very much interested in having the increased capital stock paid for and in our statement before December 31st, 1927, and worried because the obligation to pay for such stock was Mr. Warren's and he was ill for some time, starting December 12th, 1927. To my knowledge he was absent continuously from December 12th to December 19th, 1927, and did not attend either of the board meetings held on said dates. About the end of that week, I talked with him about the payment of the increased capital stock and asked him whether or not he was going to be able to pay for it by December 31st, 1927, as it was necessary, as I stated, to have it in our statement. He told me that he was trying to or had made an engagement with a person not named whom he thought would arrange the loan. I believe that it was the first part of the following week that he had reported to me that he had been unsuccessful in arranging a loan and that he had received a proposition for the sale of a controlling interest in the bank and that this was the only way that he could see of having the increased capital stock issued and paid for and in our statement of December 31st, 1927. On December 29th, he informed me that the ne-

gotiations had not been successful and that he was going out to the Guardian Trust Company and try to arrange a loan which would enable him to pay for the unissued capital stock and later on, on that date, as stated in my previous affidavit, he informed me that he had arranged such loan.

4. I at no time had any other understanding but that Mr. Warren was obligated to pay for such stock and that when paid for, it was to be his own free from any agreement or obligation to the bank, the directors or signers of the 1925 agreement or any other stockholders.

5. I was not secretly a partner to any fraudulent scheme as alleged in the aforesaid affidavit of Mr. Sexton and did not know of any fraudulent scheme concocted by Mr. Warren as therein alleged. I did not profit, attempt or hope to profit through any fiduciary relationship of mine to the bank at the expense of said bank or of the stockholders or of the 1925 agreement which, as before stated in my previous affidavit, had never been recognized or acted under in approximately two years and had never been mentioned to me in that time by any of the signers thereof and I did not violate any of the verbal understandings from time to time agreed upon with anybody and do not know what the said Michael Sexton refers to in making such an allegation.

JOSEPH B. PAYTON.

Sworn and subscribed to before
me this 19th day of January, 1928.

OSWALD ELMER,
Notary Public of N. J.

Opinion

Submitted January 20, 1928

Decided January 27, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Motion, etc.

DANIEL D. LOEB, THOMAS J. BROGAN } Solicitors for and of Counsel for the Complainants.

MERRITT LANE, for Defendant John Warren.

HARRY H. WEINBERGER, for Defendant Edwards and Guardian Trust Co.

BENTLEY, V. C.:

On motion to dissolve a restraining order.

The Complainants are stockholders and directors of the defendant, the Journal Square National Bank, as are also the Defendants Warren, Payton and Billington. In 1925 these individuals all entered into a pooling of their stock in what is commonly called a voting trust. It committed them and each of them to confer, ten days before every stockholders' meeting of said bank, to determine how their respective stock holdings should

be voted, upon any question that might be placed before the stockholders, including the election of directors, and bound each member of such pool to vote in accordance with the wishes of the holders of the majority of such stock so pooled. It also, among other things, gave to the members thereof an option upon any or all of the stock of any member, if such member might desire to sell his shares, including after-acquired stock, and provided that such member so desiring to sell should offer the same to the remaining members of such pool at $200.00 per share or the book value thereof before disposing of it to any other person.

In January, 1927, the stockholders of the bank adopted a resolution, whereby the authorized capital stock of the bank was increased from 2,500 shares to 5,000 shares, and providing that subscriptions to the new authorized stock should be made by the first day of April, 1927, and that the right to subscribe should thereupon terminate and expire. Only a very few subscriptions were received, and the defendants say that, as a result thereof, the directors of the company adopted a resolution on April 11, 1927, forfeiting the rights of all stockholders and turning over to Mr. Warren, as president of the bank, all such rights, "to do with as he sees fit without any consideration for the rights." The complainants deny that any such resolution was passed.

On December 30th, 1927 (the last business day of that year), there remained of the new stock a total of 2,057 authorized shares as yet unissued and for which no subscriptions had been made. On that day Mr. Warren paid to the Journal

Square National Bank the sum of $514,250.00 for the 2,057 shares just mentioned, which was at the rate of $250.00 per share as fixed by the bank as the price for which they were to be issued and sold. This money he secured by a pledge of these particular shares and some others that he had theretofore owned, and still continued to own, with another defendant, the Guardian Trust Company, as collateral.

Before the last-mentioned date, Mr. Warren had negotiated with another defendant, Edwards, to sell to the latter sufficient shares of stock of the Journal Square National Bank to constitute the controlling stock interest therein at a price of $350.00 for each share so delivered. Upon learning of the contemplated transaction, this bill was filed and an order to show cause allowed, with *ad interim* restraint. The matter now comes on upon the return of a notice seeking a vacation of the restraining order.

The proofs filed are voluminous and acrimonious being filled with criminations and recriminations, much of which is beside the case and requires little or no consideration. There are two attacks made by the complainants: first, that Mr. Warren had violated the provisions of the pooling agreement, which has been called the contract of 1925; and, secondly, that he has been guilty of a breach of faith in his fiduciary relation to the bank and the stockholders thereof.

Much has been said for and against the validity of the contract of 1925. It is vigorously defended by the complainants and quite as vigorously attacked by the defendants. My mind is still open

upon the question, and I do not feel that the time necessary to investigate it would be well spent, in view of what will presently be said. But there is so great a doubt raised in my mind by the decisions of *Warren* vs. *Pim,* 66 N. J. Eq., 353, and *Bridgers* vs. *Bank,* 152 N. C., 292 (cited by counsel for Mr. Warren) that I should hesitate to allow a temporary injunction on this phase of the bill.

When the meeting of April 11th, 1927, was held and the rights of other stockholders to subscribe for the new stock was terminated, the concluding language of the resolution was as follows:

> * * * and these rights are to be turned over to President Warren to do with as he sees fit without any consideration for the rights.

The 12th section of the by-laws of the bank provide for subscription rights of each stockholder in proportion to his holdings of the old stock. In the notice to stockholders, sent out by the direction of the board of directors, apprising them of their right to subscribe to the intended issue, they were notified that their subscriptions must be filed not later than April 1st, 1927. They were also notified at the same time that payment for the new stock to which they might subscribe, must be made in two equal installments on the first days of May and June, 1927. Disregarding for the purposes of this motion the peculiar language of the concluding sentence of the resolution of April 11th, 1927, and the query as to the capacity in which "President Warren" was to succeed to the former subscription rights of the other stockholders, and

assuming he took them individually, one is faced with the proposition that the latter was to take those rights either upon the same terms upon which they had been offered to the other stockholders or else they were turned over to him without qualifications of any kind whatsoever. If it was to be upon the former condition, then he did not exercise his option according to its terms. If it was without limitation, then this large holding of stock was offered to him upon an inequitable plan entirely different from the terms accorded the other stockholders. If one is offered an opportunity to subscribe for stock for which he may pay whenever he pleases, it is a far more disadvantageous proposal for him than an offer to another who must exercise his right within a limited time. It has been seen that the right to subscribe proportionally and upon equal terms is reserved to the stockholders of the bank by Sec. 12 of the by-laws, in the same way that would be the case if this was a New Jersey corporation. *Wall* vs. *Utah Copper Co.*, 70 N. J. Eq., 17.

But it seems to me that the complainants are entitled to relief upon a much broader ground than any that has so far been mentioned. An amendment to the bill discloses the fact that Mr. Warren, besides being a member of the bar, is, and was, the president of the bank, a member of the board of directors and a partner of the firm that is counsel to the bank. From the 11th day of April, 1927, until the 30th day of December, he permitted the bank to carry the unissued shares of stock while he sought a purchaser. Just prior to the latter date, I think upon December 27th, 1927, he entered into

the contract already mentioned to sell to a perfectly responsible purchaser the then unissued shares of stock. At any rate, he himself says he made his arrangements to finance his purchase of the shares from the bank on December 29th, 1927, at which time he must have known, in the very nature of things, that he had a firm contract to resell them at a profit of $100 for each share of stock he purchased on the 30th. These things he relates himself, so that there can be no question of the fairness of acting upon them.

It would seem unnecessary to do more than state the facts: He was the highest officer, and the most influential officer, in the bank and, as a director and executive, he occupied a position of trust and confidence. *Marr* vs. *Marr,* 73 N. J. Eq., 643. He knew what dealings between him and the bank, where his interest is opposed to that of the latter, would be subjected to the closest scrutiny and not sustained against the stockholders unless consistent with good faith and fair dealing on his part, *Ibid.* When one is placed in such a relation of confidence and trust to another as Mr. Warren occupied to the bank, a duty rests upon him when dealing with the other to fully and honestly reveal and explain every fact within his knowledge before the negotiations are carried into effect. Pom. Eq. Jurisp., Sec. 955 *et sec.* (4th ed.). That author quotes from the rather recent case of *Tate* vs. *Williamson,* L. R. 1 Eq., 528, as follows:

> The broad principle on which the court acts in cases of this description is, that wherever there exists such a confidence, of whatever character that confidence may be,

> as enables the person in whom confidence of trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties who stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him.

On the proofs as they now appear it would seem as if the complainants as stockholders of the bank should be protected until the final hearing by having the present situation continued unchanged.

There can be no doubt that Mr. Warren has been the *deus ex machina,* and as such has sustained the brunt of building up the banking institution of which he is the president. But because of his large interest in it, such work has not been entirely altruistic. It is the burden which falls upon the shoulders of the chief executives of banks and most any other organization; but that does not, in one iota, change the quality or the measure of his legal and equitable obligations. It is said that it was a matter, either of stern necessity or of the greatest benefit to the bank itself that the shares which form the subject matter of this suit should actually be issued and sold, and that this defendant was improving the position of the bank by seeing that it was done. True as this may be, it did not justify his reaping a secret profit that should have gone to the one which had placed its confidence in him. It is true that Edwards would not have purchased the 2,057 shares that were still

unissued if those were all that could have been delivered by Mr. Warren. The latter, however, held upwards of a thousand shares which had come regularly into his possession, and these, combined with the 2,057, would have constituted many more than a majority of all the authorized shares of the company. Had he delivered sufficient of these combined blocks to have accomplished his contract, there could not have been, so far as I am able now to see, the slightest objection to his harvesting, for his own account, the profit he would have made upon the stock he owned prior to December 20th, 1927, provided he had not dealt with the 2,057 shares as he did, but had made that sale for the benefit of the bank.

Much stress is laid upon the contention that a director is under no duty to divulge information which may come to his attention and which affects the market value of stock when dealing with a fellow stockholder for the purchase of some of all of the latter's holdings, except where there were special circumstances, as existed in *Strong* vs. *Rapids,* 213 U. S., 419. It would seem as if the argument is academic, in view of the decision with regard to the contract of 1925. With that contract out of the way, it cannot be said that Mr. Warren negotiated with any stockholder of the bank or purchased the shares of stock belonging to a stockholder. As I see the situation, the transactions whereby he acquired the stock from the bank itself is so tainted by fraud that it is that transaction which will not stand the tests already referred to and which should be set aside if the stock had never been issued.

Mr. Warren further says that he was under a valid contract to take the 2,057 shares of stock, and that the complainants made no protest when they assisted as officers of the bank in the execution of the certificate of shares. If they had known at that time of his dealings with Edwards for the sale of the stock, these two stockholders should not be heard at this time to complain about his dealing therewith. The difficulty with that position, however, is that the complainants emphatically deny the charge, and I confidently believe them. Every probability is in their favor. Business men have not yet become so charitably inclined as to complacently observe one stockholder make off with upwards of $200,000.00 of corporate property, or property rights, and make no outcry. There is no explanation of the pretended attitude of the complainants at the meeting of January 9th, 1928, and the filing of this bill two days later. The entire explanation of it is contained in the complainants' proof, namely, that when the certificate of shares was executed, they were led to believe by Mr. Warren that he was dealing with the shares as the chief executive officer of the bank and for its benefit, and it was not until several days afterwards, and immediately before the filing of the bill, that they learned of this intention to turn over the control of the bank to an outside interest.

It is argued that there is no relief that can be given the complainants or the bank, because the National Banking Act prohibits any bank organized under its provisions to hold its own stock except for one limited purpose which does not appear in this case. 6 Fed. Stats. Anno (2d. Ed.),

p. 762. It is said that the stock having been once issued cannot be returned to the bank to be held and subsequently disposed of by it, because of that provision. I can see no reason why, if the proofs eventually demand it, the entire transaction cannot be set aside and annulled and the *status quo ante* restored. Ordinarily, this might not be possible because of the intervening interests of other defendants who are not charged with any knowledge or notice of the facts hereinabove related. Those other defendants, however, have proclaimed themselves willing to either complete their contract or consent to rescind the same, according to the decision with relation to the legality of the conduct of Mr. Warren toward the bank. In other words, they have stated in open court that they will consent to a cancellation of the agreement between Mr. Warren and Edwards, upon securing the return of the deposit made, and have intimated that they would prefer to be relieved of the contract which will bring them into a situation where so much discord prevails.

It is further said on behalf of the defendants that the stock holdings of the complainants is small. Their combined shares amount to 162 in number. If they were the owners of but a single share of stock, it seems to me that I would have to protect their interests, for the reasons I have expressed in *Lonsdale Securities Corporation* vs. *International Mercantile Marine Co.* (not yet officially reported).

I have not lost sight of the principle enunciated in *Citizens Coach Co.* vs. *Camden Horse Railroad Co.*, 29 N. J. Eq., 299, and the long line of cases

which have followed it and which were so strenuously urged upon the argument. That principle was in my mind when I said that if the case rested entirely upon the stock-pooling agreement, I would feel constrained to refuse a preliminary injunction. While there is an attempt upon the part of Mr. Warren to contravert the facts upon which the complainant relies, he has not succeeded, because there is no conflict in the proofs with regard to the matter now being decided, other than his denial that the complainants knew nothing of his contract with the outside interests until after the 2,057 shares had been issued and delivered to him. It was never intended by the master of the English language who wrote the Citizens Coach Co. opinion to tie the hands of this court and leave the complainant remediless, if the defendant was unscrupulous enough to deny, under oath, every material allegation of the bill. That is why he used the word "contraverted" and not "denied." It has not even been suggested that the law is not perfectly well settled in this court, that protects a beneficiary, or quasi-beneficiary, from the depredations of a fiduciary.

Lastly, it was maintained that a weighing of the conveniences should be a sufficient factor against the making of any injunctive order. I am unable to bring myself to any such belief. It is true that under Mr. Warren's contract he is obliged to deliver possession of the stock in question not later than the 15th day of May, next, or the agreement will be at an end. In the meantime, he will be obliged to pay interest on the loan of $514,250.00 with which he secured the stock from the bank. If he succeeds upon the final hearing,

he can be made whole in this respect. In order that no hardship may befall him, I will provide that if the cause is referred to me for final hearing, I will hear and decide it before the date just mentioned. I will, further, impose upon the complainants as a term for the allowance of the injunction, the condition that they shall, as soon as possible after the filing of the answers, apply for an order of reference. On the other hand, if Mr. Warren is left free to complete his contract with Edwards and the complainants shall prevail eventually, it is impossible to tell whether any relief will then be possible.

The bill and the amendments thereto are most inartificially drawn with regard to the prayers for relief. The complainants must prepare, serve and file an amended bill, or such amendments to the present bill as will apprise the defendants, not only of all the facts upon which the complainants will rely at the final hearing, but a complete statement of their prayers for the relief they will seek. The defendants are entitled to be acquainted with what the complainants will ask the court to compel them and each of them to do. The 60th Rule was adopted by the Chancellor to meet a very different situation than the one found here where the defendants say that the only prayer made, standing alone, is an impossible one, and seek to be enlightened as to what the complainants expect or hope to accomplish. Any amendments must be served not later than February 4th, 1928. The circumstances of this case are such as to make it apparent that it would be idle for any stockholder to secure approval of the board of directors of the bank, to institute a suit for the recovery of the stock.

Second Amendment to Bill of Complaint

IN CHANCERY OF NEW JERSEY

Filed February 4, 1928

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

The complainants amend the complaint herein by striking out the amendment allowed on or about January 20th, 1928, designated as paragraphs 8a, 8b, 8c and 8d and striking out the prayer for relief and process, being the concluding part of paragraph 8 of the original bill, beginning with the words "Complainants are without adequate remedy in the courts of law and therefore pray," and all that follows the same, and adding and substituting in lieu thereof, the following:

9. Complainants further charge that at all times herein stated, said Warren was the president and a member of the board of directors of said bank and in active management and control of its affairs, and in control of the officers thereof, and also a member of the law firm, which was counsel to the bank, and as such, advised said bank and its officers and directors with respect to all matters of law affecting its affairs, and as such,

complainants charge said Warren was in a fiduciary relation to the bank and its stockholders; that in violation of his trust, said Warren on December 30th, 1927, or shortly subsequent thereto caused the officers of said bank to issue to him in his own name a stock certificate or certificates for 2,057 shares of its capital stock, and paid or caused to be paid the said bank therefor, at the rate of not exceeding $250.000 per share in order that he might be enabled to thereupon resell the same to said Edwards or his nominees, under the aforesaid contract, at the price of $350.00 per share; that at the time of said transaction, said Warren had entered into a firm contract with said Edwards or said Weinberger or said New Jersey Bankers Securities Company for the resale of said shares at the price of $350.00 per share. The said contract was concealed from the directors of the bank. That said Warren, in order to temporarily finance the issue of said stock to him by the bank, pending the consummation of his contract with said Edwards and/or said Weinberger and/or said New Jersey Bankers Securities Company, pledged said stock with the Guardian Trust Company or Guardian Securities Company affiliated with it, but that said Edwards, Weinberger, New Jersey Bankers Securities Company, Guardian Trust Company and Guardian Securities Company, at the time of their transactions with said Warren, had knowledge of his fiduciary relation to said bank, and the manner of his procurement of said 2,057 shares from said bank, and participated in the acts of said Warren in procuring the issue of said stock, and furnished the money paid into

the bank upon the issue of said securities or are chargeable with knowledge of all material facts relating thereto.

10. Complainants file this bill on behalf of themselves for the enforcement of their rights under the 1925 contract above set forth, between themselves and said Warren, and also on behalf of themselves and of other stockholders of said bank and on behalf of said bank.

Complainants being without remedy at law pray for relief as follows:

1. That the defendants, John Warren, Edward I. Edwards, Harry H. Weinberger, New Jersey Bankers Securities Company, Guardian Trust Company, Guardian Securities Company, Journal Square National Bank, Joseph B. Payton, and James Billington, make answer to this said bill of complaint, and all the allegations thereof, as fully as though the several allegations were here repeated.

2. That it may be decreed that the issues of said 2,057 shares of the capital stock of said bank to said Warren was fraudulent and that the same may be set aside, and that the said defendants or such of them as have custody or control thereof be enjoined and commanded to surrender said stock certificates to the bank for a cancellation to the end that the directors of said bank may take action for the lawful issue thereof.

3. In the alternative and in the event of denial of relief as last above prayed, that it may be decreed that said Warren account to said bank for all profits realized or to be realized by him upon the resale of said 2,057 shares, whether the same

be sold to complainants under their 1925 agreement with said Warren, or in the event that said agreement be held not binding with respect thereto, upon the resale of said stock to any other person or persons.

4. That the defendant, Warren, be decreed to specifically perform the 1925 agreement with complainants aforesaid, with respect to the stock owned by said Warren at the time of said agreement, and also with respect to said 2,057 shares in the event that it be held that said 2,057 shares were lawfully issued to said Warren, and that said Warren and all other defendants be enjoined and restrained from selling, pledging or otherwise affecting the title or custody of said stock certificates, otherwise than by tendering the same to complainants under said agreement.

5. In the event that it be held that the issue of said 2,057 shares to said Warren should not be set aside, and in the further event that it be held that said 2,057 shares are not subject to the 1925 agreement with complainants, then and in such event, Defendants Warren, Edwards, Weinberger, New Jersey Bankers Securities Company, Guardian Trust Company and/or Guardian Securities Company, be enjoined and restrained from cancelling or in anywise modifying the agreement or agreements between them or some of them for the sale of said stock pending the determination of this suit, but that said contract or contracts be enforced for the benefit of the bank and its stockholders.

6. That defendants or such of them as have knowledge thereof, set forth and discover the

minutes of all actions, if any, taken by the stockholders and directors of said bank, with respect to the issue of said 2,057 shares and set forth and discover all contracts and transactions of said Warren with said bank for the subscription or issue of said stock and also all contracts and transactions of said Warren with said Edwards, Weinberger, New Jersey Bankers Securities Company, Guardian Trust Company and/or Guardian Securities Company, with respect to said stock and all considerations received or to be received by said Warren upon the resale or other disposition of said stock, and all commissions or other payments to be made in connection therewith, and to whom paid and to be paid and in what amounts.

7. That complainants may have such other and further relief as may be equitable and just.

8. That the State's writ of subpoena issue directed to the above-named defendants, according to law and the practice of this Court.

DANIEL LOEB,
Solicitor for and of Counsel with Complainants

Notice of Motion for Re-Argument

Filed February 3, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN
NICHOLAS W. D'ELIA AND
MICHAEL J. SEXTON,
Complainants,

AND

JOHN WARREN, et als,
Defendants.

On Bill, etc.

TO DANIEL D. LOEB, Solicitor for Complainants:

TAKE NOTICE, that I shall apply to the Honorable John Bentley, Vice Chancellor, at Chancery Chambers in the City of Jersey City on Wednesday, the 1st day of February, 1928, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard:

1. To reargue the motion to dissolve the injunction, which motion was decided by him January 27th upon the ground that the ultimate relief referred to by the Vice Chancellor in his opinion and with respect to which he concludes that the injunction should be continued as ancillary cannot be granted because, among other reasons:

(a). Said relief is not within the scope of any of the pleadings.

(b). The proper parties for the granting of such relief are not before the Court.

(c) The granting of such relief would be detrimental to the bank which is not before the Court.

(d). The Court has no jurisdiction to compel the bank to repay the consideration for the stock.

(e). The effect of directing the bank to repay the consideration of the stock would be to compel the officers of the bank to violate a law of the United States, i.e., the National Banking Act.

(f). It does not appear and has not been made to appear that the bank is able to repay the consideration paid for said stock.

(g). Because of the result of restoring the *status quo ante* would be an illegal reduction of capital of the bank.

(h). Because, upon the phase of the case upon which the restraint is sustained, complainants have elected by memorandum filed with the Vice Chancellor under Section 2 of "Complainants' theory of relief," to hold defendants to an accounting.

2. And I shall urge, among others, as a reason for such reargument that the ground upon which the Vice Chancellor concludes that the restraint should not be dissolved was not mooted or argued.

3. If the motion to reargue be denied, then to settle the form of the order and to require as a condition for the granting of relief that complainants give a bond to indemnify defendant and the bank from injury, the bond to the defendant to be not less than $1,200,000.00, and the bond to the bank to be not less than $600,000.00 to cover the amount of money which, under the decision of the Court if carried to final hearing, the bank may be required to repay to defendant, and such order also to include such other provisions as may be

proper to safeguard the rights of defendant and the bank.

4. To continue the hearing upon the order to show cause until such time as the pleadings have been perfected under the determination of the Court and to argue the order to show cause.

5. At such time and place I shall also apply for such other relief as may be proper.

This order is made returnable on the day stated by permission of the Vice Chancellor.

Respectfully,

MERRITT LANE,

Solicitor for Defendant John Warren.

Dated: January 28th, 1928.

Opinion on Re-Argument

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Motion, etc. Supplemental Opinion.

February 27th, 1928.

DANIEL D. LOEB, Solicitor,
THOMAS J. BROGAN, Esq., of Counsel,
For the Complainants;
MERRITT LANE,
For Defendant Warren;
HARRY H. WEINBERGER,
For Deft. Edwards and Guardian Trust Co.

BENTLEY, *V.C.*:

On motion to dissolve a restraining order.

Since the publication of the decision of January 27th, 1928, the entire motion has been reargued upon all the grounds stated on behalf of the proponent at the original argument, and the additional point that to set aside the issue of the 2,057 shares on December 30th, 1927, is a legal impossibility.

So far as the points that were covered on the first argument are concerned, I can only repeat

what I have already said. If the issue was tainted by fraud, it is, in the eyes of this court, as if it had never taken place and the fraud-doer should not be able to reap the benefit of his plan irrespective of the double liability of stockholders in national banks, unless there is a lack of power in the court.

There has been cited as authority against the attack that has been made upon the stock issue, *Keely* vs. *Black,* 90 N. J. Eq., 439, reversed in 91 N. J. Eq., 520. There, the defendant, Black, the president of the Farmers Telephone Company, by legal but unethical means, secured from other stockholders of that company almost the entire outstanding stock of that corporation. The distinguishing feature between that case and the one at bar is, that here Mr. Warren was dealing with the corporation to which it is not disputed he stood in a position of confidence and trust, whereas in the case of Black the dealings were between him and his fellow stockholders toward whom he stood in no position of confidence or trust. It is elementary that one stockholder is not a fiduciary of the others, nor is the relation between a stockholder who is also a director and the other stockholders one of a trust nature, except under special circumstances, as I have already said in my previous opinion. In the Keely Case, on appeal, the Court of Errors pointed out this distinction when it said:

> For it is important to observe that he was not dealing with the property of the company, but with his own, the title to some of which he derived from other stockholders. That is the significant feature of the

present case, which distinguishes it from the cases relied on by the respondents.

Another case urged upon the court for consideration is *Tooker* vs. *National Sugar Refining Company,* 80 N. J. Eq., 305, and the decisions therein cited commencing on page 329. These cases are all cited for the purpose of proving that the court cannot cancel stock that is once issued except by the method contained in the General Corporation Act. The principal one of these cases is *Knickerbocker Improvement Company* vs. *Board of Assessors,* 74 N. J. Law, 583. That case was based upon a writ of certiorari to review the assessment of several thousand shares of stock which had been purchased back by the corporation and returned into the treasury of the company. There is no similarity between the attack upon an issue on the ground of fraud in a court of equity and a proceeding in a court of law to avoid the payment of a tax, even though the subject matter of the tax is corporate stock.

In *Stephany* vs. *Marsden,* 76 N. J. Eq., 611, a bill was filed by a stockholder for the cancellation of shares of stock issued in consideration of less than their par value, in violation of our statute. The case was actually decided on the doctrine of laches, the complainant having waited an unconscionable period of time to commence his suit. It is true that the Court of Errors and Appeals, in a *per curiam* opinion, threw some doubt upon surrender and cancellation being the proper remedy in such a case as that; but there is nothing to show that the court was there considering a question at all comparable with the one in the case at bar.

It was fraud of a very different nature and degree. It seems to me apparent that there is inherent power and authority in a court of equity to dissolve any transaction for the purpose of remedying a situation brought about by fraud of one who stands in a position of *quasi*-trusteeship. There are a number of cases in the Federal Courts, such as:

Kennedy vs. *Gibson,* 8 Wall., 498;
Casey vs. *Galli,* 94 U. S., 673;
Bank vs. *Case,* 99 U. S., 628;
McCormick vs. *Bank,* 165 U. S., 538; and
Scott vs. *Deweese,* 181 U. S., 202,

which declare that the certification of an increase by the Comptroller of the Currency is not open to collateral attack. It is pointed out in some of them, however, that the rule is otherwise where the attack is directly against the issue and not an attempted evasion of the obligation incurred upon subscribing for stock and then not paying for it.

I still feel that this case can best be dealt with by holding the questioned proceeding as it now is until the court can have the benefit of a final hearing. I am informed that process has been issued and served, and there has been ample time for the filing of answers. If there is a reference to me, I will arrange with counsel to hear them at the earliest date upon which they can prepare for final hearing, and will then promptly decide the issues presented to me.

The motion seeking an order to require the complainants to file a bond can be dealt with more intelligently after the final hearing.

The motions should be denied.

Order Dismissing Bill of Complaint As Against Guardian Securities Company

Filed February 28, 1928

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc. Order Dismissing Bill of Complaint As Against the Defendant Guardian Securities Company.

This matter being opened to the Court by Lindabury, Depue & Faulks, Solicitors for and of Counsel with the Guardian Securities Company, one of the defendants to the amended Bill of Complaint filed in the above-entitled cause; and Daniel D. Loeb, Esq., Solicitor of Complainants, consenting hereto;

IT IS on this 28th day of February, 1928, on motion of Lindabury, Depue & Faulks, Solicitors for and of Counsel with the defendant, Guardian Securities Company, ORDERED that Complainants' said Bill as amended be and the same is hereby dismissed as against said Guardian Securities Company, without costs to either the Complainants or said Guardian Securities Company as against the other.

E. R. WALKER, *C.*

I consent to the making of the above order.

DANIEL LOEB,
Solicitor of and Counsel with Complainants.

Notice of Motion to Modify Restraint As to Guardian Trust Company

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

To Messrs.
DANIEL D. LOEB,
Solicitor of Complainants;
MERRITT LANE,
Solicitor of Defendant John Warren;
WILLIAM HARRIS,
Solicitor of Defendants Edward I. Edwards, New Jersey Bankers Securities Company, Harry H. Weinberger;
Joseph B. Payton and James Billington, Dfdts.

SIRS:

TAKE NOTICE, that on Thursday, March fifteenth, nineteen hundred and twenty-eight, at ten o'clock in the forenoon before the Chancellor, at the Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, we shall move for an order in the above-entitled matter vacating or

modifying any restraint which may have been imposed by any order herein, and for an order permitting the defendant, Guardian Trust Company, to sell the three thousand forty-nine (3,049) shares of stock of the Journal Square National Bank held by it as collateral security for the payment of a demand note of the Defendant John Warren, payment of which note was demanded on March first, nineteen hundred twenty-eight, and not made in accordance with said demand.

And in the event the order permitting this defendant to sell said stock is not made, application will be made for an order directing the complainants to furnish a bond to indemnify this defendant from any loss or damage by reason of the continuance of the restraint against said defendant selling or otherwise disposing of the stock held by it as collateral security for the payment of said note.

AND TAKE FURTHER NOTICE that upon said application the affidavit annexed to this notice of motion will be used.

AND TAKE FURTHER NOTICE that the within notice of motion is made returnable at the time and place herein set forth by special permission of the Honorable Vice Chancellor John Bentley.

Respectfully,
STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with Defendant Guardian Trust Co.

May 8, 1928.

Affidavit—Clarence G. Appleton

IN CHANCERY OF NEW JERSEY

BETWEEN NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, etc.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss:

CLARENCE G. APPLETON, being duly sworn, on his oath says:

That he is an officer of the Guardian Trust Company of New Jersey, holding the position of president.

Deponent further says that on December twenty-ninth, nineteen hundred twenty-seven, the Guardian Trust Company agreed to loan to John Warren a certain sum of money on a demand note to be executed by the Defendant John Warren, payment of which was to be secured by the assignment to the Guardian Trust Company of certain shares of stock in the Journal Square National Bank owned by the said Defendant John Warren.

Deponent further says that two thousand thirty-seven (2,037) shares of said stock would be part of a new issue of twenty-five hundred (2,500)

shares for which application for authority to increase had been made to the Comptroller of the Currency at Washington, who had jurisdiction in such matters.

Deponent further says that it was understood that the authority to increase the capital stock of the Journal Square National Bank would not be granted by the Comptroller of the Currency until after the subscription price of the twenty-five hundred (2,500) shares had been actually paid into the Journal Square National Bank.

Deponent further says that on December thirtieth, nineteen hundred twenty-seven, the Defendant John Warren sold to the Guardian Trust Company his demand note of six hundred fifty thousand dollars ($650,000.00) and delivered to the said Guardian Trust Company a temporary receipt representing two thousand thirty-seven (2,037) shares of stock of the Journal Square National Bank, being part of the increased stock issue of twenty-five hundred (2,500) shares, and also deposited stock certificates representing one thousand twelve (1,012) shares of the stock of the Journal Square National Bank although some of the certificates delivered at that time were in the name of the Bergen National Bank, which deponent understands was the original name of the Journal Square National Bank.

Deponent further says that all the negotiations in connection with the proposed loan to be made by the Guardian Trust Company to the said John Warren were made solely and exclusively with the said John Warren, and that no other person, firm or corporation took any part in said negotiations and that at no time during said negotiations

was the Guardian Trust Company informed of the existence of the agreement, a copy of which is annexed to the bill of complaint and marked Schedule "A."

Deponent further says that he is informed and verily believes that of the six hundred and fifty thousand ($650,000.00) dollars loaned by the Guardian Trust Company to John Warren on December thirtieth, nineteen hundred twenty-seven, five hundred nine thousand two hundred fifty ($509,250.00) dollars was immediately paid by the said John Warren to the Journal Square National Bank in full payment of the subscription price of two thousand thirty-seven (2,037) shares of said stock, and that on the same day the Comptroller of the Currency authorized the Journal Square National Bank to increase its capitalization by the issuance of twenty-five hundred (2,500) shares of additional stock, and that within a few days thereafter, stock certificates representing two thousand and thirty-seven (2,037) shares of the Journal Square National Bank were delivered to the Guardian Trust Company in exchange for the temporary receipt held by it, which was delivered to it at the time the said note was purchased.

Deponent further says that said two thousand thirty-seven (2,037) shares of stock are represented by twenty-two certificates, No. 501 to 522, inclusive, and that the same were signed by Michael J. Sexton as vice president of said Journal Square National Bank, one of the complainants herein, and countersigned by Michael Pecora, as cashier.

Deponent further says that neither he nor any other officer of the Guardian Trust Company had any knowledge, notice or information concern-

ing the agreement, a copy of which is annexed to the bill of complaint herein and marked Schedule "A"; that the Guardian Trust Company purchased the note of the Defendant John Warren as herein described and took as collateral security the three thousand forty-nine (3,049) shares of the stock of the Journal Square National Bank as an innocent holder for value and without notice of any agreement or of any fact or circumstances which would or should estop it from demanding payment of said note made by the said John Warren, or selling the stock held as security for the payment of said note.

Deponent further says that the Guardian Trust Company on March first, nineteen hundred twenty-eight, demanded payment of said note from the said John Warren, and payment of said note was not made.

Deponent further says that the officers and directors of the Guardian Trust Company are of the opinion that while at the present time the collateral held by the bank as security for the payment of said note can be sold at a price sufficient to liquidate said indebtedness, there is serious doubt in their minds as to whether or not, if the litigation herein continues and receives as much publicity in the future as it has in the past, that the value of said stock will continue to remain at an amount sufficient to protect the defendant, the Guardian Trust Company, and that inasmuch as the financial responsibility of the complainants in the within suit so far as the investigation of the Guardian Trust Company discloses, is not sufficient to protect the Guardian Trust Company for any loss which might occur by reason of the diminution of the value of said security, and as the

officers and directors of the said Guardian Trust Company are advised by counsel that as a matter of law the complainants cannot be held for damages for any loss which might occur to the Guardian Trust Company by reason of the restraint which they are advised has been imposed by this Honorable Court, deponent has been authorized by the board of directors of the Guardian Trust Company to cause an application to be made to this Honorable Court for permission to sell at public or private sale the three thousand forty-nine (3,049) shares of stock of the Journal Square National Bank held by the Guardian Trust Company, so that the rights and interest of the stockholders of the Guardian Trust Company may be adequately and promptly protected.

CLARENCE G. APPLETON.

Sworn and subscribed to before me
this eighth day of March, nineteen
hundred twenty-eight.

CLIFFORD A. ROTHFUSS,
Notary Public of N. J.

My commission expires April 27th, 1932.

Affidavit—John Warren

IN CHANCERY OF NEW JERSEY

Between

NICHOLAS W. D'ELIA AND
MICHAEL J. SEXTON,
Complainants,

AND

JOHN WARREN, et als.,
Defendants.

} On Bill, &c.

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

JOHN WARREN, of full age, being duly sworn according to law, upon his oath deposes and says:

The shares of stock which were issued to me of the increased capital of 2,057 number of shares, together with 1012 shares which I owned prior to my acquiring those of the increase of the capital, were pledged by me with the Guardian Trust Company for a loan of $650,000. Of this sum of $650,000 I used $514,250 to pay the Bank for the stock which I acquired. The Guardian Trust Company has called the loan. I am unable to make payment. If the Guardian Trust Company should be permitted to sell the collateral I would suffer great loss and injury because I am unable to protect myself.

I now have a contract for the sale of that stock with Edward I. Edwards, which will bring me in sufficient to liquidate the indebtedness on the stock. A copy of that contract I annex hereto and make a part of this affidavit.

Under the present injunctive orders of the court I cannot carry out the terms of the contract. If the injunction of the court were lifted said Edward I. Edwards would at once perform the terms of the contract and I would be able so to perform. No one else can carry out such contract. An inspection of it indicates that there are personal obligations to be fulfilled by me.

Sworn and subscribed to
before me this 15th
day of March, 1928.

JOHN WARREN.

SAMUEL NURCHBERG,
Master in Chancery of N. J.

Exhibit—John Warren

THIS AGREEMENT made and entered into this 30th day of December, Nineteen hundred and twenty-seven, between JOHN WARREN of the City of Jersey City, County of Hudson and State of New Jersey, party of the first part, hereinafter called the Seller, and EDWARD I. EDWARDS, of the City of Jersey City, County of Hudson and State of New Jersey, party of the second part, hereinafter called the Buyer,

WITNESSETH:—

1. The party of the first part agrees to sell and the party of the second part agrees to buy three thousand and one shares of stock of the Journal Square National Bank of Jersey City, for the sum of one million sixty-seven thousand eight hundred and fifty dollars ($1,067,850.00).

2. The Seller will deposit with the Guardian Trust Company of New Jersey, located in the City of Newark, County of Essex and State of New Jersey, the said 3,001 shares of stock to be delivered to the buyer as hereinafter provided.

3. The Buyer will pay the said purchase price as follows: $50,000.00 on the signing of this agreement, receipt whereof is hereby acknowledged; $600,000.00 on or before March 1, 1928, with interest at 6% per annum from the date hereof; $255,350.00 on or before May 15, 1928, with interest at 6% per annum from the date hereof; $162,500.00 on or before July 1, 1928, with interest at the rate of 6% per annum from the date hereof.

4. The said payments shall be made to the Guardian Trust Company of New Jersey for the account of the Seller. Upon the payment of Nine Hundred and Five Thousand and three hundred and fifty dollars ($905,350.00) as hereinabove required, with interest thereon, the said Guardian Trust Company will deliver to the Buyer twenty-five hundred and one shares of stock, and upon the payment of One hundred sixty-two thousand five hundred dollars ($162,500.00), with interest thereon as hereinbefore provided, will deliver to the Buyer five hundred shares of stock.

5. The Buyer will, on May 15, 1928, purchase from the Seller, if requested so to do, five hundred additional shares of stock of said bank at three hundred dollars ($300.00) a share, or any number of shares less than five hundred, at same price.

6. The Seller covenants that the said bank is the sole owner of all outstanding stock of the Journal Square Bank Building Company and that said Company is the owner in fee simple of the property on the West Side of Journal Square, Jersey City, New Jersey, running from the Boulevard to Sip Avenue; that said property is encumbered by two mortgages, one a first mortgage in the sum of four hundred thousand

dollars ($400,000.00) and a second mortgage upon which the sum of one hundred thousand dollars ($100,000.00) is due. The said first mortgage is past due and the second mortgage has over three years to run, which second mortgage provides for payments as follows: $12,000.00 in the month of August, 1928; $18,000.00 in the month of August, 1929; $30,000.00 in the month of August, 1930, and $40,000.00 in the month of August, 1931, and that the stock of said building company is not pledged. That the said second mortgage contains a clause by which the mortgagee agrees to subordinate said mortgage to a first mortgage not to exceed four hundred thousand ($400,000.00) dollars.

7. The Seller agrees to procure a one year extension on the four hundred thousand dollars ($400,000.00) first mortgage covering property mentioned in paragraph six at his own cost.

8. The Seller agrees that three mortgages owned by said bank encumbering vacant land will be purchased by him if the loans are regarded as doubtful by the Comptroller of Currency, or if required so to do by said Comptroller for any other reasons, within sixty days after the delivery of said 2,501 shares of stock, or within sixty days after the request of the Comptroller, whichever date is the later.

9. The Seller agrees to guarantee any and all past due notes held by the bank as of this date, and in the event that the Comptroller of the Currency requests their elimination from the assets of the bank, he will substitute therefor his notes, on the agreement on the part of the bank that payment will not be required until one year from the date hereof.

10. The Seller represents that all of the assets of the bank were acquired in the regular course of banking; that he is not interested in them directly or indirectly, except the firm account of Warren & Stanton, which owes the bank $13,000.00, and the Atlas Title & Mortgage Insurance Company, which owes the bank $16,500.00, and in collateral loans, not exceeding the sum of $15,000.00, and that neither he nor any company he is interested in, directly or indirectly, have any interest in any of the leases of the Journal Square Bank Building, other than the lease for the office for Warren & Stanton, for Gibraltar, Inc., and the Journal Square National Bank.

11. The Seller agrees that between now and the time required for the delivery of the 2,501 shares that no further loans will be made directly or indirectly to the Seller or any company in which he is interested, directly or indirectly.

12. The Purchaser agrees that in the event he is elected as successor of the Seller as President of the Journal Square National Bank, that he will recommend to the directors to continue the employment for the balance of the year the present cashier and assistant cashier at the salary they are receiving at the time of said election.

IN WITNESS WHEREOF, the parties hereto have hereunto duly set their hands and seals the day and year first above written.

(Signed) JOHN WARREN (L. S.)
Party of the first part.

(Signed) EDWARD I. EDWARDS (L. S.)
Party of the Second Part

Signed, sealed and delivered
in the presence of

(Signed) ROSE BILINKOFF.

Opinion

IN CHANCERY OF NEW JERSEY

Between

MICHAEL J. SEXTON and
NICHOLAS W. D'ELIA,
Complainants,

AND

JOHN WARREN, et als.,
Defendants.

On Bill, &c.

April 7, 1928.

BENTLEY, V. C.

There are two motions in this case awaiting decision. First, the application of the Guardian Trust Co. for a modification of the restraint, to the extent of permitting it to sell the collateral security held by it, pursuant to the terms of Mr. Warren's note upon which he secured a loan of $650,000. Secondly, the motion on behalf of Senator Edwards for a cancellation or rescision of his contract with Mr. Warren for the purchase of most of the latter's stockholding in the Journal Square National Bank. The form in which this latter motion has been made is not attacked.

There are considerations that make it appear to me unwise to allow a sale at this time. It is true that, ordinarily, there should be no interference with a creditor collecting his unquestioned claim against his debtor, unless a third party is able to show inequitable conduct on the part of the debtor calculated to adversely affect the third party's legal or equitable rights. The transac-

tion between the Trust Company and Mr. Warren, out of which its application arises, presents some aspects that appear to be most unusual and to give substance to the charge of the complainants that it is not entirely innocent in the premises. I suppose it may be judicially noticed that bankers as a class are very inquisitive when passing upon a request for a loan of their depositors' money, and that the curiosity of the bankers increases as the square of the amount of the loan desired. $650,000 is not an inconsiderable amount to be loaned by a commercial bank in this vicinity and, as a general thing, is made only upon very sound and ample security. Bank stock, on account of its liability to large fluctuations in value, is not ordinarily regarded as the most desirable form of security. In making the loan in question the trust company loaned to within less than $100,000 of the par value of the stock deposited with it as security and out of all proportion to its actual market value at the time of the transaction. Notwithstanding these considerations, it desires the court to believe that it was willing to hazard its resources in a very large amount, upon the security of the value of the stock and the otherwise unsecured promise to pay. It is inconceivable to me that it would have done any such thing.

Of course, I grant it to be true that knowledge of Mr. Warren's contract with Senator Edwards on the part of the Trust Company would not of itself affect its right to the relief it now seeks. But it is just as impossible for me to bring myself to believe that the risk involved was assumed upon the hope and expectations that its money

was to be repaid out of the consummation of his contract by a person over whom the trust company had no control and with whom it had no contract or understanding. In short, and to state the point bluntly, it appears to me that the lender knew, and must have known, of the scheme that was to be perpetrated at the expense of the Journal Square National Bank, and if that is so, it will be admitted that it is entitled to no assistance from the court at this time.

In addition, the reason expressed by the trust company for its present wish to sell is the fear that the value of the stock in question may diminish before the conclusion of this litigation. No reason is given for any such conclusion; no facts are advanced to support it, and it seems to be completely answered by the fact that the market values of the shares in question has advanced since the date of the filing of the bill of complaint herein from the price of $240 to its present price of $260 per share.

I fear the possible results attendant upon compliance with the suggestion that Mr. Warren and Senator Edwards be permitted to consummate their contract and then impound in the hands of the latter all of the purchase price above the amount due upon the note held by the Guardian Trust Company. That would, of course, completely satisfy the last named defendant; but in view of what has already been said and the fact that the court would be left without complete control over all these transactions, as well as the subject matter of the suit, it might be impossible to carry into execution the decree that otherwise the court would feel compelled to render. Be-

sides that, the motion next to be mentioned would be decided, although it is felt that it should not be, for the reason presently to be explained.

Furthermore, I will repeat what I have said so often, namely, that I will hear this case if it is referred to me as speedily as the parties can prepare to present it. Service has been effected upon all of the defendants, several have filed answers, and I am informed that the time for the filing of all answers has expired. Therefore, if the defendants co-operate, the matter can be promptly and completely decided. Of course, I realize that the Court of Errors and Appeals will be open to any parties thereafter who may feel aggrieved; but I know of no special circumstances that would deprive any of these parties from a review of any order made upon the order that will incorporate this decision; and I can see how the final disposition of the matters involved can be materially advanced by the course I intend to pursue, to say nothing of the not unreasonable desire of the court to be as well informed as possible before formulating any decision that may be dispositive of the whole case.

With regard to the motion on behalf of Senator Edwards, I think that, too, should await the results of final hearing. It is true that there appears to have been a technical breach of the contract on the part of Mr. Warren, but I am so poorly informed of the entire transaction between him and Mr. Warren that I cannot decide that question now, to say nothing of the legal considerations that have scarcely been presented to me at all.

Order

IN CHANCERY OF NEW JERSEY

Between

NICHOLAS W. D'ELIA AND
MICHAEL J. SEXTON,
Complainants,

AND

JOHN WARREN, et als,
Defendants.

On Bill, &c.

This matter coming on to be argued in the presence of Daniel D. Loeb and Thomas Brogan, of Counsel with the complainants; and Merritt Lane, of Counsel with the defendant, John Warren; and Edward R. McGlynn, of Counsel with the defendant, Guardian Trust Company; and Harry H. Weinberger, of Counsel with the defendant, Edward I. Edwards, New Jersey Bankers Securities Co., and individually; and Thomas J. Stanton, of Counsel with Journal Square National Bank; upon the Order to Show Cause heretofore made herein, the notice to vacate the restraint contained in the Order to Show Cause, the notice of application to re-argue the matter and in case restraint be granted to require indemnity and to settle the form of the Order, the re-argument having been granted and had, which notice was given by the Defendant John Warren, the notice of the Guardian Trust Company of application for relief, the application for relief, the application made in open Court on behalf of the Defendant Edward I. Ed-

wards, the making of which application was consented to by the respective parties in open court, and the court having considered the pleadings and affidavits and argument of counsel.

It is on this 12th day of April, 1928, ORDERED:

1. That application to dissolve the restraint contained in the Order to Show Cause be denied, and the restraint heretofore granted be continued until the further order of this court.

2. That the application to compel the complainants to give a bond to indemnify the Defendant John Warren and/or the Journal Square National Bank be denied.

3. That the application of the Guardian Trust Company for leave to proceed to sell the stock held by it as collateral be denied.

4. That the application of the Guardian Trust Company to compel the complainants to give a bond to indemnify the said defendant, Guardian Trust Company, be denied.

5. That the application of Edward I. Edwards for leave to cancel his contract for the purchase of the stock from the said John Warren be denied, and that his application for a return by the defendant, John Warren, of the $50,000.00 deposit made by him be denied.

6. That until the further order of the court all defendants in this cause and each and every of them and their agents and attorneys desist and refrain from transferring, pledging, delivering or dealing with, in any way the shares of stock of the Journal Square National Bank standing in the name of the defendant, John Warren, or in which he claims an interest, including all of the

stock of said bank or otherwise delivered to said Guardian Trust Company by sair John Warren or on his behalf.

7. That the defendant, Guardian Trust Company, its agents and attorneys be enjoined and restrained from proceeding in any way whatever to enforce any rights claimed by it with respect to said stock.

8. That the defendant, Edward I. Edwards, his agents, attorneys and assigns be enjoined and restrained from taking any action for the enforcement or cancellation of his contract for the purchase of said stock or any part thereof.

Respectfully advised,

E. R. WALKER,
C.

JOHN BENTLEY,
V. C.

Answer of John Warren to the Bill of Complaint As Amended

IN CHANCERY OF NEW JERSEY

Between
NICHOLAS W. D'ELIA AND
MICHAEL J. SEXTON,
Complainants,
AND
JOHN WARREN, et als,
Defendants.
} On Bill &c.

Defendant John Warren, of Englewood, in the County of Bergen and State of New Jersey, answering the bill, says:

1. He admits that on or about the 9th day of September, 1925, an agreement was made between Joseph B. Payton, James Billington and this defendant but as to the terms and conditions of said agreement he refers thereto when the same shall be produced.

2. With respect to the terms and conditions of said agreement he refers thereto when the same shall be produced.

3. He admits the statements contained in paragraph 3.

4. He refers to the agreement for its terms when it shall be produced, and further says that the particular clause of said agreement, a copy of which is purported to be set forth in the fourth paragraph, in no wise affects the stock referred to in the Bill of Complaint and was not intended to affect such stock.

Answer of John Warren to the Bill of Complaint As Amended

5. The defendant admits that the capital stock of the Journal Square National Bank of Jersey City was increased and that this defendant received upon paying value certain shares of said increased capital stock. The remaining statements contained in said paragraph defendant denies.

6. Defendant admits that he gave an option for the purchase of said stock so obtained by this defendant, as aforesaid, together with certain other stock of the said Journal Square National Bank of Jersey City owned by this defendant, but as to the terms and conditions of said option or contract he refers thereto. He admits that the said New Jersey Bank & Security Company made a down payment of $50,000.

7. He admits the statements contained in paragraph 7.

8. He denies the statements contained in paragraph 8.

9. Answering paragraph 9, this defendant says that he admits that he was the President and a member of the Board of Directors of said bank and that he was one of those in active management and control of its affairs; he admits that on or about the 30th day of December, 1927, there was issued to him stock certificate or certificates for 2,057 shares of the capital stock of said bank and that he paid said bank for said stock at the rate of $250.00 a share. He admits that he pledged said stock with other stock with the Guardian Trust Company, a banking corporation of the State of New Jersey, as collateral security for his note and he says that the Guardian Trust Company advanced him upon said note so secured with said stock and an additional 992 shares of stock

of said bank owned by this defendant, the sum of $650,000.00 and this defendant says that of said sum the sum of $514,250.00 was paid by this defendant to the said bank as the consideration for said stock. The remaining statements contained in said paragraph 9 this defendant denies.

Further answering the Bill:

10. With respect to the agreement alleged to have been made between Joseph B. Payton, James Billington and this defendant on or about the 9th day of September, 1925, this defendant says:

(a) Said agreement is and always has been void or unenforceable for the reason that the subject of said agreement was shares of stock of a National Bank and the purpose of said agreement was to permit the subscribers to said agreement to control the management of the said bank or to influence the control of the management of the said bank by having said stock voted at election of directors and at meeting of the stockholders for other purposes as a block as directed by a majority of the stock under said agreement, without regard to the other stockholders of said bank and their rights and such agreement had no limitation with respect to time; this defendant pleads with respect hereto Section 61, Title 12, "Banks and Banking," U. S. Code Anno. and the Laws of the United States with respect to National Banks.

(b) This defendant says that if the Court should enforce the said agreement at the present time with respect to the stock sought to be brought under the terms of the agreement by the Bill of Complaint herein, the Court would place under the agreement more than a majority of the stock of said bank with the result that the control of said

bank would be perpetually vested in said stock and that such stock by the terms of said agreement itself would be controlled by the vote of a majority of such stock and under the terms of said agreement would be voted as a block for the election of directors of said bank and at all meetings of stockholders of said bank upon any subject or matter whatsoever; that the exercise of control in such manner is contrary to the public policy of both the State of New Jersey and of the United States, and defendant pleads the provisions of Section 61 of Title 12, "Banks and Banking," as aforesaid, and the laws of the United States with respect to the control of National Banks.

(c) This defendant says that the said agreement referred to in the Bill of Complaint was by mutual consent of the parties abandoned and is not in any wise enforceable; that the terms of said agreement have been disregarded by all the parties thereto and breached by the complainants herein; that it would be grossly inequitable and unjust to enforce the terms of said agreement at this time against this defendant.

(d) The said complainants knew that the defendant was purchasing the stock of the said bank of the new issue and paying the said bank therefor the sum of $250.00 per share; that although the said complainants knew that the defendant was taking such stock and paying therefor at the rate of $250.00 per share, said complainants did not claim that the terms of the said agreement applied to such stock; that under the terms of said agreement defendant would not be permitted to sell said stock without first offering it to complainants at $200.00 per share; that complainants

are estopped from now claiming that the terms of said agreement apply to such stock or any of the stock purchased by this defendant; that to enforce the terms of said agreement against this defendant under the circumstances aforesaid would be harsh, unjust, and inequitable; that said agreement does not apply by its terms to the stock issued to defendant upon the increase of the capital of the said bank nor to the stock purchased by defendant from others; that a practical construction has been put upon the terms of said agreement by the parties and this agreement does not apply to such stock forming a part of the increase of the capital as aforesaid, nor to such stock purchased by this defendant from others.

(e) Defendant says that the prayer of the Bill with respect to said agreement aforesaid is for specific performance and that this Court will not, in its discretion, grant the relief of specific performance under the circumstances of this case because to grant it would be harsh, unjust and inequitable and would also injure third parties and it is impossible to grant by reason of the fact that said stock is pledged by this defendant with a bona fide holder in good faith and without notice, i.e., the Guardian Trust Company; and defendant also pleads the provisions of the National Banking Act which makes shares of capital stock of a National bank personal property and transferable; defendant says that complainants have a complete and adequate remedy at law and will be left to their remedy at law, and that this Court has no jurisdiction in equity and that the Bill of Complaint does not set forth a cause of action cognizable in equity against this defendant with respect to any relief upon said agreement and

this defendant makes these objections as if upon a motion to strike the Bill so far as relief is prayed under said agreement and reserved the right to move to strike the Bill.

11. With respect to the relief prayed for against defendant upon the facts stated in the 9th paragraph of the Bill as amended, this defendant says:

(a) Upon or about the month of April, 1927, this defendant made a binding agreement to take the shares of stock subsequently issued to him referred to in the ninth paragraph of the amended bill, at the rate of $250.00 per share; that on or about the 30th day of December, 1927, this defendant, in pursuance of his said agreement, paid to the said bank the sum of $514,250.000 and said stock was thereupon issued to him and was rightfully issued to him.

(b) The complainants knew, since the month of April, 1927, that the defendant was under a binding agreement to take said shares of stock at the rate of $250.00 a share and knew that said defendant had entered into said agreement and participated in the making of said agreement between the bank and this defendant; that complainants were offered the opportunity to subscribe to said capital stock prior to April, 1927, and refused to take advantage of such opportunity to take up said stock; that after April, 1927, said complainants did not offer to take any of the said stock knowing full well that it was necessary that the said stock be issued prior to the 1st of January, 1928, and that if they did not offer to take said stock defendant would be obliged to take and pay for the

same; that the defendant paid full value for said stock; that complainants are stopped from setting up any illegality in the issuance of said stock to defendant.

(c) Defendant further says that the relief prayed for in the Bill of Complaint cannot be granted by this Court for the reason, among others, that upon the issuance of the increased capital stock said increase has become a part of the capital stock of the bank and the moneys paid by this defendant to said bank for said capital stock and the liability imposed upon the holder of said stock under the terms of Section 64, Title 12, "Banks and Banking," U. S. Code Anno., which this defendant pleads, has become a trust fund for the benefit of depositors and customers of said bank: that to grant such relief would be to illegally decrease the capital stock of the said bank in violation of the Laws of the United States and with respect thereto this defendant pleads the provisions of Section 59, Title 12, "Banks and Banking," U. S. Code Anno., and says that the effect of such relief as prayed for would be to reduce the capital of said bank otherwise than as provided in such section.

(d) Defendant says that this Court has no jurisdiction to interfere with the internal affairs of a National bank in the manner as would be required by the granting of relief having to do with the cancellation of said stock; that the effect of the granting of such relief would be to impair the efficiency of said bank as a National agency and to frustrate the purpose of the National Banking Act would be to interfere with the powers, management and control of a National bank, and such powers are wholly beyond the jurisdic-

tion of this Court and this defendant relies upon an Act Concerning Banks and Banking, Title 2, U. S. Code Anno., and says further that this case calls for a construction of the statutes and laws of the United States.

(e) This defendant further says that no tender has been made to this defendant of the amount which this defendant paid to the said bank to obtain said stock either by the complainants or by the said bank and that said bank is unable to make said tender by reason of the provisions of the laws of the United States heretofore referred to and that said complainants have not made any tender and that in the absence of such a tender no relief can be granted against this defendant with respect to a cancellation of said stock and this defendant says that for this reason the said bill of complaint upon this aspect of the case does not set forth a cause of action cognizable in equity against this defendant and this defendant makes this statement as if upon a motion to strike and reserves the right to move to strike the bill so far as relief of cancellation is prayed either before or at the hearing.

F. This defendant further shows that it is impossible to cancel said stock because said stock has been pledged by this defendant with the Guardian Trust Company for a loan of $650,000 and that said Guardian Trust Company is a bona fide holder of said stock as collateral without notice.

G. If said stock were cancelled it would be necessary that the said bank pay out of its capital stock the sum of upwards of $500,000; that to require said bank to make such payment would be a hardship upon the said bank and its depositors; that no offer has been made to take said stock

from said bank at $250.00 per share or a price in excess thereto; that to grant the relief prayed for by complainants upon this aspect of the case would be to cause hardship and inequity to said bank, its depositors and stockholders other than complainants; and that this Court in its discretion will not grant such relief.

H. Defendant says that the Bill of Complaint does not set forth a cause of action cognizable in equity against this defendant with respect to the cancellation of said stock; that complainant has a complete, full and adequate remedy at law; that the complainants are in laches. Defendant makes these objections as if upon a motion to strike the bill and reserves the right to move to strike the bill either at or before the hearing.

I. Defendant says that he is not called upon to account either to the complainants or to the said bank; that said stock was purchased and paid for by him under the circumstances hereinbefore set forth and, having been purchased under such circumstances, he is not called upon to account, and he says that no fiduciary relation existed between himself and the complainants or himself and the bank with respect to the issuance of said increased capital stock.

J. This defendant further says that he has entered into a binding agreement to sell said stock to the defendant, Edwards, upon terms and conditions set forth in said agreement and that he has pledged said stock to the Guardian Trust Company for a loan, as above set forth; that said Guardian Trust Company and the said Edwards have acquired interests in said stock without notice and for value; that this defendant is under obligations to carry out the provisions of said

contract and perform the obligations incurred by him thereunder if he is called upon to account.

k. Defendant says that the said Bill of Complaint does not set forth a cause of action in equity against this defendant for an accounting; that complainants have a full, complete and adequate remedy at law; that complainants are in laches; defendant makes these objections as if upon a motion to strike the bill and reserves the right to move to strike the bill so far as relief by way of accounting is prayed either before or at the hearing.

MERRITT LANE,
Solicitor for and of Counsel with Defendant John Warren.

Answer of Guardian Trust Company

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, &c.

The answer of the Guardian Trust Company to the bill of complaint and amendments thereto filed in the above matter, respectfully shows that:

1. It never had any knowledge, information or notice of the facts alleged in paragraphs 1 and 2 of the bill of complaint or of the agreement, a copy of which is annexed to the bill of complaint and marked Schedule A, and made part thereof, and therefore denies the same.

2. It admits the facts alleged paragraph 3 of the bill of complaint.

3. It never had any knowledge, information or notice of the facts alleged in paragraph 4 of the bill of complaint or of the agreement, a copy of which is annexed to the bill of complaint and marked Schedule A, and made part thereof, and therefore denies the same.

4. It never had any knowledge or information of the facts alleged in paragraphs 5 and 6 of the bill of complaint and therefore denies the same.

5. This defendant has no knowledge or information sufficient to form a belief with regard

to the facts alleged in paragraph 7 of the bill of complaint and therefore denies the same.

6. This defendant denies that if the said John Warren, Edward I. Edwards and/or the New Jersey Bankers' Securities Co., their agents, representatives or attorneys, are permitted to consummate the said option to purchase, described in the bill of complaint, the complainants will lose large sums of money and profits which they would have made and to which they are justly entitled, if the terms of said agreement alleged in the bill of complaint were duly carried out by the said John Warren; and further denies that it has any knowledge, information or notice with regard to any such alleged agreement, and therefore is not in a position to consummate any such agreement.

7. This defendant admits that at all times stated in the bill of complaint, said John Warren was president and a member of the Board of Directors of said Journal Square National Bank of Jersey City, but denies that he was in active management and control of its affairs and in control of the officers thereof.

8. This defendant also admits that the said John Warren was a member of the law firm which was counsel to the said Journal Square National Bank of Jersey City, but denies that as such counsel the said John Warren advised said bank and its officers and directors with respect to all matters of law affecting its affairs and denies that as such, the said John Warren was in a fiduciary relation to the bank and its stockholders and denies that in violation of his trust, the said John Warren, on December 30th, 1927, or shortly subsequent thereto, caused the officers of said bank to issue to him in his own name, a stock certificate

or certificates for 2,057 shares of the capital stock, and denies that the said John Warren paid or caused to be paid to said Journal Square National Bank of Jersey City for said 2,057 shares of its stock at the rate not exceeding $250.00 per share, in order that he might be enabled to resell the same to said Edward I. Edwards or his nominees under an original contract at a price of $350.00 per share.

9. Defendant denies that at the time of said transaction it had any knowledge, information or notice that the said John Warren had entered into a firm contract with said Edward I. Edwards or said Harry Weinberger, or said New Jersey Bankers Securities Co. for the resale of said shares at the price of $350.00 per share.

10. Defendant denies that it had any knowledge or information or notice that said contract was concealed from the directors of said bank.

11. Defendant denies that said John Warren, in order to temporarily finance the issue of said stock to him by the bank, pending the consummation of his contract with said Edward I. Edwards, and/or said Harry Weinberger, and/or said New Jersey Bankers Securities Co., pledged said stock with the Guardian Trust Company or Guardian Security Company, affiliated with it, and denies that this defendant at the time of its transaction with the said John Warren, had any knowledge of his fiduciary relations with said bank and the manner of his procurement of said 2,057 shares from said John Warren in procuring the issue of said stock, and that it furnished the money paid into the bank upon the issue of said securities, or that it is chargeable with knowledge of all material facts relating thereto.

Answer of Guardian Trust Company

FIRST AND SEPARATE DEFENSE

This defendant further answering the bill of complaint, says that:

1. On December twenty-ninth, nineteen hundred twenty-seven, thru its officers and agents, it agreed to loan John Warren a certain sum of money on a demand note, with interest at six per cent., taking as security for the payment of said note, three thousand forty-nine (3,049) shares of the stock of the Journal Square National Bank of Jersey City owned by the said John Warren, and which said shares of stock were to be assigned to this defendant in accordance with said agreement.

2. On December thirtieth, nineteen hundred twenty-seven, this defendant discounted a note made by the said John Warren in the sum of six hundred fifty thousand ($650,000.00) dollars, which note was payable on demand, with interest at six per cent, and received as security for the payment of said note, three thousand forty-nine (3,049) shares of stock in said Journal Square National Bank of Jersey City, originally issued in due and legal form to the said John Warren and assigned by him to this defendant.

SECOND AND SEPARATE DEFENSE

This defendant further answering the bill of complaint, says that:

1. It is a holder in due course, without notice or knowledge of any of the facts alleged in the bill of complaint of a demand note made by the said John Warren, and this defendant holds as security for the payment of said note, three thousand forty-nine (3,049) shares of stock in the Journal Square National Bank of Jersey City issued in due and legal form by the authorized officers of said Journal Square National Bank of Jersey

City pursuant to resolutions regularly adopted by the Board of Directors of said Journal Square National Bank of Jersey City, and all of which stock had been legally issued pursuant to the certificate or certificates of the Comptroller of the Treasury of the United States, in accordance with the statutes in such case made and provided.

THIRD AND SEPARATE DEFENSE

This defendant further answering the bill of complaint, says that:

1. The complainant, Michael J. Sexton, is estopped from asserting any of the claims made in the bill of complaint as against this defendant, because he, as Vice President of the Journal Square National Bank signed certificates representing two thousand thirty-seven (2,037) shares of stock of the said Journal Square National Bank issued to John Warren as part of an authorized increased issue of twenty-five hundred (2,500) shares of stock of said bank, and at the time of the execution of said stock certificates by the said complainant, Michael J. Sexton, he knew that the defendant, Guardian Trust Company, was holding the same as collateral security for money advanced by it to the said John Warren.

RESERVATION OF RIGHT TO MAKE MOTION TO DISMISS BILL OF COMPLAINT

This defendant reserves the right to move for a dismissal of the bill of complaint filed herein, as amended, on the ground that the bill of complaint as amended does not set forth the facts which entitle complainants to any equitable relief as against this defendant, Guardian Trust Company.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with Defendant Guardian Trust Company.

Answer of Defendant, Journal Square National Bank of Jersey City

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA, et al, *Complainants,* AND JOHN WARREN, et al, *Defendants.*	On Bill, etc.

Defendant, Journal Square National Bank of Jersey City, a corporation organized under the laws of the United States of America, having its office in the City of Jersey City, County of Hudson and State of New Jersey, answering the bill, says:

1. It has no knowledge, information or belief concerning the matters alleged in paragraphs 1, 2, 4, 6, 7 and 8 of the bill of complaint.

2. It admits the allegations of paragraph 3 of the bill of complaint.

3. It admits that 2,057 shares of its increased capital were issued to the defendant, John Warren, but it has no knowledge, information or belief as to the other allegations contained in paragraph 5 of the bill of complaint.

4. As to the allegations set forth in paragraph 9 of the bill of complaint, it states that the defendant, John Warren, was its President, one of its Directors, and one of the officers in active management and control of its affairs; it admits that the defendant, John Warren, was a member of the law firm which was counsel to it, but states that invariably all matters referred to such law

firm were handled by persons connected with the said firm other than the defendant, Warren. It admits the issuance on December 30, 1927, of 2,057 shares of its capital stock to the said Warren, and the receipt by it of the sum of $514,250.00 from the said Warren in payment thereof, and says that such issuance was regular. In April, 1927, the defendant, Warren, subscribed for this amount of stock, which was part of a total issue of 2,500 shares of its stock. The said Warren agreed at that time to take this amount of stock and to pay therefor the sum of Two Hundred and Fifty ($250.00) Dollars per share, which is the price paid for all other shares of this issue. The issuance by this defendant of certificates for 2,057 shares of its stock to defendant, Warren, and its receipt of the sum of $514,250.00 from the said Warren in payment thereof, was in performance of its agreement with the said Warren made in April, 1927. The sum of $514,250.00 which the said Warren paid to this defendant on December 30, 1927, for stock so issued as above, was immediately applied to its capital account, and in the statements issued by this defendant, setting forth its financial condition as of the close of business December 31, 1927, and in all statements which it has issued since then, this sum of money is included as a part of its capital assets. This defendant states that the said sum is a part of its capital assets and cannot be removed therefrom in any manner, other than in that provided for by the laws of the United States of America relating to and governing the operation and management of National Banks. This defendant, since December 30, 1927, has held itself out to its

customers and to the public, as having capital assets of an amount which included the sum of $514,-250.00 above mentioned, and it has solicited business on the strength thereof, and persons have done business with it relying thereon. This defendant takes the position that this Court cannot and should not make any decree which would have the effect of decreasing its capital assets. This defendant has no knowledge, information or belief as to the other allegations set forth in paragraph 9 of the bill of complaint.

5. (a) This defendant further states that in the month of April, 1927, a binding agreement was entered into between it and the defendant Warren, whereby the defendant, Warren, subscribed for 2,057 shares of its increased capital stock and agreed to pay it therefor the sum of $514,250.00 and this defendant agreed to issue said amount of stock to him upon the payment of the said sum of money, and that on or about the 30th day of December, 1927, upon the payment to it by the defendant, Warren, of the said sum of $514,250.00 it lawfully and rightfully issued to him 2,057 shares of its stock.

(b) This defendant states further that upon the issuance of the above-mentioned 2,057 shares of its increased capital stock to the said Warren, that the moneys received therefor became a part of the capital assets of the bank, and certain liabilities became imposed upon the holder of said stock by virtue of the provisions of an Act of Congress regulating the operating and management of National Banking Institutions, which Act of Congress this defendant pleads. This money so paid and the liability created by the issuance

of said stock, became a trust fund for the benefit of its depositors and customers. That to grant the relief prayed for in complainants' bill would have the effect of illegally decreasing this defendant's capital stock, in violation of the laws of the United States of America above referred to, and this defendant says that its capital assets can be decreased only in the manner provided for in such Acts of Congress.

(c) Defendant says that this Court has no jurisdiction to interfere with the internal affairs of a National Bank in the manner as would be required by the granting of relief having to do with the cancellation of said stock; that the effect of the granting of such relief would be to impair the efficiency of said bank as a National agency and to frustrate the purpose of the National Banking Act, and would be to interfere with the powers, management and control of a National Bank, and such powers are wholly beyond the jurisdiction of this Court, and this defendant relies upon the Acts of Congress relating to National Banking Institutions, and says further that this case calls for a construction of the statutes and laws of the United States.

(d) If said stock were cancelled as requested in complainants' bill, this defendant would be required to pay out of its capital assets the sum of $514,250.00; that to require this defendant to make such payment would be a hardship upon it and its depositors; that no offer has been made to take said stock from it at the price of $250.00 per share or in excess thereof; and that to grant the relief prayed for by the complainants upon this aspect of the case would be to cause hardship

and inequity to it, its depositors and stockholders. This defendant states that this Court in its discretion should not grant such relief.

(e) This defendant states that the bill does not set forth a cause of action cognizable in equity against this defendant with respect to the cancellation of the said stock; that complainants have a complete, full and adequate remedy at law and that the complainants are in laches. Defendant makes these objections as if upon a motion to strike out the bill, and reserves the right to make a motion to strike out the bill either at or before the hearing.

THOMAS J. STANTON,
Solicitor for Defendant, Journal Square National Bank of Jersey City.

Notice of Appeal

IN CHANCERY OF NEW JERSEY

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants,* AND JOHN WARREN, et als, *Defendants.*	On Bill, &c.

TAKE NOTICE that the Defendant John Warren hereby appeals from so much of the order of the Chancellor made on the 12th day of April, 1928, on the advice of the Honorable John Bentley, Vice Chancellor, as:

1. Denies the application to dissolve the restraint contained in the order to show cause, and continues the restraint until the further order of the Court.

2. Denies the application to compel the Complainants to give a bond to indemnify the Defendant John Warren.

3. Directs that the Defendants and each and every of them and their agents and attorneys desist and refrain from transferring, pledging, delivering, or dealing with, in any way, the shares of the stock of the Journal Square National Bank standing in the name of the Defendant John Warren, or in which he claims an interest, including all of the stock of said Bank, or otherwise delivere to the Guardian Trust Company by said John Warren, or on his behalf to the New Jersey

Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Solicitor for John Warren
Defendant-Appellant.

Dated: April 19th, 1928.

I conceive that there is good cause for appeal in the above-entitled cause.

MERRITT LANE,
Of Counsel with Defendant John Warren.

Petition of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants-Respondents,* AND JOHN WARREN, et als, *Defendants-Appellants.*	On Appeal of John Warren

To the Honorable the Justices of the Court of Errors and Appeals in the Last Resort in All Causes:

The humble petition of John Warren, the Appellant in the above-entitled cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable John Bentley, Vice Chancellor, bearing date the 12th day of April, 1928, wherein the said Michael J. Sexton and others were Complainants and the said John Warren and others were Defendants, in this respect, to wit: that said order:

1. Denies the application to dissolve the restraint contained in the order to show cause, and continues the restraint until the further order of the Court.

2. Denies the application to compel the Complainants to give a bond to indemnify the Defendant, John Warren.

3. Directs that the Defendants and each and every of them and their agents and attorneys desist and refrain from transferring, pledging, delivering, or dealing with, in any way, the shares of the stock of the Journal Square National Bank standing in the name of the Defendant John Warren, or in which he claims an interest, including all of the stock of said Bank, or otherwise delivered to the Guardian Trust Company by said John Warren, or on his behalf, and your petitioner, humbly appeals from so much of said order as directs as aforesaid upon the ground that the same is erroneous for that the proofs before the Court did not warrant the Court in granting the ad interim relief to the Complainants which by said order was granted to them, and for that upon the facts and the law it appeared that the Court was wholly without power or jurisdiction to grant the ultimate relief in aid of which the injunctive relief was granted by said order to the Complainants, because it appeared that the ultimate relief required that the Journal Square National Bank should pay out of its capital approximately the sum of $500,000.00, the amount which the Defendant John Warren paid for the stock, and said stock would be returned to said Bank, thus reducing the capital of said bank by approximately one-half, and the said Court of Chancery is wholly without jurisdiction or power to direct the cancellation of said stock, and also for that it appeared that the rights of the Complainants were not clear either upon the law or the facts, and for that it further appeared that any agreement upon which the Complainants relied was contrary

to public policy and void, and did not by its terms cover or control the disposition of the stock referred to in the Bill of Complaint, and for that it also appeared that said agreement had been abandoned and Complainants were estopped from claiming thereunder, and to grant Complainants' relief thereunder would be grossly inequitable and unjust, and for that it appeared that the Complainants had no right or interest to protect which made it either necessary or proper that the ad interim relief granted to the Complainants should be granted, and for that it appeared by the proofs before the Court that if any ad interim relief were granted, great injury and harm might be occasioned to the Defendant John Warren, and that to protect against the said injury and harm, the Court should have granted the application of the Defendant John Warren for indemnity, and for that the Court should have granted the prayer of the Defendant John Warren to vacate the restraint contained in the order to show cause, and for that, for other reasons the order of the Chancellor is erroneous.

The Petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and have nothing holden, and that your Petitioner may have such other relief in the premises as to this Honorable Court shall seem meet.

MERRITT LANE,
Solicitor for and of Counsel with Appellant.

Notice of Appeal On Behalf of Defendant, Guardian Trust Company

IN CHANCERY OF NEW JERSEY

Between

NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON,
Complainants,

AND

JOHN WARREN, et als,
Defendants.

On Bill, &c.

TAKE NOTICE that the defendant, Guardian Trust Company, hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from so much of the order of the Chancellor made on the 12th day of April, 1928, on the advice of the Honorable John Bentley, Vice Chancellor, as:

1. Denies the application to dissolve the restraint contained in the order to show cause, and continues the restraint until the further order of the Court.

2. Denies the application of the Guardian Trust Company for leave to proceed to sell the stock held by it as collateral.

3. Denies the application of the Guardian Trust Company to compel the complainants to give a bond to indemnify the Guardian Trust Company.

4. Directs that the defendants and each and every of them and their agents and attorneys desist and refrain from transferring, pledging, de-

livering, or dealing with, in any way, the shares of the stock of the Journal Square National Bank standing in the name of the defendant, John Warren, or in which he claims an interest, including all of the stock of said Bank, or otherwise delivered to the Guardian Trust Company by said John Warren, or on his behalf.

5. Directs that the Guardian Trust Company, its agents and attorneys, be enjoined and restrained from proceeding in any way whatsoever to enforce any rights claimed by it with respect to said stock.

STEIN, McGLYNN & HANNOCH
Solicitors for Guardian Trust Company Defendant-Appellant

Dated: April 19th, 1928.

I conceive that there is good cause for appeal in the above-entitled cause.

E. R. McGLYNN,
Of Counsel with Defendant Guardian Trust Company

Petition of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants-Respondents,* AND JOHN WARREN, et als, *Defendants-Appellants.*	On Appeal of Guardian Trust Co.

To the Honorable, the Justices of the Court of Errors and Appeals in the Last Resort in All Causes:

The humble petition of Guardian Trust Company, the Appellant in the above-entitled cause, respectfully shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable John Bentley, Vice Chancellor, bearing date the 12th day of April, 1928, wherein the said Michael J. Sexton and others were complainants and the said Guardian Trust Company and others were defendants, in this respect, to wit: that said order:

1. Denies the application to dissolve the restraint contained in the order to show cause, and continue the restraint until the further order of the Court.

2. Denies the application of the Guardian Trust Company for leave to proceed to sell the stock held by it as collateral.

3. Denies the application of the Guardian Trust Company to compel the complainants to give a bond to indemnify the Guardian Trust Company.

4. Directs that the defendants and each and every of them and their agents and attorneys desist and refrain from transferring, pledging, delivering, or dealing with, in any way, the shares of the stock of the Journal Square National Bank standing in the name of the defendant, John Warren, or in which he claims an interest, including all of the stock of said Bank, or otherwise delivered to the Guardian Trust Company by said John Warren, or on his behalf.

5. Directs that the Guardian Trust Company, its agents and attorneys, be enjoined and restrained from proceeding in any way whatsoever to enforce any rights claimed by it with respect to said stock.

And your petitioner humbly appeals from so much of said order as directs as aforesaid upon the ground that the same is erroneous for that the proofs before the Court did not warrant the Court in granting the ad interim relief to the complainants which by said order was granted to them and for that upon the facts and the law it appeared that the Court was wholly without power or jurisdiction to grant the ultimate relief in aid of which the injunctive relief was granted by said order to the complainants, because it appeared that the ultimate relief required that the Journal Square National Bank should pay out of its capital approximately the sum of $500,000.00, the amount which the defendant, John Warren, paid for the stock, and said stock would be returned to said Bank, thus reducing the capital of said Bank by

approximately one-half, and the said Court of Chancery is wholly without jurisdiction or power to direct the cancellation of said stock, and also for that it appeared that any agreement upon which the complainants relied was contrary to public policy and void, and did not by its terms cover or control the disposition of the stock referred to in the bill of complaint and for that it also appeared that said agreement had been abandoned and complainants were estopped from claiming thereunder, and to grant complainants' relief thereunder would be grossly inequitable and unjust, and for that it appeared that the complainants had no right or interest to protect which made it either necessary or proper that the ad interim relief granted to the complainants should be granted, and for that it appeared by the proofs before the Court that if any ad interim relief were granted, great injury and harm might be occasioned to the defendant, Guardian Trust Company, and that to protect against the said injury and harm, the Court should have granted the application of the defendant, Guardian Trust Company, for indemnity, and for that the Court should have granted the prayer of the defendant, Guardian Trust Company, to vacate the restraint contained in the order to show cause, and for that, for other reasons the order of the Chancellor is erroneous.

The petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and have nothing holden, and that your petitioner may have such other relief in the premises as to this Honorable Court shall deem meet.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with Appellant, Guardian Trust Company

Answer of Guardian Trust Company t Petition of Appeal of John Warren

NEW JERSEY COURT OF ERRORS AND APPEALS

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants-Respondents,* AND JOHN WARREN, et als, *Defendants-Appellants.*	On Appeal from the Court of Chancery

The answer of the Appellant, Guardian Trust Company of New Jersey, to the petition of appeal of the Appellant, John Warren.

This Appellant not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was on the 12th day of April, 1928, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purpose in said petition mentioned and as therein set forth, but as to the substance and form of said order Appellant begs leave to refer thereto when the same shall be produced.

And this Appellant is advised and believes that all portions of said order which apply to the Guardian Trust Company of New Jersey is contrary to equity and good conscience whether or not the whole or any part thereof may be affirmed in so far as the same applies to the Appellant John

Answer of Guardian Trust Company to Petition of Appeal of John Warren

Warren, and prays that all portions of said order which apply to the Guardian Trust Company of New Jersey be reversed whether or not said order or any part thereof be affirmed, in so far as the same applies to the Appellant, John Warren.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Guardian Trust Company of New Jersey

Substitution

NEW JERSEY COURT OF ERRORS AND APPEALS

Between NICHOLAS W. D'ELIA AND MICHAEL J. SEXTON, *Complainants-Respondents,* AND JOHN WARREN, et als, *Defendants-Appellants.*	Substitution

I consent to the substitution of Messrs. Wall, Haight, Carey & Hartpence in my place and stead as solicitor for Defendant John Warren.

MERRITT LANE.

Dated: May 9th, 1928.

New Jersey Court of Errors and Appeals

Between

NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants-Respondents,

and

JOHN WARREN and GUARDIAN TRUST COMPANY,
Defendants-Appellants,

AND OTHERS,
Defendants.

On Bill &c.
On Appeal from Chancery.

BRIEF FOR DEFENDANT-APPELLANT JOHN WARREN.

Statement of the Issues.

This is an appeal from an order advised by Vice-Chancellor BENTLEY in the Court of Chancery on April 12th, 1928 (Case, p. 199), in which, *inter alia*, he restrained the defendant-appellant, John Warren, from transferring, pledging, delivering or dealing with in any way the shares of stock of the Journal Square National Bank standing in his name or in which he claims an interest, including all the stock of said bank or otherwise delivered to said Guardian Trust Company by said John Warren or on his behalf.

The order also continued the restraint in the order to show cause (Case, p. 21) which restrained

the defendant-appellant from violating the terms of the agreement set forth in Schedule A annexed to the bill of complaint and from "consummating the option to purchase of the capital stock of the Journal Square National Bank of Jersey City referred to in said bill of complaint"; and also from transferring or attempting to transfer any shares of the capital stock of the Journal Square National Bank of Jersey.

The order appealed from on page 200 also denied the application to compel the complainants to give a bond to indemnify the defendant, John Warren, and/or the Journal Square National Bank.

The appeal of John Warren (Case, p. 224) appealed from the order because:

1. It denied the application to dissolve the restraint contained in the order to show cause and continued that restraint until the further order of the court;

2. It denied the application to compel the complainants to give a bond to indemnify John Warren;

3. It directed that the defendants and their agents, &c., refrain from transferring, pledging, delivering or dealing with in any way the shares of the stock of the bank standing in the name of said Warren or in which he claimed an interest, including all the stock of the bank or otherwise delivered to the Guardian Trust Company by said Warren or on his behalf, the specific ground of error as to this part of the order being that the proofs before the Court did not warrant it in granting the *ad interim* relief which the order granted and that upon the facts and the law it appeared that the court was wholly without power or jurisdiction to grant the ultimate relief in aid of which the injunctive relief was granted by said order to the complainants because it appeared that the ultimate relief required that

the bank should pay out of its capital approximately $500,000 the amount which said Warren paid for the stock, and said stock would be returned to said bank, thus reducing the capital of the bank by approximately one-half and that the Court of Chancery is without jurisdiction to direct the cancellation of said stock; and also because it appeared that the rights of the complainants were not clear either upon the law or the facts, and that any agreement upon which complainants relied was contrary to public policy and void and did not by its terms govern or control the disposition of the stock referred to in the bill of complaint; and also because it appeared that said agreement had been abandoned and complainants were estopped from claiming thereunder, and that to grant complainants' relief thereunder would be unjust because it appeared that complainants had no right or interest to protect which made it either necessary or proper that the *ad interim* relief granted to the complainants should be granted and because it appeared by the proofs before the court that if any *ad interim* relief were granted great injury and harm might be occasioned to the defendant, John Warren, and that to protect against said injury and harm the court should have granted the application of defendant Warren for indemnity and should have granted his prayer to vacate the restraint contained in the order to show cause.

Statement of the Case.

The bill of complaint as amended sets forth that on September 9th, 1925, the complainants, together with one Joseph D. Payton, James Billington and the defendant John Warren, entered into a certain agreement, copy of which is attached to the bill of complaint as Exhibit A (Case, pp. 6-15), in which each of the parties thereto agreed that none of the individuals mentioned in said agreement

would at any time sell, give or bequeath certain shares of the capital stock of the Journal Square National Bank, or any part thereof, or interest therein, without first offering the same for sale to the other parties to the agreement, at a price of $200 per share or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st (Exhibit A, Paragraphs 1st, 2nd, 3rd, 4th, 5th and 6th, Case, pp. 8, 9 and 10).

The agreement expressly provided that nothing therein contained should prevent the parties thereto from using such stock as collateral for loans. It was agreed, however, that the party pledging the stock as collateral would notify the other parties that it had been pledged, and would notify the pledgee of the terms of the agreement, and would require the pledgee to agree in the event that the collateral should at any time be offered for sale that such pledgee would notify the parties in writing ten days before such sale of the time and place of the sale, also that in the event of any sale of the collateral any one of the parties to the agreement should have the right to pay the pledgee the sum of $200 per share or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st, whichever sum might be greater, and receive the stock subject to the right of the party originally pledging the stock to redeem the stock from him by the payment to him of the amount advanced with interest. Upon failure of the original pledgor to so redeem the same, it was stipulated that the stock should then be offered to the remaining parties to the agreement in the proportion of their holdings of stock of the Journal Square National Bank then subject to the agreement, and in the event they failed to take their proportion of the

stock, said stock should then be owned by the party purchasing the same free and clear of any right of ownership of the party originally pledging it and should continue to be affected by the agreement in his hands (Exhibit A, Paragraph 7th, Case, pp. 10, 11 and 12).

The agreement further provided before any stockholders' meeting the parties would confer and discuss the quetions to come before such stockholders' meeting, and would vote, or cause to be voted, their stock in accordance with the decision of such conference. At all conferences each party should have one vote for every share of stock then owned by him and affected by the agreement, and that the majority of the votes cast would decide all questions considered at such conference (Exhibit A, Paragraph 11th, Case, pp. 12-13).

The agreement further provided that in case of the increase of the stock of the Journal Square National Bank any party to the agreement who should not desire to subscribe should notify all of the other parties, and any of the other parties should have the right, upon payment of an amount stipulated in the agreement, to acquire his proportionate share of the subscription rights of the party not subscribing (Exhibit A, Paragraph 13th, Case, pp. 13-14). It is also provided that all new stock thereafter to be issued which should become owned by any of the parties to the agreement should become affected by the agreement in the same manner as the shares owned by the party at the time of the making of the agreement (Exhibit A, Paragraph 13th, Case, p. 15).

At the time of the making of the agreement there were 578 shares (about 22% of the entire issue of shares) owned by the parties thereto, as follows: Joseph B. Payton, 50 shares; John Warren, 319 shares; Nicholas W. D'Elia, 121 shares; Michael J.

Sexton, 25 shares; and James Billington, 63 shares. The agreement further provided that any party thereto to whom stock in the future should be transferred on the books of the company might bring such stock under the agreement by notifying the other parties thereto (Exhibit A, Paragraph 8th, Case, p. 12).

The original bill of complaint charged that in December, 1927, the defendant, John Warren, in violation of the above agreement, had given the defendants, Senator Edward I. Edwards, New Jersey Bankers Securities Co. and Harry H. Weinberger, the option to purchase all of his shares then standing in his name at the price of $350. per share, and prayed that the consummation of this option should be enjoined (Case, pp. 4-5).

A rule to show cause with an *ad interim* restraint was allowed on January 11, 1928 (Case, p. 21). On January 16, 1928, a motion was made to vacate the restraint (Case, p. 23), the hearing upon which was continued to January 20, 1928 (Case, p. 24), and was denied January 27, 1928 (Opinion, Case, p. 157). On January 20, 1928, the bill of complaint was first amended (Case, p. 26). On January 28, 1928, notice for reargument was given returnable February 1, 1928 (Case, p. 174). The second amendment was made to the bill of complaint on February 4, 1928 (Case, p. 169).

By this amendment the complainants further charge that at all of the times in the bill of complaint stated, John Warren was President, a member of the Board of Directors, and in active management and control of the affairs and officers of the Journal Square National Bank, and the law firm, of which he was a partner, its legal advisors, and occupied a fiduciary relation to both the bank and its stockholders. That in violation of such trusts he on December 30, 1927, caused to be issued

to him in his own name 2,057 shares of the capital stock for which he paid $250. per share in order that he might resell the same to Senator Edwards or his nominees at a price of $350. per share; that his contract to resell said stock was concealed from the Directors of the bank; that in order to temporarily finance the issue of the stock to him by the bank pending the consummation of his contracts with Edwards and/or Weinberger and/or New Jersey Bankers Securities Co., pledged the stock with the Guardian Trust Company of New Jersey; further charging that the said Edwards, Weinberger, New Jersey Bankers Securities Co. and Guardian Trust Company of New Jersey at the time of their transactions with John Warren had or were chargeable with knowledge of all of the material facts relating to the transaction (Case, pp. 169-171).

By the second amended bill complainants pray (a) that it be decreed that the issue of 2,057 shares of the capital stock of the bank to Warren was fraudulent and that it be set aside and the stock surrendered to the bank for cancellation; (b) That in the alternative and in the event of denial of the relief as above prayed, it may be decreed that Warren account to said bank for all profits realized or to be realized upon the resale of the said 2,057 shares whether the same be sold to complainants under their 1925 agreement with said Warren, or in the event that said agreement be held not binding with respect thereto, upon the resale of said stock to any other person or persons: (c) That Warren be decreed to specifically perform the 1925 agreement with the complainants in respect both to the stock owned by Warren at the time of said agreement, and also in respect to the 2,057 shares issued to him in December, 1927, and that Warren and all other defendants

be enjoined and restrained from selling, pledging, or otherwise affecting the title or custody of said stock certificates, otherwise than by tendering same to complainants under said agreement; (d) in the event that the issue of the 2,057 shares to said Warren should not be set aside and in the further event that these shares should not be held to be subject to the 1925 agreement with complainants, that then and in such event defendants, Warren, Edwards, Weinberger, New Jersey Bankers Securities Co. and/or Guardian Trust Company of New Jersey be enjoined and restrained from cancelling or in anywise modifying the agreement or agreements between them or some of them for the sale of said stock pending the determination of the suit, but that said contract or contracts be enforced for the benefit of the bank and its stockholders (Case, pp. 171-172).

The motion for reargument was denied on February 27, 1928 (Case, p. 178).

On March 15, 1928, Guardian Trust Company of New Jersey made application to have the restraint as to it modified so that it might sell said stock to satisfy its loan, or in the event such motion should be denied, to require complainants to furnish a bond to indemnify it from loss, which was returnable on March 15, 1928 (Case, p. 183).

The applications to dissolve the restraint contained in the original order to show cause; to compel the complainants to give a bond to indemnify Warren; to permit the Guardian Trust Company of New Jersey to proceed to sell the stock to satisfy its loan or in the alternative to compel the complainants to give a bond to indemnify it against loss that might occur by reason of any continued restraint, and the application of Edward I. Edwards for leave to cancel his contract for the purchase of the stock, hereinbefore

referred to, which had also been made was denied by order made April 12, 1928, from which order this appeal is taken (Case, p. 199).

All of the hearings were had upon supporting affidavits and answering affidavits (Case, pp. 16, 29-156, 85-185-194).

In the affidavit submitted on behalf of the defendant, Warren, it is definitely and unequivocally averred that the agreement of 1925 was entered into at a time when the officers of another bank in Jersey City were purchasing stock of the said Journal Square National Bank in an endeavor to obtain control of the Journal Square National Bank, and the only purpose of the agreement was to defeat this endeavor (Case, p. 40), and that finally in the month of December, 1926, the attempt was completely frustrated by Warren's purchasing 532 shares of the Journal Square National Bank that had been acquired in the interest of the outside bank at $195.50 a share, the purchase price amounting to $104,006 (Case, p. 42); that subsequently none of the terms of the agreement had ever been observed by any party to it, that it had been repeatedly violated by the parties thereto in respect to the sale, pledging and voting of the stock expressly affected thereby without any objection from anyone, that upon the increase of the stock of the bank, hereinafter mentioned, the provision of the agreement had not been observed by any party thereto. In short, that from the time the endeavor of outside parties to get control of the bank had been defeated, it had been considered by all parties thereto as at an end and abandoned (Case, p. 36-47). These allegations are not denied in the affidavits submitted by the two complainants except to the extent that it is averred by them that they had not been aware of any violations of the terms of the agreement by any of

the other parties thereto and that it was their understanding that the agreement was in full force and effect (Case, pp. 58-63; 64-67).

In denial of the claim that the 2,057 shares of the new stock of the Journal Square National Bank had been acquired by Warren in breach of his fiduciary relation to the bank and its stockholders, the affidavits submitted on behalf of Warren show that in October, 1926, the bank purchased its site in Journal Square and in order to secure funds to purchase and improve the property an increase of the capital stock of the bank from 2,500 shares to 5,000 shares was duly authorized by the stockholders at the annual meeting held on January 11, 1927 (Case, p. 130). At the Directors' meeting held on the same day it was resolved that the new stock should be issued for $250 a share and at the meeting of the Directors held January 21, 1927, it was resolved that it should first be offered to the stockholders pro rata, warrants to be sent out about the middle of February and to state that stockholders should forfeit their rights if their subscriptions were not presented on or before April 1st and payments should not be made in equal installments on May 1st and June 1st. Few stockholders subscribed and at the meeting of the Board of Directors held April 11, 1927, at which both complainants were present, a resolution was unanimously passed "forfeiting the rights of all stockholders who had not presented their subscriptions for the increased capital stock on or before April 1st and these rights turned over to President Warren to do with as he sees fit without any consideration for the rights" (Case, pp. 32, 20-30). The number of unsubscribed shares turned over were 2,277.

Warren then conceived the idea of welding the depositors of the bank to it through the creation of

a trust estate which would sell shares for $25 and with the proceeds purchase the increased capital of the said bank (Case, p. 42). A circular letter approved by the Board of Directors on April 18, 1927, was sent to the depositors offering to them the opportunity of obtaining an interest in the stock of said bank through the purchase of said trust estate shares. The trust estate through the sale of its shares secured money to purchase 180 shares of the increased stock, which after the sale of 40 shares to three other persons, left 2,057 shares yet to be disposed of (Case, pp. 42-45).

Warren stated that he assumed the obligation to pay for these shares but had difficulty in raising the money and the Board of Directors extended the time for payment from time to time (Case, p. 44). Being unable to arrange for any sale whereby the purchaser of the stock would pay for the increased capital before December 31, 1927, Warren negotiated on December 30th with the Guardian Trust Company of New Jersey a loan of $650,000, of which amount he paid to the Journal Square National Bank $514,250, being the issue price of the 2,057 shares unsold and as evidence of said loan gave his demand note and pledged with the Guardian Trust Company of New Jersey 3,049 shares of the Journal Square National Bank, consisting of the 2,037 shares of the new stock and 1,012 other shares of said bank then owned by him (Case, pp. 43-46; 185-189). About the same time Warren entered into an agreement with Senator Edward I. Edwards, wherein and whereby he agreed to sell to the said Senator Edward I. Edwards, or his nominee, 3,001 shares of the Journal Square National Bank at the price of $350 a share, or a total price of $1,067,850 (Exhibit, Case, pp. 191-194).

The affidavits submitted on behalf of Warren unequivocally aver that it was the understanding of all members of the Board of Directors that his individual obligation to take the stock at $250 a share was absolute from April 11, 1927, and that whatever he did in negotiating the sale of the stock was in his own behalf and not in behalf of the bank or any of its stockholders. Not only the directors but all of the stockholders and depositors of the bank were given the opportunity to take the stock at the price of $250 a share, which they refused, and which obligation Warren assumed, and that the sale of the stock by him was in his own interest and not as a fiduciary or representative of the bank; and the price obtained based upon the fact that he was including his own individual shares and selling a controlling interest in the bank; that all of the directors knew that he was endeavoring to effect a sale of this control in his own interest and not as a fiduciary of the bank. Sexton, one of the complainants, signed the certificates for the new stock issued to Warren and pledged to the Guardian Trust Company of New Jersey and raised no objection thereto.

Argument.

We submit on behalf of the defendant Warren, that the order of April 12, 1928, should be reversed, and the defendant Warren relieved of any restraint from immediately disposing of the said stock of the Journal Square National Bank, or at least that the complainants should be required, as a condition to the continuance of the injunction against disposing of said stock, to furnish to him adequate security to indemnify him against any loss he may suffer by reason of any restraint that may be continued against him.

POINT I.

The Court should not have prevented the transaction from being consummated. Impounding the proceeds of the sale would have fully complied with the theory that the proceeds belonged to the bank and not to defendant Warren

Simply stated, the issue in the case is whether the 2,057 shares of the increased capital stock belonged to Mr. Warren to deal with as an individual, or whether they belonged to the bank.

Mr. Warren placed the shares, together with other shares he owned which in the aggregate represented a majority of the outstanding shares of the bank, with Guardian Trust Company in Newark as collateral for a loan of $650,000. He also agreed with Senator Edwards to sell 3,001 shares of stock (one more than a majority) to Senator Edwards for $350 a share. The issue price of the increased capital stock of the bank recommended by the stockholders to the directors and adopted by the directors, was $250 per share.

Of the moneys borrowed from the Guardian Trust Company, Mr. Warren on December 30th, 1927, paid to the bank the amount due for the 2,057 shares at $250 per share, and on the same day the Comptroller of the Currency's certificate permitting the issue of the stock was received. No question of price enters into the case. The full $250 fixed by the stockholders and directors has been paid in and added to the assets of the bank and was shown on its December 31st, 1927, statement and published in the newspapers.

POINT II.

The Court erred in granting a preliminary injunction.

In *Citizens' Coach Co.* v. *Camden Horse R. R. Co.*, 29 N. J. E. 299, the Court of Errors held that a preliminary injunction will not be ordered unless from the pressure of urgent necessity, and that the damage threatened to be done and which it is legitimate to prevent during the pendency of the suit, must be in an equitable point of view of an irreparable character.

The Court of Errors and Appeals in *Guangione* v. *Guangione* (1924), 97 N. J. E. 303, refers to the cases and quotes the statement of the present Chief Justice in *McMillan* v. *Kuehnle*, 78 N. J. E. 253, that such a restraint (*i. e.*, preliminary injunction) should not be adopted "unless from the pressure of urgent necessity"; and that the present Chancellor in *Aldrich* v. *Union Bag, &c., Co.*, 81 N. J. E. 244, stated:

> "It has been decided again and again that a preliminary injunction should not be awarded unless from the pressure of urgent necessity, and also unless the injury to be prevented *pendente lite* will be irreparable."

There is no irreparable injury with which the complainants are threatened. On their own theory that the avails of Mr. Warren's contract belong to the bank, they are running greater risks of losing the avails of that contract by tieing up indefinitely the whole transaction and exposing it to the hazard of nonperformance by virtue of changes in market conditions, publicity, &c.

The Vice Chancellor took the view that the relation of Mr. Warren was a fiduciary one; but why was it necessary, in order to secure the bank on this theory, to hold up the whole transaction and enjoin defendant Warren, the Guardian Trust Company, Senator Edwards, &c.? Full protection for all parties concerned will be attained by permitting the transaction to go through, the sum of $350 a share for 3,001 shares, payable under the agreement between Mr. Warren and Senator Edwards, or such part as the Court thinks proper, could be impounded to await the final order of the Court.

It should be noted that the 2,057 shares does not represent control of the bank. It is only when these shares were joined with other shares owned by Mr. Warren that he was able to contract with Senator Edwards; and it is also to be noted that Senator Edwards did not contract in reference to the specific 2,057 shares. What he was interested in under the contract was in obtaining control. Obviously he would not have paid $350 a share unless the shares he bought represented control, and this feature of control was imparted to the transaction by other shares which Mr. Warren had acquired and about which there is no controversy.

The above is submitted more in respect of the motion to modify the restraint which is before the Court; but in respect of the appeal from the order we go farther and say that no restraint should have been imposed.

Other cases in respect of the doctrine of the *Citizens' Coach Company* case are:

Meyer v. *Somerville Water Co.*, 79 N. J. E. 613;
Brunette v. *Montclair*, 87 N. J. E. 338;
Harned v. *Rowand*, 74 N. J. E. 264;

See also,

Simmons v. *Paterson,* 60 N. J. E. 385, at 393;

Benedict v. *Columbus Construction Co.,* 49 N. J. E. 23;

Dobleman v. *Gately & Hurly Co.,* 64 N. J. E. 223.

POINT III.

The relation of defendant Warren to the 2,057 shares for which he subscribed was not a fiduciary relation.

On December 27th, 1926, Warren purchased 532 shares from the owners, who were officials of another bank. He paid $195.50 per share for these shares and some of his fellow directors in the Journal Square National Bank stated at the Board meeting that the price was too high. At that time the total share capital of the bank was 2,500 shares.

On January 11th, 1927, the shareholders of the bank voted that the capital stock be increased from 2,500 to 5,000 shares and suggested to the Board of Directors that the issue price be fixed at $250. On the same day the directors adopted $250 as the issue price per share.

On January 31st it was reported at the directors' meeting that the Federal Bank Examiner had made certain suggestions as to the form of the issue of the stock, and these suggestions were adopted.

Section 12 of the by-laws of the bank reads as follows:

> "Sec. 12. Whenever an increase of stock shall be determined upon in accordance with law, it shall be the duty of the board to

notify all of the shareholders of the same and to cause a subscription to be opened for such increase of capital. In the increase of capital each shareholder shall have the privilege of subscribing for such number of shares of the new stock as he may be entitled to subscribe for, according to his existing stock in the bank. If any shareholder fails to subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing to such unsubscribed stock."

On April 11th, 1927, at a meeting of the Board of Directors at which both complainants were present, a resolution was unanimously passed "forfeiting the rights of all stockholders who had not filed their subscriptions for the increased capital stock on or before April 1st, and these rights are to be turned over to President Warren to do with as he sees fit without any consideration for the rights" (Case, p. 32, lines 20-27).

The unsubscribed shares which by this resolution were turned over to the defendant Warren, were 2277 (Pecora, Case, p. 33, line 21).

After the passage of this resolution Warren reported to the Board on several occasions that he had difficulty in arranging financing to pay for the shares and asked the members of the Board at Board meetings on several occasions at which complainants Sexton and D'Elia were present, if they would not purchase and pay for some of the unsubscribed shares which had been turned over to him, as he found it a difficult matter to finance them (Case, p. 33, lines 27-31).

At the next meeting on April 18th, a circular letter addressed to the depositors of the bank offering them the opportunity of purchasing an interest in the bank by the purchase of Trust

Estate Shares, was prepared and read by Payton to the Board of Directors and unanimously approved (Case, p. 54, lines 9-16). This was a scheme devised by Warren when in the previous March it became apparent that subscriptions for the increased stock were not being received and that less than 250 shares would be subscribed including approximately 30 shares by the directors (Payton, Case, p. 53, lines 21-36). The idea was to interest the depositors in procuring business for the bank through a depositor ownership plan whereby a trust should be created which would sell shares to the depositors at $25 and with the proceeds purchase the increased capital stock of the bank (*Ibid*). Warren was president of the Trust Estate and complainant D'Elia was treasurer; but the Trust Estate purchased only 180 shares of the increased stock (Payton, Case, p. 54, lines 19-22).

At various meetings of the Board Warren stated that it was impossible for him to make payment for the unsubscribed capital stock amounitng to over 2,000 shares within the time provided by the Board, and requested the Board to purchase some of the stock and to extend his time for payment (Payton, Case, p. 54; lines 36-40, p. 55, lines 1-16).

The Board did extend Warren's time for payment on several occasions but none of the directors would purchase any more of the stock than that for which they had already subscribed, the complainants among other directors on several occasions stating that the price was too high and they could purchase it for less money on the open market.

The annual statement of the bank would be issued as of December 31st, 1927, and at the Board meetings it was considered necessary that the increased capital be paid for and issued before December 31st (Case, p. 55, lines 16-20).

In December, 1927, Warren stated that he thought it would be impossible for him to finance the purchase of the stock and that he could see no way out of the difficulty except to sell a controlling interest in the bank to somebody who would provide the funds for the increased capital (Case, p. 55, lines 20, *et seq.*). The complainants knew of the attempt of Warren to sell a controlling interest in the bank because of the necessity for providing additional stock, and they discussed the matter with Payton, who was a Vice-President, and also a director, on several occasions during December, 1927 (Payton, Case, p. 55, lines 30-38).

On December 29th Warren informed Payton lhat he had arranged to obtain the money for the 2057 shares of stock of the new issue (Case, p. 56, lines 1-4).

The difference between 2,057 and the 2,277 subscribed for by Warren is accounted for by the 180 shares that were taken by the so-called Trust Estate and a few small lots sold by Warren. About December 23rd Warren first attempted to sell the stock.

POINT IV.

The alleged agreement of September 9, 1925, is contrary to public policy and void.

At least one of the primary purposes of said agreement as evidenced by Paragraph "Eleventh" thereof was to combine the voting rights of the parties thereto holding the stock of said bank affected by said agreement to be voted at all meetings of stockholders of said bank in accordance with the determination of the owners of a majority of the shares affected by the agreement. This control is unlimited as to time.

Such an agreement is clearly void. *Warren* v. *Pim* (Ct. of E. & A., 1903), 66 N. J. Eq. 353.

In *Bridgers* v. *First National Bank of Tarboro* (Sup. Ct. N. C., 1910), 67 S. E. Rep. 770, the Court had before it a voting trust agreement between the majority shareholders of a National Bank which was designed to prevent the control of a majority of the stock passing by purchase into the hands of another stockholder, and it was held that the agreement was against public policy and void. The Court said:

> "* * * It is urged upon us that this voting trust agreement ought to be sustained, because it was intended to prevent the control of a majority of the stock of the bank from passing into the hands of a stockholder who, to many of the stockholders, seems to be '*persona non grata*,' and who is buying up the stock and paying for it much more than its market or even book value. It is clear that the control of the stock cannot be acquired by this person unless some of the subscribers to the present agreement are willing to sell their stock to him. Some, it seems, have done so; and this agreement prevents the transfer of the absolute and unconditional title. We are by this argument asked to sustain this agreement to prevent a man who has invested a large sum of money in the purchase of this stock, who has that direct interest in the success of the bank which an investment of his own money necessarily creates, and who shall be denied the full use of his property by being deprived of an incident or privilege inseparably connected with it; and this to be done in favor of three trustee whose only interest in the stock of the other subscribers is to vote it at the annual or special meetings of the stockholders, to perform a trust uncoupled with an interest. * * *"

If the claim of the complainants that all of the stock held by the Guardian Trust Company of New Jersey is affected by the agreement is sound,

it would lead to the result that a majority of the stock of said bank is affected by said agreement and that the control of said bank is determinable for an indefinite period by a mere majority of a majority of the stock of the bank.

POINT V.

The agreement by its terms does not purport to affect any of the stock in question other than the 319 shares owned by Warren at the time of the execution thereof.

At the time of the making of said agreement it is undisputed that Mr. Warren held only 319 shares of the stock of the Journal Square National Bank. Subsequently he acquired by purchase the remainder of the 1,012 shares of the original capital stock of the Journal Square National Bank pledged to the Guardian Trust Company of New Jersey from other persons. In respect to such stock the agreement expressly provides that "any party to this agreement to whom stock in the future is transferred on the books of the said bank may have said stock added to the stock now owned by him in his name as hereinabove set forth and affected in every respect by this agreement, by notifying the other parties hereto by registered mail addressed to them at the addresses written after their signatures affixed hereto" (Exhibit A, Paragraph 8th, Case, pp. 6, 12). There is no claim made anywhere in the record that any of the original stock of the Journal Square National Bank purchased by Mr. Warren subsequent to the date of the agreement ever became affected by the agreement under this provision thereof.

Nor was the 2,057 shares of the increased stock of the Journal Square National Bank affected by the agreement. It is true that the agreement provides that:

> "All new stock hereafter to be issued by the Bergen National Bank of Jersey City (subsequently changed to Journal Square National Bank) which shall become owned by any of the parties to this agreement, shall be added to the number of shares they then own, which are affected by this agreement, and such new stock will become affected by this agreement in the same manner as the shares now owned by the parties hereto and mentioned in this agreement are affected hereby" (Exhibit A, Paragraph 13th, Case, pp. 6, 15).

This provision, however, taken in connection with the preceding Paragraph "Twelfth" of the agreement clearly shows that it was only intended to apply to any increased stock acquired in the exercise of subscription rights thereto in the manner provided by said Paragraph "Twelfth" of the agreement, the design of which was to secure to the other parties thereto their proportionate interest in any such authorized increase of stock issued by the bank and it is uncontrovertible that not only did each of the parties to the agreement have full opportunity to acquire their proportionate interest in the increased stock in question but also the opportunity to acquire as much more as they desired, which they refused to avail themselves of. In fact it is not denied that Sexton, one of the complainants, as Vice-President, signed the very certificates in question. The records of the bank show that both Sexton and D'Elia were present not only at the meeting of the directors held April 11, 1927, when the stock in question was "turned over to President Warren to do with as he see fit without any consideration for the rights" (Case, p. 32) but also at the meeting of the Board of Directors held April 18, 1927, when these minutes were read and approved (Case, p. 112).

POINT VI.

The agreement by its terms authorizes the pledging by any party thereto of his stock affected by the agreement.

Paragraph "Seventh" of the agreement provides:

> "Nothing herein contained is to prevent the parties hereto from using such stock as collateral for loans, but in such event the party pledging such stock as collateral will notify the other parties hereto of the name of the person or corporation holding said stock as collateral and further agrees to notify the person or corporation holding such stock as collateral, of the terms and conditions of this agreement and to require of the pledgee that in the event that the said collateral is at any time offered for sale, that he or it will notify the parties hereto in writing ten days before such sale of the time and place of the same. Any person pledging his aforesaid stock as collateral shall promptly notify the other parties hereto in the event that his loan or loans is or are called or the stock is by the pledgee offered for sale. In the event that any such loan is called or any such collateral is offered for sale, any one of the parties hereto will have the right to pay to the pledgee of such collateral the sum of Two Hundred Dollars ($200.00) per share, or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st, whichever sum is the greater, in which event, the person so pledging said stock as collateral will have the right to redeem the same from the other party by paying to the party so making payment to the former pledgee of the moneys advanced by such other parties plus interest at the rate of 6 per cent. per annum. * * * In the event that such payment is not made within thirty days to the party making payment to the original pledgee by the party pledging such collateral, then he shall

notify the other parties to this agreement by registered mail addressed to them at the addresses written after their signatures affixed hereto, who will then have the right within thirty (30) days thereafter to purchase such proportion of such stock (at $200.00 per share plus interest at 6 per cent. from the time payment to the pledgee), as the number of shares then owned by them and affected by this agreement bears to the total number of shares affected by this agreement owned by the parties desiring to purchase such stock, which notification will set the time and place within the City of Jersey City not less than ten or more than fifteen days after the date of such notice for the delivery of the stock and the payment of the purchase price thereof, in which event the said stock shall then be owned by the parties purchasing the same, free and clear of any claim or rights of ownership or interest on the part of the party hereto originally pledging such stock, but such stock will continue to be affected by this agreement."

Assuming that all of the stock held by the Guardian Trust Company of New Jersey as collateral is subject to the agreement, and that the Guardian Trust Company of New Jersey had full knowledge of the terms thereof, the Court below certainly erred in restraining the Guardian Trust Company of New Jersey from proceeding to sell the stock in accordance with the terms of the agreement.

POINT VII.

The courts of this State have no jurisdiction to rescind the issue to the defendant John Warren of the 2,037 shares of the new stock of the Journal Square National Bank.

Upon receipt of the $514,250 paid by Warren to the bank and the issuance of the stock by the officers of the bank, the Comptroller of the Currency

of the United States issued his certificate specifying the amount of such increase of capital stock and his approval thereof, and that it had been duly paid in as part of the capital of such bank pursuant to Section 57 of the Code of Laws of the United States, Title 12, Banks and Banking, Rev. Stat., Sec. 5142. The said sum of $514,250 thereupon immediately became a part of the capital of the bank in which all stockholders, creditors or depositors of the bank became interested to the extent specified in the United States Banking Law.

It has been repeatedly held that this certificate of the Comptroller that the capital stock has been increased by a certain amount and that such amount has been paid in cash, is a conclusive determination of the regularity of all of the acts of the officers, the stockholders, and the corporation itself in making the increase, and cannot be attacked in a collateral proceeding. *Scott* v. *Deweese* (Mo. 1901), 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822, affirming *Scott* v. *Latimer* (Mo. 1898), 89 F. 843, 33 C. C. A. 1; *Latimer* v. *Bard* (C. C. Mo. 1896), 76 F. 536; *Columbia Nat. Bank* v. *Mathews* (Wash. 1898), 85 F. 934, 29 C. C. A. 491, reversing (C. C. 1897), 79 F. 558; *Wallace* v. *Hood* (C. C. Kan. 1898), 89 Fed. 11, affirmed *Hood* v. *Wallace* (1899), 97 F. 983, 38 C. C. A. 692, which was affirmed in (1901), 21 S. Ct. 885, 182 U. S. 555, 45 L. Ed. 1227; *Bailey* v. *Tillinghast* (Ohio 1900), 99 F. 801, 40 C. C. A. 93, affirming *Tillinghast* v. *Bailey* (C. C. 1897), 86 F. 46; *Brown* v. *Tillinghast* (Wash. 1899), 93 F. 326, 35 C. C. A. 323.

It is fundamental that the issuance of the 2,057 shares of stock in question cannot be rescinded without the return of the $514,250 received by the Journal Square National Bank in consideration therefor.

And it is equally clear that any decree of the

Courts of this State ordering the repayment of said sum of $514,250 to the defendant, Warren, would result in a reduction of the capital stock of the Journal Square National Bank contrary to the provisions of the laws of the United States concerning Banks and Banking. Section 59 thereof expressly provides:

> "Any association formed under this chapter may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this chapter to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such redemption has been approved by the said Comptroller of the Currency and by the Federal Reserve Board (R. S. Sec. 5143; Dec. 23, 1913, c. 6, Sec. 28, 38 Stat. 274)."

Our Courts of this State have several times passed upon the question here involved.

In *Knickerbocker Importation Co.* v. *Board of Assessors* (Ct. of E. & A., 1906), 74 N. J. Law 583, this Court said:

> "The 'Act concerning corporations' (Pamph. L. 1896, p. 277, secs. 27, 29, 30) provides for the method of retiring, reducing or decreasing capital stock. It throws certain safeguards about, and imposes certain restrictions upon, such changes and alterations in the corporate organization, requiring certain proceedings on the part of both directors and stockholders, and notice by publication, and expressly providing against the release from liability of stockholders for unpaid stock, and against the release from obligations of the corporation to the state.

"In Siegman *v.* Electric Vehicle Co., decided at this term of this court (65 Atl. Rep. 910), Mr. Justice PITNEY, speaking for this court and referring to the reduction of capital stock in connection with sections 27, 29 and 30 of the 'Act concerning corporations' (Revision of 1896), says:

> " 'Taking the three sections together, they are designed to make sure—*first*, that capital shall not be reduced by indirection nor without deliberate and considered action taken for that avowed purpose, first by the directors and afterwards by two-thirds in interest of the stockholders, each stockholder having reasonable notice of the meeting and of the purpose for which it is called; and *secondly*, that formal written evidence of the action taken is to be lodged with the secretary of state and published in a newspaper, to the end that all the world may be apprised thereof.'

"Irrespective of the prohibitions contained in section 30 of the Corporation Act, the creation by the legislature of a precise method by which, under certain conditions, stock may be retired and cancelled, is a clear expression of an intention that such corporation shall accomplish this same result in no other way. * * *

"Stock once issued is and remains outstanding until retired and canceled by the method provided by statute for the retirement and cancellation of capital stock. * * *"

In *Stephany* v. *Marsden* (Ct. of E. & A. 1909), 76 N. J. Eq. 611, 612, a bill was filed to obtain a declaration by the Court of Chancery that 300 shares of the capital stock of the corporation of the par value of $15,000 issued to certain persons called the promoters, for property transferred to the company, and which stock was then held by the defendant Marsden, was issued without value and

were held in fraud of the rights of the stockholders, and, further, to obtain a decree that the shares so issued and held were without value in the hands of Marsden, and that they should be surrendered and cancelled, at least to the extent that the consideration for their issue failed. On appeal, this Court in its opinion said:

> "* * * Where stock is fraudulently issued for property purchased in excess of the value of that property, it may well be doubted whether the remedy is to compel the surrender and cancellation of the stock. Such a method of reducing capital is not that provided by the Corporation Act; and to permit its adoption might be to seriously imperil the rights of creditors."

In *Tooker* v. *Sugar Refining Co.* (Ct. of Chan. 1912), 80 N. J. Eq. 305, the Court after reviewing the above mentioned cases, held that in a suit to cancel stock issued without consideration, where a decree, recognizing the stock as valid but subject to assessment, would leave the corporation in the control of the holders of such stock, *while a decree cancelling the stock would be contrary to the mode provided by the Corporation Act* (P. L. 1896, p. 277) *for the retirement of capital stock,* the decree will recognize the stock as outstanding so far as the State or creditors are concerned, but will enjoin the corporation from paying dividends thereon, and the holders from voting thereon, except to vote to retire the stock in the mode provided by the Corporation Act.

The Journal Square National Bank is a corporation organized under the Laws of Congress, and in so far as the Courts of New Jersey are concerned, has the status of a foreign corporation doing business here. A forced reduction of capital stock is clearly a matter that concerns the internal

organization thereof, and it is fundamental that the Courts of one State will not attempt to interfere with such organization of corporations of any foreign state or country.

By the provision of Section 59 of the Code of Laws of the United States above quoted it is expressly provided that no reduction of capital stock of a national bank shall be made "until the amount of the proposed reduction had been reported to the Comptroller of the Currency and such redemption has been approved by the said Comptroller of the Currency and by the Federal Reserve Board" (R. S., Sec. 5143, Dec. 23, 1913, c. 6, sec. 28, 38 Stat. 274). Neither the Comptroller of the Currency nor the Federal Reserve Board is a party to this suit.

Upon both the uncontrovertible facts and the law we submit that the Court below was wholly without power or jurisdiction to grant the ultimate relief in aid of which the injunction relief was granted to the complainants.

We submit that the order appealed from should be reversed.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with
Defendant, John Warren,

ALBERT C. WALL,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants-Respondents,

and

JOHN WARREN and GUARDIAN TRUST COMPANY,
Defendants-Appellants,

AND OTHERS,
Defendants.

On Bill &c.
ON APPEAL FROM CHANCERY.

BRIEF FOR DEFENDANT-APPELLANT, GUARDIAN TRUST COMPANY OF NEW JERSEY.

Statement of the Issues.

This is an appeal from an order made by Vice-Chancellor Bentley in the Court of Chancery on April 12, 1928, wherein and whereby he, among other things, restrained the defendant-appellant, Guardian Trust Company of New Jersey, from proceeding to sell 3,049 shares of stock of the Journal Square National Bank of Jersey City pledged to it by the defendant-appellant, John Warren, on December 30, 1927, as collateral security for the payment of a loan to him of $650,000., evidenced by his note payable on demand. Prior to the making of the said order demand for the payment of said note had been duly made and payment refused.

By said order the Honorable Vice-Chancellor also denied the application of the Guardian Trust Company of New Jersey to compel the complainants to give as a condition of said restraint a bond to indemnify the said defendant, Guardian Trust Company of New Jersey, against any loss it might suffer by reason of such restraint (Case, pp. 199-201).

The Guardian Trust Company of New Jersey in its petition of appeal prays that said order be reversed, set aside and for nothing holden, and all restraint imposed upon it by said order be vacated. If this be refused, it prays that the complainants be required to furnish sufficient bond to indemnify it against loss that may result from the continuance of such restraint.

Statement of the Case.

The bill of complaint as amended sets forth that on September 9th, 1925, the complainants, together with one Joseph D. Payton, James Billington and the defendant John Warren, entered into a certain agreement, copy of which is attached to the bill of complaint as Exhibit A (Case, pp. 6-15), wherein and whereby each of the parties thereto agreed that none of the individuals mentioned in said agreement would at any time sell, give or bequeath certain shares of the capital stock of the Journal Square National Bank, or any part thereof, or interest therein, without first offering the same for sale to the other parties to the agreement, at a price of $200. per share or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st (Ex. A., paragraphs 1st, 2nd, 3rd, 4th, 5th, and 6th, Case, pp. 8, 9, and 10).

The agreement expressly provided that nothing therein contained should prevent the parties thereto from using such stock as collateral for loans. It was agreed, however, that the party pledging the stock as collateral would notify the other parties that it had been pledged, and would notify the pledgee of the terms of the agreement, and would require the pledgee to agree in the event that the collateral should at any time be offered for sale that such pledgee would notify the parties in writing ten days before such sale of the time and place of the sale, also that in the event of any sale of the collateral any one of the parties to the agreement should have the right to pay the pledgee the sum of $200. per share or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st, whichever sum might be greater, and receive the stock subject to the right of the party originally pledging the stock to redeem the stock from him by the payment to him of the amount advanced with interest. Upon failure of the original pledgor to so redeem the same, it was stipulated that the stock should then be offered to the remaining parties to the agreement in the proportion of their holdings of stock of the Journal Square National Bank then subject to the agreement, and in the event they failed to take their proportion of the stock, said stock should then be owned by the party purchasing the same free and clear of any right of ownership of the party originally pledging it and should continue to be affected by the agreement in his hands (Ex. A., paragraph 7th, Case, pp. 10, 11 and 12).

The agreement further provided before any stockholders' meeting the parties would confer and discuss the questions to come before such stockholders' meeting, and would vote, or cause to be voted, their stock in accordance with the de-

cision of such conference. At all conferences each party should have one vote for every share of stock then owned by him and affected by the agreement, and that the majority of the votes cast would decide all questions considered at such conference (Ex. A, paragraph 11th, Case, pp. 12-13).

The agreement further provided that in case of the increase of the stock of the Journal Square National Bank any party to the agreement who should not desire to subscribe should notify all of the other parties, and any of the other parties should have the right upon payment of an amount stipulated in the agreement to acquire his proportionate share of the subscription rights of the party not subscribing (Ex. A, paragraph 13th, Case, pp. 13-14). It also provided that all new stock thereafter to be issued which should become owned by any of the parties to the agreement should become affected by the agreement in the same manner as the shares owned by the party at the time of the making of the agreement (Ex. A, paragraph 13th, Case, p. 15).

At the time of the making of the agreement there were 578 shares owned by the parties thereto, as follows: Joseph B. Payton 50 shares, John Warren 319 shares, Nicholas W. D'Elia 121 shares, Michael J. Sexton 25 shares and James Billington 63 shares. The agreement further provided that any party thereto to whom stock in the future should be transferred on the books of the company might bring such stock under the agreement by notifying the other parties thereto (Ex. A, paragraph 8th, Case, p. 12).

The original bill of complaint charged that in December, 1927, the defendant, John Warren, in violation of the above agreement, had given the defendants, Senator Edward I. Edwards, New Jersey Bankers Securities Co. and Harry H. Weinberger, the option to purchase all of his

shares then standing in his name at the price of $350. per share, and prayed that the consummation of this option should be enjoined (Case, pp. 4-5).

A rule to show cause with an ad interim restraint was allowed on January 11, 1928 (Case, p. 21). On January 16, 1928, a motion was made to vacate the restraint (Case, p. 23), the hearing upon which was continued to January 20, 1928 (Case, p. 24), and was denied January 27, 1928 (Opinion, Case, p. 157). On January 20, 1928, the bill of complaint was first amended (Case, p. 26). On January 28, 1928, notice for reargument was given returnable February 1, 1928 (Case, p. 174). The second amendment was made to the bill of complaint on February 4, 1928 (Case, p. 169).

By this amendment the complainants further charge that at all of the times in the bill of complaint stated, John Warren was President, a member of the Board of Directors, and in active management and control of the affairs and officers of the Journal Square National Bank, and the law firm, of which he was a partner, its legal advisors, and occupied a fiduciary relation to both the bank and its stockholders. That in violation of such trusts he on December 30, 1927, caused to be issued to him in his own name 2,057 shares of the capital stock for which he paid $250. per share in order that he might resell the same to Senator Edwards or his nominees at a price of $350. per share; that his contract to resell said stock was concealed from the Directors of the bank; that in order to temporarily finance the issue of the stock to him by the bank pending the consummation of his contracts with Edwards and/or Weinberger and/or New Jersey Bankers Securities Co., pledged the stock with the Guardian Trust Company of New Jersey; further charging that the said

Edwards, Weinberger, New Jersey Bankers Securities Co. and Guardian Trust Company of New Jersey at the time of their transactions with John Warren had or were chargeable with knowledge of all of the material facts relating to the transaction (Case, pp. 169-171).

By the second amended bill complainants pray (a) that it be decreed that the issue of 2,057 shares of the capital stock of the bank to Warren was fraudulent and that it be set aside and the stock surrendered to the bank for cancellation; (b) that in the alternative and in the event of denial of the relief as above prayed, it may be decreed that Warren account to said bank for all profits realized or to be realized upon the resale of the said 2,057 shares whether the same be sold to complainants under their 1925 agreement with said Warren, or in the event that said agreement be held not binding with respect thereto, upon the resale of said stock to any other person or persons; (c) that Warren be decreed to specifically perform the 1925 agreement with the complainants in respect both to the stock owned by Warren at the time of said agreement, and also in respect to the 2,057 shares issued to him in December, 1927, and that Warren and all other defendants be enjoined and restrained from selling, pledging, or otherwise affecting the title or custody of said stock certificates, otherwise than by tendering same to complainants under said agreement; (d) in the event that the issue of the 2,057 shares to said Warren should not be set aside and in the further event that these shares should not be held to be subject to the 1925 agreement with complainants, that then and in such event defendants, Warren, Edwards, Weinberger, New Jersey Bankers Securities Co. and/or Guardian Trust Company of New Jersey be enjoined and restrained from cancelling or in anywise modifying

the agreement or agreements between them or some of them for the sale of said stock pending the determination of the suit, but that said contract or contracts be enforced for the benefit of the bank and its stockholders (Case, pp. 171-172).

The motion for reargument was denied on February 27, 1928 (Case, p. 178).

On March 15, 1928, Guardian Trust Company of New Jersey made application to have the restraint as to it modified so that it might sell said stock to satisfy its loan, or in the event such motion should be denied, to require complainants to furnish a bond to indemnify it from loss, which was returnable on March 15, 1928 (Case, p. 183).

The applications to dissolve the restraint contained in the original order to show cause; to compel the complainants to give a bond to indemnify Warren; to permit the Guardian Trust Company of New Jersey to proceed to sell the stock to satisfy its loan or in the alternative to compel the complainants to give a bond to indemnify it against loss that might occur by reason of any continued restraint, and the application of Edward I. Edwards for leave to cancel his contract for the purchase of the stock, hereinbefore referred to, which had also been made was denied by order made April 12, 1928, from which order this appeal is taken (Case, p. 199).

All of the hearings were had upon supporting affidavits and answering affidavits (Case, pp. 16, 29-156, 85-185-194).

In the affidavit submitted on behalf of the defendant, Warren, it is definitely and unequivocally averred that the agreement of 1925, was entered into at a time when the officers of another bank in Jersey City were purchasing stock of the said Journal Square National Bank in an endeavor to obtain control of the Journal Square National Bank, and the only purpose of the agreement was

to defeat this endeavor (Case, p. 40), and that finally in the month of December, 1926, the attempt was completely frustrated by Warren's purchasing 532 shares of the Journal Square National Bank that had been acquired in the interest of the outside bank at $195.50 a share, the purchase price amounting to $104,006 (Case, p. 42); that subsequently none of the terms of the agreement had ever been observed by any party to it, that it had been repeatedly violated by the parties thereto in respect to the sale, pledging and voting of the stock expressly affected thereby without any objection from anyone, that upon the increase of the stock of the bank, hereinafter mentioned, the provision of the agreement had not been observed by any party thereto. In short, that from the time the endeavor of outside parties to get control of the bank had been defeated, it had been considered by all parties thereto as at an end and abandoned (Case, pp. 36-47). These allegations are not denied in the affidavits submitted by the two complainants except to the extent that it is averred by them that they had not been aware of any violations of the terms of the agreement by any of the other parties thereto and that it was their understanding that the agreement was in full force and effect (Case, pp. 58-63; 64-67).

In denial of the claim that the 2,057 shares of the new stock of the Journal Square National Bank had been acquired by Warren in breach of his fiduciary relation to the bank and its stockholders, the affidavits submitted on behalf of Warren show that in October, 1926, the bank purchased its site in Journal Square and in order to secure funds to purchase and improve the property an increase of the capital stock of the bank from 2,500 shares to 5,000 shares was duly authorized by the stockholders at the annual meeting held on January 11, 1927 (Case, p. 130). At the Directors'

meeting held on the same day it was resolved that the new stock should be issued for $250. a share and at the meeting of the Directors held January 21, 1927, it was resolved that it should first be offered to the stockholders pro rata, warrants to be sent out about the middle of February and to state that stockholders should forfeit their rights if their subscriptions were not presented on or before April 1st, and payments should not be made in equal installments on May 1st and June 1st. Few stockholders subscribed and at the meeting of the Board of Directors held April 11, 1927, at which both complainants were present, a resolution was unanimously passed "forfeiting the rights of all stockholders who had not presented their subscriptions for the increased capital stock on or before April 1st, and these rights turned over to President Warren to do with as he sees fit without any consideration for the rights" (Case, pp. 32, 20-30). The number of unsubscribed shares turned over were 2,277.

Warren then conceived the idea of welding the depositors of the bank to it through the creation of a trust estate which would sell shares for $25., and with the proceeds purchase the increased capital of the said bank (Case, p. 42). A circular letter approved by the Board of Directors on April 18, 1927, was sent to the depositors offering to them the opportunity of obtaining an interest in the stock of said bank through the purchase of said trust estate shares. The trust estate through the sale of its shares secured money to purchase 180 shares of the increased stock, which after the sale of 40 shares of three other persons, left 2,057 shares yet to be disposed of (Case, pp. 42-45).

Warren stated that he assumed the obligation to pay for these shares but had difficulty in raising the money and the Board of Directors extended the time for payment from time to time (Case,

p. 44). Being unable to arrange for any sale whereby the purchaser of the stock would pay for the increased capital before December 31, 1927, Warren negotiated on December 30th with the Guardian Trust Company of New Jersey a loan of $650,000., of which amount he paid to the Journal Square National Bank $514,250., being the issue price of the 2,057 shares unsold and as evidence of said loan gave his demand note and pledged with the Guardian Trust Company of New Jersey, 3,049 shares of the Journal Square National Bank, consisting of the 2,057 shares of the new stock and 1,012 other shares of said bank then owned by him (Case, pp. 43-46; 185-189). About the same time Warren entered into an agreement with Senator Edward I. Edwards wherein and whereby he agreed to sell to the said Senator Edward I. Edwards, or his nominee, 3,001 shares of the Journal Square National Bank at the price of $350. a share, or a total price of $1,067,850 (Ex. , Case, pp. 191-194).

The affidavits submitted on behalf of Warren unequivocally aver that it was the understanding of all members of the Board of Directors that his individual obligation to take the stock at $250. a share was absolute from April 11, 1927, and that whatever he did in negotiating the sale of the stock was in his own behalf and not in behalf of the bank or any of its stockholders. Not only the Directors but all of the stockholders and depositors of the bank were given the opportunity to take the stock at the price of $250. a share, which they refused, and which obligation Warren assumed, and that the sale of the stock by him was in his own interest and not as a fiduciary or representative of the bank; and the price obtained based upon the fact that he was including his own individual shares and selling a controlling interest in the bank; that all of the Directors knew that

he was endeavoring to effect a sale of this control in his own interest and not as a fiduciary of the bank. Sexton, one of the complainants, signed the certificates for the new stock issued to Warren and pledged to the Guardian Trust Company of New Jersey and raised no objection thereto.

The affidavits submitted on behalf of the complainants unequivocally aver that although the complainants were present at the meeting of the Board of Directors held April 11, 1927, that no such resolution forfeiting the rights of the stockholders was presented or passed; that the time for stockholders to subscribe extended to December 15th and that no further extension was ever authorized by the Board. They deny that they understood that Warren in his endeavor to dispose of the stock was acting in his own individual interest, and aver that he was acting as a fiduciary of the bank and that they knew nothing of the terms of his agreement of sale of the controlling interest in the bank to Senator Edward I. Edwards until it was announced in the newspapers during the first week in January, 1928.

There is no averment of any facts in any of the affidavits submitted on behalf of the complainants that the Guardian Trust Company of New Jersey, or any of its officers, had any knowledge of the agreement of 1925 at the time of its loan to Warren or that it had any knowledge of any facts that Warren in acquiring the 2,057 shares of the new stock of the Journal Square National Bank was violating any alleged fiduciary relation with said bank or its stockholders. On the other hand, it appears uncontradicted in the affidavit of Mr. Appleton, President of the Guardian Trust Company of New Jersey, bearing date March 8, 1928 (Case, p. 185), that he was the officer of the Guardian Trust Company of New Jersey with whom the loan was negotiated by

Warren and that he had no knowledge of the agreement of 1925 or of anything therein contained, and that the Guardian Trust Company of New Jersey purchased the note of the defendant, John Warren, and took as collateral security the 3,049 shares of stock of the Journal Square National Bank as an innocent holder for value and without notice of any agreement or of any facts or circumstances which would or should estop it from demanding payment of said note made by the said John Warren, or selling the stock held as security for the payment of said note. The Guardian Trust Company of New Jersey on March 1, 1928, demanded payment of said note from said John Warren and payment of said note has not been made. He further says that while the officers and directors of the Guardian Trust Company of New Jersey were at the time of making the affidavit of the opinion that the collateral held by the bank as security for the payment of said note could then be sold at a price sufficient to liquidate said indebtedness, there is serious doubt in their minds as to whether or not if the litigation continues and receives as much publicity in the future as it has in the past, that the value of said stock will continue to remain at an amount sufficient to protect the defendant, the Guardian Trust Company of New Jersey, and that consequently the Guardian Trust Company of New Jersey is desirous of selling said stock so that the rights and interests of the stockholders of the Guardian Trust Company of New Jersey may be adequately and promptly protected (Case, pp. 185-189).

ARGUMENT.

Without any reliance upon any of the controverted issues in the case, we submit on behalf of the Guardian Trust Company of New Jersey, that the order of April 12, 1928, in so far as it pertains to the Guardian Trust Company of New Jersey, should be reversed, set aside and for nothing holden, and the Guardian Trust Company of New Jersey relieved of any restraint from immediately disposing of the said stock of the Journal Square National Bank held by it as collateral security, or at least the complainants should be required, as a condition to the continuance of the injunction against the disposing of said stock, to furnish to it adequate security to indemnify it against any loss it may suffer by reason of any restraint that may be continued against it. And this for the following reasons:

I.

The alleged agreement of September 9, 1925, is contrary to public policy and void.

At least one of the primary purposes of said agreement as evidenced by paragraph "Eleventh" thereof was to combine the voting rights of the parties thereto holding the stock of said bank affected by said agreement to be voted at all meetings of stockholders of said bank in accordance with the determination of the owners of a majority of the shares affected by the agreement. This control is unlimited as to time.

Such an agreement is clearly void. *Warren* v. *Pim* (Ct. of E. & A., 1903), 66 N. J. Eq. 353.

In *Bridgers* v. *First National Bank of Tarboro* (Sup. Ct. N. C. 1910), 67 S. E. Rep. 770, the Court had before it a voting trust agreement between the majority shareholders of a National Bank which was designed to prevent the control of a majority of the stock passing by purchase into the hands of another stockholder, and it was held that the agreement was against public policy and void. The Court said:

> "* * * It is urged upon us that this voting trust agreement ought to be sustained, because it was intended to prevent the control of a majority of the stock of the bank from passing into the hands of a stockholder who, to many of the stockholders, seems to be 'persona non grata', and who is buying up the stock and paying for it much more than its market or even book value. It is clear that the control of the stock cannot be acquired by this person unless some of the subscribers to the present agreement are willing to sell their stock to him. Some, it seems, have done so; and this agreement prevents the transfer of the absolute and unconditional title. We are by this argument asked to sustain this agreement to prevent a man who has invested a large sum of money in the purchase of this stock, who has that direct interest in the success of the bank which an investment of his own money necessarily creates, and who shall be denied the full use of his property by being deprived of an incident or privilege inseparably connected with it; and this to be done in favor of three trustees whose only interest in the stock of the other subscribers is to vote it at the annual or special meetings of the stockholders, to perform a trust uncoupled with an interest. * * *"

If the claim of the complainants that all of the stock held by the Guardian Trust Company of New Jersey is affected by the agreement is sound, it would lead to the result that a majority of the

stock of said bank is affected by said agreement and that the control of said bank is determinable for an indefinite period by a mere majority of a majority of the stock of the bank.

II.

The Guardian Trust Company of New Jersey had no notice of said agreement.

The agreement of September 9, 1925, was an agreement between five of the stockholders of the Journal Square National Bank, of which Mr. Warren was one. Whatever rights that were created by said agreement did not affect the legal title of any of the stock affected thereby, and at most gave to the parties thereto as against any third party having notice of the terms thereof the option to buy at a specified price before the stock could be offered by the owners thereof to any one not a party to the agreement.

There is not a suggestion of any fact in any of the affidavits submitted on behalf of the complainants that the Guardian Trust Company of New Jersey had any knowledge of this agreement or of any of its provisions. The only proof before the Court concerning any knowledge by the Guardian Trust Company of New Jersey was the affidavit of Mr. Appleton, President of said Trust Company, which unequivocally averred that he alone negotiated said loan, and that neither he nor any officer of the Trust Company had any knowledge of said agreement, or of any of the stipulations thereof (Case, pp. 185-186). The court below does not even suggest that it had such knowledge (Opinion, Case, pp. 157-168; 178-181; 195-198).

III.

The agreement by its terms does not purport to affect any of the stock in question other than the 319 shares owned by Warren at the time of the execution thereof.

At the time of the making of said agreement it is undisputed that Mr. Warren held only 319 shares of the stock of the Journal Square National Bank.

Subsequently he acquired by purchase the remainder of the 1,012 shares of the original capital stock of the Journal Square National Bank pledged to the Guardian Trust Company of New Jersey from other persons. In respect to such stock the agreement expressly provides that "Any party to this agreement to whom stock in the future is transferred on the books of the said bank may have said stock added to the stock now owned by him in his name as hereinabove set forth and affected in every respect by this agreement, by notifying the other parties hereto by registered mail addressed to them at the addresses written after their signatures affixed hereto" (Ex. A, paragraph 8th, Case, pp. 6, 12). There is no claim made anywhere in the record that any of the original stock of the Journal Square National Bank purchased by Mr. Warren subsequent to the date of the agreement ever became affected by the agreement under this provision thereof.

Nor was the 2,057 shares of the increased stock of the Journal Square National Bank affected by the agreement. It is true that the agreement provides that

> "All new stock hereafter to be issued by the Bergen National Bank of Jersey City

> (subsequently changed to Journal Square National Bank) which shall become owned by any of the parties to this agreement, shall be added to the number of shares they then own, which are affected by this agreement, and such new stock will become affected by this agreement in the same manner as the shares now owned by the parties hereto and mentioned in this agreement are affected hereby.'' (Ex. A, paragraph 13th, Case, pp. 6, 15.)

This provision, however, taken in connection with the preceding paragraph ''Twelfth'' of the agreement clearly shows that it was only intended to apply to any increased stock acquired in the exercise of subscription rights thereto in the manner provided by said paragraph ''Twelfth'' of the agreement, the design of which was to secure to the other parties thereto their proportionate interest in any such authorized increase of stock issued by the bank and it is uncontrovertible that not only did each of the parties to the agreement have full opportunity to acquire their proportionate interest in the increased stock in question but also the opportunity to acquire as much more as they desired, which they refused to avail themselves of. In fact it is not denied that Sexton, one of the complainants, as Vice-President, signed the very certificates in question. The records of the bank show that both Sexton and D'Elia were present not only at the meeting of the Directors held April 11, 1927 when the stock in question was ''turned over to President Warren to do with as he see fit without any consideration for the rights'' (Case, p. 32) but also at the meeting of the Board of Directors held April 18, 1927 when these minutes were read and approved (Case, p. 112).

IV.

The agreement by its terms authorizes the pledging by any party thereto of his stock affected by the agreement.

Paragraph "Seventh" of the agreement provides:

> "Nothing herein contained is to prevent the parties hereto from using such stock as collateral for loans, but in such event the party pledging such stock as collateral will notify the other parties hereto of the name of the person or corporation holding said stock as collateral and further agrees to notify the person or corporation holding such stock as collateral, of the terms and conditions of this agreement, and to require of the pledgee that in the event that the said collateral is at any time offered for sale, that he or it will notify the parties hereto in writing ten days before such sale of the time and place of the same. Any person pledging his aforesaid stock as collateral shall promptly notify the other parties hereto in the event that his loan or loans is or are called or the stock is by the pledgee offered for sale. In the event that any such loan is called or any such collateral is offered for sale, any one of the parties hereto will have the right to pay to the pledgee of such collateral the sum of Two Hundred Dollars ($200.00) per share, or book value according to the last published statement of the bank as of the next preceding July 1st or January 1st, whichever sum is the greater, in which event, the person so pledging said stock as collateral will have the right to redeem the same from the other party by paying to the party so making payment to the former pledgee of the moneys advanced by such other parties plus interest at the rate

> of 6 per cent. per annum. * * * In the event that such payment is not made within thirty days to the party making payment to the original pledgee by the party pledging such collateral, then he shall notify the other parties to this agreement by registered mail addressed to them at the addresses written after their signatures affixed hereto, who will then have the right within thirty (30) days thereafter to purchase such proportion of such stock (at $200.00 per share plus interest at 6 per cent. from the time of payment to the pledgee), as the number of shares then owned by them and affected by this agreement bears to the total number of shares affected by this agreement owned by the parties desiring to purchase such stock, which notification will set the time and place within the City of Jersey City not less than ten or more than fifteen days after the date of such notice for the delivery of the stock and the payment of the purchase price thereof, in which event the said stock shall then be owned by the parties purchasing the same, free and clear of any claim or rights of ownership or interest on the part of the party hereto originally pledging such stock, but such stock will continue to be affected by this agreement.''

Assuming that all of the stock held by the Guardian Trust Company of New Jersey as collateral is subject to the agreement, and that the Guardian Trust Company of New Jersey had full knowledge of the terms thereof, the Court below certainly erred in restraining the Guardian Trust Company of New Jersey from proceeding to sell the stock in accordance with the terms of the agreement.

V.

The courts of this State have no jurisdiction to rescind the issue to the Defendant, John Warren, of the 2,037 shares of the new stock of the Journal Square National Bank.

Upon receipt of the $514,250. paid by Warren to the bank and the issuance of the stock by the officers of the bank, the Comptroller of the Currency of the United States issued his certificate specifying the amount of such increase of capital stock and his approval thereof, and that it had been duly paid in as part of the capital of such bank pursuant to Section 57 of the Code of Laws of the United States, Title 12, Banks and Banking, Rev. Stat. Sec. 5142. The said sum of $514,250 thereupon immediately became a part of the capital of the bank in which all stockholders, creditors or depositors of the bank became interested to the extent specified in the United States Banking Law.

It has been repeatedly held that this certificate of the Comptroller that the capital stock has been increased by a certain amount and that such amount has been paid in cash, is a conclusive determination of the regularity of all of the acts of the officers, the stockholders, and the corporation itself in making the increase, and cannot be attacked in a collateral proceeding. *Scott* v. *Deweese* (Mo. 1901), 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822, affirming *Scott* v. *Latimer* (Mo. 1898), 89 F. 843, 33 C. C. A. 1; *Latimer* v. *Bard* (C. C. Mo. 1896), 76 F. 536; *Columbia Nat. Bank* v. *Mathews* (Wash. 1898), 85 F. 934, 29 C. C. A. 491, reversing (C. C. 1897) 79 F. 558; *Wallace* v. *Hood* (C. C. Kan. 1898, 89 Fed. 11, affirmed *Hood* v. *Wal-*

lace (1899), 97 F. 983, 38 C. C. A. 692, which was affirmed in (1901 21 S. Ct. 885, 182 U. S. 555, 45 L. Ed. 1227; *Bailey* v. *Tillinghast* (Ohio 1900), 99 F. 801 40 C. C. A. 93, affirming *Tillinghast* v. *Bailey* (C. C. 1897), 86 F. 46; *Brown* v. *Tillinghast* (Wash. 1899), 93 F. 326, 35 C. C. A. 323.

It is fundamental that the issuance of the 2,057 shares of stock in question cannot be rescinded without the return of the $514,250. received by the Journal Square National Bank in consideration therefor.

And it is equally clear that any decree of the courts of this State ordering the repayment of said sum of $514,250. to the defendant, Warren, would result in a reduction of the capital stock of the Journal Square National Bank contrary to the provisions of the laws of the United States concerning Banks and Banking. Section 59 thereof expressly provides:

> "Any association formed under this chapter may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this chapter to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such redemption has been approved by the said Comptroller of the Currency and by the Federal Reserve Board. (R. S. sec. 5143; Dec. 23, 1913, c. 6, sec. 28, 38 Stat. 274.)"

Our Courts of this State have several times passed upon the question here involved.

In *Knickerbocker Importation Co.* v. *Board of Assessors* (Ct. of E. & A., 1906), 74 N. J. Law 583, this Court said:

> "The 'Act concerning corporations' (Pamph. L. 1896, p. 277, secs. 27, 29, 30) provides for the method of retiring, reducing or decreasing capital stock. It throws certain safeguards about, and imposes certain restrictions upon, such changes and alterations in the corporate organization, requiring certain proceedings on the part of both directors and stockholders, and notice by publication, and expressly providing against the release from liability of stockholders for unpaid stock, and against the release from obligations of the corporation to the state.
>
> "In Siegman *v.* Electric Vehicle Co., decided at this term of this court (65 Atl. Rep. 910), Mr. Justice Pitney, speaking for this court and referring to the reduction of capital stock in connection with sections 27, 29 and 30 of the 'Act concerning corporations' (Revision of 1896), says:
>
> 'Taking the three sections together, they are designed to make sure—*first,* that capital shall not be reduced by indirection nor without deliberate and considered action taken for that avowed purpose, first by the directors and afterwards by two-thirds in interest of the stockholders, each stockholder having reasonable notice of the meeting and of the purpose for which it is called; and *secondly,* that formal written evidence of the action taken is to be lodged with the secretary of state and published in a newspaper, to the end that all the world may be apprised thereof'.
>
> "*Irrespective of the prohibitions contained in section 30 of the Corporation Act, the creation by the legislature of a precise method by which, under certain conditions, stock may be retired and cancelled, is a clear expression of an intention that such corporation shall accomplish this same result in no other way.*
> * * *

> *"Stock once issued is and remains outstanding until retired and canceled by the method provided by statute for the retirement and cancellation of capital stock."*

In *Stephany* v. *Marsden* (Ct. of E. & A. 1909) 76 N. J. Eq. 611, 612, a bill was filed to obtain a declaration by the Court of Chancery that 300 shares of the capital stock of the corporation of the par value of $15,000. issued to certain persons called the promoters, for property transferred to the company, and which stock was then held by the defendant Marsden, was issued without value and were held in fraud of the rights of the stockholders, and, further, to obtain a decree that the shares so issued and held were without value in the hands of Marsden, and that they should be surrendered and cancelled, at least to the extent that the consideration for their issue failed. On appeal, this court in its opinion said:

> "* * * Where stock is fraudently issued for property purchased in excess of the value of that property, it may well be doubted whether the remedy is to compel the surrender and cancellation of the stock. Such a method of reducing capital is not that provided by the Corporation Act; and to permit its adoption might be to seriously imperil the rights of creditors."

In *Tooker* v. *Sugar Refining Co.* (Ct. of Chan. 1912) 80 N. J. Eq. 305, the Court after reviewing the above mentioned cases, held that in a suit to cancel stock issued without consideration, where a decree, recognizing the stock as valid but subject to assessment, would leave the corporation in the control of the holders of such stock, *while a decree cancelling the stock would be contrary to the mode provided by the Corporation Act* (*P. L. 1896, p. 277*), *for the retirement of capital stock,* the decree

will recognize the stock as outstanding so far as the state or creditors are concerned, but will enjoin the corporation from paying dividends thereon, and the holders from voting thereon, except to vote to retire the stock in the mode provided by the Corporation Act.

The Journal Square National Bank is a corporation organized under the Laws of Congress, and in so far as the Courts of New Jersey are concerned, has the status of a foreign corporation doing business here. A forced reduction of capital stock is clearly a matter that concerns the internal organization thereof, and it is fundamental that the Courts of one state will not attempt to interfere with such organization of corporations of any foreign state or country.

By the provision of Section 59 of the Code of Laws of the United States above quoted it is expressly provided that no reduction of capital stock of a national bank shall be made "until the amount of the proposed reduction had been reported to the Comptroller of the Currency and such redemption has been approved by the said Comptroller of the Currency and by the Federal Reserve Board" (R. S. Sec. 5143, Dec. 23, 1913, c. 6 sec. 28, 38 Stat. 274). Neither the Comptroller of the Currency or the Federal Reserve Board is a party to this suit.

Upon the uncontrovertible facts and the law we submit that the court below was wholly without power or jurisdiction to grant the ultimate relief in aid of which the injunction relief was granted to the complainants.

VI.

The Guardian Trust Company of New Jersey had no notice of the alleged breach of Warren's fiduciary relations with the bank.

In restraining the Guardian Trust Company of New Jersey, the Court based its decision entirely upon the premise that he might take judicial notice "that bankers as a class are very inquisitive in passing upon a request for a loan of their depositors' money and that the curiosity of bankers increases as the square of the amount of the loan desired". He concludes: "In short and to state the point bluntly it appears to me that the lender knew and must have known of the scheme that was to be perpetrated at the expense of the Journal Square National Bank."

That the Guardian Trust Company of New Jersey had knowledge of any scheme which was to be perpetrated at the expense of the Journal Square National Bank or of any facts that would charge it with notice thereof is not supported by any proof in the record of the case and was directly and emphatically denied in the affidavit of Mr. Appleton, President of the Guardian Trust Company of New Jersey (Case pp. 185-189).

VII.

The Court below erred in granting a preliminary injunction.

As long as fifty years ago, this Court in the case of *Citizens Coach Co.* v. *Camden Horse Rail-*

road Co. (Ct. of E. and A.—1878), 29 N. J. E. 299, said:

> "First: It is entirely settled that a preliminary injunction will never be ordered unless from the pressure of an urgent necessity. The damage threatened to be done, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character. Such is the clear language and mandate of the cases from the earliest to the latest. * * * In the leading case of *Bonaparte* v. *Camden and Amboy R. R. Co.,* Bald. C. C. 205, 217, the cautionary words of Judge Baldwin are equally emphatic against a too frequent resort to this writ. He says: 'There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless in *cases of great injury,* where the courts of law cannot afford an adequate or commensurate remedy in damages.'
>
> The rule thus declared at this remote period has never, so far as I can discover, been questioned or abridged by any of the courts of this state when the matter has been presented for consideration. * * * 'Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right. To do so would be unnecessarily to prejudge the case before a full hearing on its merits—and so are the authorities.' * * *
>
> In the second place: No rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. In the case of *Stevens* v.

Paterson and Newark R. R. Co., 5 C. E. Gr. 126, this principle is expressed in these words, viz: 'An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law, about which there may be a doubt, which has not been settled by the courts of law of this state.' * * *

In the third place: When this order for this injunction was made, every fact that created an equity in favor of the complainant was denied by the answer and proofs of the defendant. The order for the injunction was made on a rule to show cause, and, on this rule, the answer and accompanying affidavits were used by the appellants. * * * These sworn statements, as I have said, denied, as directly and emphatically as it was possible, every material allegation on which, in the bill, the prayer for an injunction rested.''

In the instant case it is not denied that the capital stock in question has been duly authorized by the stockholders of the Journal Square National Bank, and the only question here involved is the sale price thereof. The price of $350. per share offered for the stock by Senator Edwards is obviously higher than any price that can be obtained by the bank in the sale of the 2,057 shares of the new stock issued to the defendant Warren. It appears from the undisputed testimony that the officers of the bank endeavored to make sale of the stock for more than a year at the price of $250. Obviously, it is to the interest of the complainants, as well as to the interest of all other stockholders of the bank, to retain the capital secured in the issuance of the stock to Warren.

Complainants' rights against the defendant, Warren, if any, are for an accounting, and we submit that the Court below should, in equity, have allowed the transaction to have been consummated and have expended the proceeds of

sale for the benefit of all those who may have been interested to the extent of the respective rights therein.

In any event the proofs of the Guardian Trust Company of New Jersey unequivocally showed that it is not in any way involved in any of the transactions of Warren and no proof was submitted by the corporation in denial of this. There was nothing before the Court below to justify any interference by it with the rights of the Guardian Trust Company of New Jersey to proceed to take such steps as the law secures to it to protect its interest. Its position is that of a bona fide purchaser for value without notice. Certainly the complainants should have been compelled as a condition to the continuation of any restraint granted against it to indemnify it against any loss that it might suffer by reason of any such restraint.

We submit that the order appealed from should be reversed, set aside and for nothing holden with costs to the defendant Guardian Trust Company of New Jersey.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with the defendant Guardian Trust Co. of New Jersey.

J. EDWARD ASHMEAD,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(4861)

16MAY.T.1928
17MAY.T.1928

Filed after the Oral Argument
by leave of Court.

New Jersey Court of Errors and Appeals

Between

NICHOLAS W. D'ELIA and MICHAEL J. SEXTON,
Complainants-Respondents,

and

JOHN WARREN and GUARDIAN TRUST COMPANY,
Defendants-Appellants,

and others,
Defendants.

On Bill, &c.
ON APPEAL FROM CHANCERY.

ANSWERING BRIEF FOR DEFENDANT-APPELLANT GUARDIAN TRUST COMPANY OF NEW JERSEY.

I.

The agreement of 1925 is of no effect.

The argument contained in Point I of the brief submitted on behalf of the Guardian Trust Company of New Jersey to the effect that the alleged agreement of September 9, 1925, is contrary to public policy and void is attempted to be answered in Point II of complainants' reply to the brief submitted on behalf of Mr. Warren.

In the Statement of Facts in complainants' reply brief the purpose of the 1925 agreement is stated as follows: "Early in 1925 two banking institutions of Jersey City had attempted to obtain control of the Journal Square National Bank, which was then known as the Bergen National

Bank of Jersey City, by buying stock. At that time, Warren entered into an agreement which is dated September 9, 1925."

The agreement, read in the light of the circumstances surrounding its origin, demonstrates that it was a defensive action, the object of which was to perpetuate voting control of the stock affected thereby in the hands of the holders of the majority of such stock. (1) It did not by its terms give to the holders of all of the shares of the corporation an equal privilege of availing themselves of its provisions; (2) its object and aim were not for the equal benefit of all the shares; (3) it ignored and defied the statutory policy of equality of every share in the eye of the law; (4) if carried out or enforced, it would place the control of the bank in a majority of the majority of the stock; (5) it would do this for an indefinite period.

We know of no case where any agreement with such a purpose or effect has ever been sustained. The consideration of this agreement is entire and consequently its stipulations are not severable. It is wholly void.

II.

The Guardian Trust Company of New Jersey is not chargeable with notice of this agreement.

The complainants in Point I of their brief in reply to the brief of the Guardian Trust Company of New Jersey do not once aver, except in the title, that the Guardian Trust Company of New Jersey had any knowledge of this agreement. There is nothing in the whole case to suggest that the Guardian Trust Company of New Jersey had such notice. Mr. Appleton, President of the Guardian Trust Company of New Jersey, and who is the only one of the Trust Company's officers who had

to do with the negotiations of the Warren loan, expressly denies that it had any notice of the agreement or any stipulation thereof (Case, pp. 185-186).

III.

The 1925 agreement does not affect the stock in question.

Complainants' reply to the brief of the Guardian Trust Company of New Jersey on this point is dealt with in Point V. of their brief in reply to the brief submitted on behalf of Mr. Warren.

None of the stock in question was affected by the agreement at the time the loan was made. There were 3,049 shares of stock pledged with the Guardian Trust Company of New Jersey. Of this amount, 1,012 were shares of the original capital stock, of which Warren owned only 319 shares at the time of the making of the agreement. The other 693 of this 1,012 shares he purchased subsequently and never brought them within the terms of the agreement by giving notice to that effect to the other parties thereto. The remaining 2,037 shares purchased were of the new stock of the bank.

Aside from the original inherent illegality of the agreement, it had, as a matter of fact, been abandoned long before the making of the loan in question.

As already stated, the agreement was for the definite purpose of defeating an attempt by outside parties to purchase control. Warren bought out these outside interests, in the latter part of 1925. Not being limited in time by its terms, the agreement must necessarily be construed to be limited to the accomplishment of the purpose of

its conception, which was realized more than a year prior to the transaction in question. From that day on, the terms of the agreement have never been observed by any of the parties thereto. The parties have sold stock without offering it to the others and made pledges of other stock without conforming to the terms of the agreement with respect to pledging such stock. Warren has never brought within the terms of the agreement the 693 shares of the original capital stock of the bank he had subsequently purchased, nor has the others the additional stock they have purchased. On the increase of the stock, none of them offered his right to subscribe to any other party to the agreement, pursuant to the terms thereof. By the terms of the agreement, the purchase price of the stock was fixed at $200, or at the book value, whichever should be the greater. Just prior to the increase of the capital stock, the book value was $129, just after the increase it was $205.96 per share (Case, p. 114, ls. 18, 36). The stockholders fixed the subscription price at $250. Both complainants refused to purchase the stock at this price. They stood by, allowing Warren to acquire the stock at a price which they considered far in excess of its real value, and, after he had consummated the purchase, they then rushed into a Court of Equity and claim that they are entitled to purchase the stock from him at $200, or at book value ($205.96) in accordance with the terms of the agreement.

We have found no cases supporting such an unconscionable claim, and the complainants have cited none.

IV.

The agreement by its terms authorizes the pledge and sale of stock.

The complainants in Point II. of their brief in reply to the brief submitted on behalf of the Guardian Trust Company of New Jersey, admit that even though all of the stock were subject to the terms of the agreement, Warren had a right to pledge it, and the Guardian Trust Company of New Jersey has a right to sell it. In view of these admissions, they must admit that the Court below in restraining the Guardian Trust Company of New Jersey from doing that which the agreement expressly provided a pledgee might do, clearly erred.

V.

The Courts have no jurisdiction to rescind the issue of the 2057 shares of the new stock issued to Warren.

Complainants attempt to answer this argument in Point VII of their brief in reply to the brief submitted on behalf of Mr. Warren.

They merely make the statement that "where an attack is made directly against the issue and not an attempted evasion of the obligation incurred upon subscribing for stock and then not paying for it, the Federal Courts have held that said issue is open to collateral attack." We have not been able to find any such decision and they cite none.

The law on this point is set out in Point V of our main brief; about the soundness of which we submit there can be no doubt.

VI.

The Guardian Trust Company of New Jersey had no notice of the alleged breach of Warren's fiduciary relation with the bank.

Complainants deal with this subject in Point I of their brief in reply to the brief submitted on behalf of the Guardian Trust Company of New Jersey, entitled "The Guardian Trust Company is chargeable with notice of the 1925 agreement". As above stated, this point makes no reference to any fact showing notice of that agreement.

As to notice of any alleged breach of fiduciary relation, complainants adopt the same reasoning as used by the Court below. The Court assumed to take judicial notice "that bankers as a class are very inquisitive in passing upon a request for a loan of their depositors' money and that the curiosity of bankers increases as the square of the amount of the loan desired". From this it concluded the Guardian Trust Company of New Jersey must have had notice.

On the contrary, Mr. Appleton, President of the Guardian Trust Company of New Jersey, expressly and emphatically denied that he or the Guardian Trust Company of New Jersey had any knowledge of any scheme which was to be perpetrated at the expense of the Journal Square National Bank or of any facts that would charge them with notice thereof (Case, pp. 185, 189), and this was the only proof pertaining to this fact before the Court. Has it come to pass that the Presidents of our reputable banks can only be dealt with upon the basis of the gravest suspicion as to their honesty and integrity? But assuming that Mr. Appleton had the amount of curiosity chargeable to him by the Court below, where

would he have gone to ascertain the facts but to the records of the Journal Square National Bank? And what would he have found? He would have found: that "the Bank having purchased a new building in Jersey City, the Comptroller of the National Currency early in 1927 directed that the capitalization of the said Bank be increased, and in accordance with that mandate, the Board of Directors and the stockholders subsequently voted to increase the capitalization to 5,000 shares of stock" (Complainants' brief in reply to brief submitted on behalf of John Warren, pp. 1 and 2); that the stockholders had suggested an issue price of $250 per share; that subsequently the Board of Directors had adopted this suggestion and fixed the price at $250 per share; that only a few of the shareholders had subscribed to the stock at such price and that the time within which they could subscribe had been limited by the Directors in offering the stock to them for subscription to April 1, 1927; that by Section 12 of the By-Laws, if any stockholder fails to subscribe for the amount of stock to which he may be entitled, the Board of Directors may determine what disposition shall be made of the privilege of subscribing to such unsubscribed stock (Case, p. 32); that at a meeting of the Board of Directors held on April 11, 1927, at which both complainants were present, a resolution had been unanimously passed forfeiting the rights of all stockholders who had not filed their subscriptions for the increased capital stock on or before April 1, and that these rights had been turned over to President Warren to do with as he should see fit without any consideration for the rights; that these minutes were read at the next meeting of the Board of Directors held on April 18th and approved, both complainants being present (Case, p. 112, ls. 33, 38); that

at this meeting on April 18th a proposed circular letter by Mr. Warren to the depositors was read to the Directors by the Vice-President and approved, and that said letter was actually sent out to the depositors of the bank on April 22, stating that—"As you know our bank has voted to increase its stock by 2,500 shares, to which the present stockholders were entitled to subscribe. The entire issue has been subscribed; but in order to establish depositor ownership a few other large subscribers have cooperated with me and have given to the Journal Square National Bank 'trust estate' options to subscribe for a substantial portion of the new stock in their place, which will, when issued be deposited in the trust department of our bank and there held for the benefit of the shareholders of the trust estate" (Case, p. 146, ls. 15-27); that only 180 shares of this stock was taken up in this way and there remained 2,057 shares which had been turned over to Warren and that Warren's time to pay for this stock had been extended from time to time by the Board of Directors (Case, p. 155, l. 12).

They would not have found any of the facts now relied upon by the complainants as evidence of fraudulent conduct on the part of Warren because both Sexton and D'Elia allege that they did not learn of these facts until the 10th day of January, eleven days or more after the loan had been negotiated by Warren with the Guardian Trust Company of New Jersey. Even then the conduct of Warren did not impress them as fraudulent, they did not set up such claim in the original bill. It was not until after the first hearing before the Court that such a theory was suggested and included by way of amendment to their original bill of complaint. In this amended bill they invite other stockholders to come in without the usual stipulation of consenting to pay a part of the cost,

but not another stockholder has joined as a complainant in this suit.

The Guardian Trust Company of New Jersey holds the stock in question as security for a demand loan upon which demand has been made and payment refused. Wherein had the Court any basis to jeopardize that security by any restraint or if it felt impelled to grant the restraint because of the rights of third parties, wherein was it justified in denying the Guardian Trust Company of New Jersey its request for ample security from the complainants to safeguard its investment in the premises?

VII.

The Court below erred in granting preliminary injunction.

Complainants treat this subject in Point I of their brief in reply to the brief submitted on behalf of Mr. Warren.

The basis of the argument seems to be that all a complainant needs to do to get a temporary injunction is to set out a theory rather than to show an infringement of an established right.

It absolutely ignores the fundamental proposition that a complainant is not entitled to a preliminary injunction when (1) the right on which he founds his claim is as a matter of law unsettled; (2) the facts on which he founds his claim are not clearly established, and (3) the injury complained of will not result in irreparable damage.

(1) It is clear that the agreement of 1925 is contrary to public policy and void. The court below repeatedly said that there was no justification in granting a preliminary injunction on this ground (Case, p. 160, ls. 1-12; Case, p. 165, l. 27; Case, p. 167, ls. 1-10).

It is equally clear that the Court would have no jurisdiction on final hearing to enforce reduction of the capital stock of the bank. To do this under the Federal statutes, the consent of the Controller and the Reserve Board are both required, neither of which are parties to this suit. Besides our Courts have repeatedly held that stock once issued must be considered as outstanding until reduced in the manner provided by statute.

Certainly, there is nothing in the authorities presented by the complainants which support the proposition that the right on which complainants found their claim is as a matter of law settled in favor of the complainants.

(2) Every fact that creates an equity in favor of the complainants is denied by the defendants. Moreover, the claims of the defendants are supported by the records of the bank and every collateral circumstance sustains the probability of their truth. The complainants have not established a case in point of fact.

(3) The complainants are not threatened with irreparable injury. As already pointed out, their claim based upon the agreement of 1925 is unenforceable (1) because of the inherent invalidity of the agreement and (2) its termination and abandonment at the time Warren purchased the stock acquired by outside interests in an effort to get control of the bank, to defeat which the agreement was conceived.

On the theory of a breach of fiduciary relation, the complainants cannot get the stock, and obviously it is to their very great advantage to have the transaction complained of consummated and the portion of the sale price of the stock to Senator Edwards, in excess of $250. per share, impounded until the termination of the litigation.

Upon what basis then can they claim irreparable injury?

For the reasons stated, we submit the order appealed from should be reversed, set aside and for nothing holden, with costs to the Guardian Trust Company of New Jersey.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with
Defendant-Appellant Guardian
Trust Company of New Jersey.

J. EDWARD ASHMEAD,
Of Counsel.

(5171) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

116MAY.T.1928
117MAY.T.1928

Filed after the Oral Argument
by leave of Court.

New Jersey Court of Errors and Appeals

Between

NICHOLAS W. D'ELIA and
MICHAEL J. SEXTON,
Complainants-Respondents,

and

JOHN WARREN and GUARDIAN
TRUST COMPANY,
Defendants-Appellants,
and others,
Defendants.

On Bill, &c.
ON
APPEAL FROM
CHANCERY.

BRIEF OF COMPLAINANTS-RESPONDENTS IN ANSWER TO BRIEF IN BEHALF OF DEFENDANT-APPELLANT JOHN WARREN.

Statement of Fact.

On January 11th, 1928, the complainants herein filed a bill in Equity to restrain the defendants Messrs. Warren and Others, and Messrs. Edward I. Edwards and Others, from consummating a deal wherein and whereby the defendant Edwards would acquire from the said Warren, three thousand shares of stock of the Journal Square National Bank, which was an amount constituting more than half of the total authorized stock of that institution. The Journal Square National Bank was organized five or six years ago by the defendant Warren, with an authorized capital of twenty-five hundred shares. The bank having

purchased a new building in Jersey City, the Comptroller of the National Currency early in 1927 did direct that the capitalization of the said bank be increased, and in accordance with that mandate the Board of Directors and the stockholders subsequently voted to increase the capitalization to five thousand shares of stock. The directors voted to put out the stock proportionate to the holdings of the then stockholders at a price of $250.00 a share for the new stock. The new stock was not marketed to the stockholders very readily, so that on April 1st, 1927, the last date upon which stockholders might take up their subscriptions under the rights that had been issued to them, there were over 2,000 shares for which the stockholders had not subscribed. In the notice which had been sent to the stockholders advising them that their subscriptions must be filled not later than April 1st, 1927, they were also notified that the new stock to which they might subscribe had to be paid for in two equal instalments, on *May 1st* and *June 1st* of 1927.

A meeting of the directors took place on April 11th, 1927, and at that meeting the defendant Warren says that a resolution was passed to this effect, "these rights are to be turned over to President Warren, to do with as he sees fit without any consideration for the rights". This resolution according to the affidavits of seven of the Board of Directors, there having been thirteen members on the said board of directors, was not passed by the directors, these seven having sworn at the preliminary hearing that no such resolution was presented or voted upon. Nothing was done about these unsubscribed-for rights until on or about December 30th, 1927, when an agreement was entered into between Warren and Edwards whereby Warren contracted to sell to Edwards 3,001 shares of the stock of the said

bank for the sum of $1,067,850.00 (see Case, page 191).

The said unissued stock had lain in the bank unissued up to the date of the Edwards-Warren contract of December 30th, 1927, and no money was paid to the bank for this stock until that same day, complainant charging that Warren had the said stock sold to Edwards before he undertook to pay for same.

The sale of the control of the bank leaked out and at the stockholders' meeting in January, 1928, the said Warren, who was and still is President of the institution was questioned by his stockholders as to whether or not control of the bank had been sold. This he denied, asserting that it had not been sold. On the following day at a meeting of the Board of Directors of the Bank he was again questioned as to whether or not control of the Bank had been sold, which he did again deny (see Case, page).

Early in 1925 two banking institutions in Jersey City had attempted to obtain control of the Journal Square National Bank, which was then known as the Bergen National Bank of Jersey City, by buying up stock. At that time Warren, who was President and Counsel, entered into an agreement which is dated September 9th, 1925, with the complainants and others, in which they and each of them covenanted (see Case, page 6), and gave, one to the other, a mutual option agreement wherein and whereby they bound themselves not to sell their holdings to outsiders, without giving the several parties to the agreement a refusal of the same, the price to be paid being fixed at $200.00 a share, or the book value of the stock. None of the parties to the agreement, except Warren, is a lawyer, and none of them at the time of signing the agreement had the benefit of independent legal advice.

On or about the tenth of January, it became generally known that Warren had made the contract of December 30th, 1927, with Edwards, and thereupon these complainants filed a bill in Equity to restrain the execution of the Edwards agreement.

POINT I.

It was proper for the Court to have prevented the consummation of the Edwards-Warren contract. Impounding the proceeds of the sale would not have preserved complainants' rights.

Counsel for the defendant Warren argues that the Court below should have permitted the Edwards-Warren deal to have been consummated and thereafter impound the proceeds of said sale. This procedure would not have preserved the rights of the complainants. The reason therefor is manifest and twofold. Under the 1925 agreement between the complainants and Warren, the stock that stood in Warren's name as an individual was subject to the terms of the agreement and Warren was unable, lawfully, to sell these shares of stock standing in his own name, without first having given the complainants and the other parties signatory to the contract the refusal of said shares of stock. Likewise, if the 2,057 shares of stock which Warren caused to be issued in January, 1928, became his lawful personal property, this stock, too, became subject to the 1925 agreement, because it provided that all stock or any increases in issue likewise came within the purview of the said agreement. (Exhibit A, par. 13, Case, pp. 6-15.)

If, on the other hand, the Court below found that Warren, in causing to be issued the 2,057

shares, was dealing with that stock in a fiduciary or representative capacity, certainly the profit therefrom should go to the bank's credit, but we submit it was impossible for the Court to have, on the one hand, permitted the sale of the 2,057 shares to go through and impound the proceeds, and at the same time restrain Warren, because of the 1925 agreement, from selling to a stranger the remaining shares which had stood in his name, as his personal property. The Edwards-Warren agreement is not a severable one, and while Edwards was certainly willing to purchase control, it is not far fetched to say that he was unwilling to purchase a minority stock interest. As the Court below said (opinion, page 197, lines 25-40), "under these circumstances the Court would be left without complete control over all these transactions, as well as the subject matter of the suit, it might be impossible to carry into execution the decree that otherwise the Court would feel compelled to render".

If the Court had not restrained the Edwards-Warren transaction, the rights of the complainant would not have been preserved. The shares of stock of this bank which Warren in 1927 claimed to own representing the control of the bank had a unique value and could not possibly be replaced in the open market. The complainants could never obtain a controlling interest in the bank, as it is their lawful right to do, and their prerogatives under the 1925 agreement would become questions of merely academic interest.

POINT II.

The 1925 agreement so-called is a valid contract and binding upon the parties signatory.

The terms and obligations of the agreement should, in the absence of its violation by any of the parties, save Warren, be construed and determined as strictly as possible against its draughtsman Warren, who used it to save himself when he was in a predicament, and blandly tears it to pieces when it serves his interests so to do. In a Court of Equity, as this is, the Court will strain itself to maintain the integrity of the agreement, if it can do so under the law. Warren *vs.* Pim had to do with an out and out voting trust agreement. The contract under consideration has, as one of its incidents, a voting trust agreement, but its primary object was the mutual selling agreement, and this was what the parties thereto understood and intended it to be. In Warren *vs.* Pim a voting trustee was brought into being by deed-poll, the ownership of the stock to be voted being entirely unconnected with such voting trustee. The 1925 agreement under discussion is no such thing, the power of voting remaining with the ownership of the stock to be voted. It appears from the affidavits filed by the defendant himself, Warren, that the agreement was made for a salutary and lawful purpose to prevent those who had fostered and nurtured this bank in its infancy from losing control to stronger and apparently rapacious institutions, who desired to wrest control from this weak group.

This Court has put its stamp of approval upon an agreement such as this, when this Court, in the case of Frost *vs.* Carse, 91 Equity 124, said "the

voting trust was formed from the aggregate stockholders to preserve the identity of those who formed and developed the company and to protect the stock from purchase by German Government agents, and it was constituted of stockholders, the men who had nurtured the corporation from an era of uncertainty to a status of highly successful recognition in the business world. In that respect and because of that fact, the voting trust is taken out of the category of illegality which condemned the voting trust in Warren *vs.* Pim, 66 Equity 353 and Cone *vs.* Russell, 48 Equity 208.''

POINT III.

Under the established principles of equitable jurisprudence and practice, the preliminary restraint should be held until the various questions raised can be decided upon their merits on final hearing.

There can be no doubt that Warren entered into the written contract alleged by the complainants, of which he was the author, and which, in terms, obligated him, in the event that he desired to sell any of the original stock then owned by him, or any additional shares of original stock which he might thereafter acquire and elected to subject to the agreement, and all stock of any increased issue which he might thereafter acquire, to first offer the same to his associates at a stipulated price.

The defense that this agreement was subsequently abandoned by acts of certain of the parties inconsistent therewith, at best, raises a disputed question of fact, which can only be determined upon final hearing, and the burden of proof of establishing such abandonment is on Warren.

Except for the alleged abandonment, upon which, at least, complainants are entitled to a trial, the only defense against the application of the agreement is that the agreement is void in *toto* because of the incidental provision therein that the parties will vote in concert. With respect to this contention we observe that the complainants are not seeking any relief under the provisions respecting voting. Even if the only question involved concerned a voting trust, there is, at best, a conflict of authority as to its validity. The contract here involved is severable, the provisions for stock purchase being entirely separate and distinct in their nature from the voting agreement. The prime purpose of the agreement was the option to purchase and not the voting agreement. In effect, the parties said to each other, we do not now desire to sell, but if at any time any of us does wish to sell, he will first offer to the other at a stipulated price, and, in the meantime, we will vote together. The mere purpose of a party to sell terminated the obligation to vote.

In the most adverse view to the complainants, the voting provision was not an illegal agreement but merely an unenforceable agreement. The distinction is pointed out in *Rosenbaum* vs. *U. S. Credit System Co.*, 65 Law 255. It is not in the class of agreements to commit a crime or to do an unlawful act. If these parties saw fit to observe their agreement to vote in concert, no one could say that they were guilty of an unlawful act. At worst, the Courts would not lend their aid to compel a party to vote in accordance with his agreement, but, if he saw fit to do so, there is nothing illegal in such conduct.

Since the performance of the agreement for sale now insisted upon does not and cannot relate to the voting agreement, but, of necessity, ends the applicability of the voting agreement, there is no

reason why the Court should deny the complainants the relief to which they admittedly would be entitled except for the inclusion of the stipulation for voting.

If the proposed sale to Edwards is not restrained until final hearing, the subject matter of the complainants' rights will be lost. Money damages will be inadequate. The stock in question has an unique value in that it constitutes majority control of the Bank.

We point out, at this juncture, to the Court that under the decision of the case *Aldridge* vs. *Union Bag Company,* 81 Equity 244, the present Chancellor stated "it has been decided again and again, that a preliminary injunction should not be awarded unless from the pressure of urgent interest and also unless the injury to be prevented *pendente lite* would be irreparable." In this case we submit that it is manifest that there is an urgent interest for restraint and that the lifting of the restraint will work an injury on the complainants which money damages cannot repay. Complainants merely ask for a stay against the defendants which will prevent them from anticipating the terms of their contract and putting the stock beyond recall. In any event it is observed that the Edwards-Warren agreement does not call for final performance until July 1, and this cause is set down for final hearing on June 18th, 1928.

POINT IV.

Warren's relationship to the unissued 2057 shares was a fiduciary and a representative relationship.

The defendant Warren relies upon the language of the resolution alleged to have been passed on April 11th, 1927, by the Board of Directors, for

his right to the unfilled stock subscriptions representing the 2057 shares. This resolution appears (Case, page 32, lines 20-27). We repeat that a majority of the board of directors have sworn that no such resolution was passed. It is significant that if the resolution was passed, that these rights were turned over to President Warren and not to John Warren, the individual. Warren further contends that he was under obligation to take this stock; certainly the language of the resolution, if it be true that such a resolution was passed, places upon him no obligation to take this stock. Certainly the case is barren of proof that he stated on the record that he would be answerable and would pay the bank for this stock; certainly there is no written memorandum of his obligation so to do, nor any down payment, or any evidence whatever of a contract to pick up this stock; nor in accordance with the notice sent out to the stockholders requiring them to fill their subscriptions by April 1st, and pay for the stock in two equal payments on *May 1st* and *June 1st,* did President Warren pay anything on May 1st or June 1st, 1927, for this burden of stock which he says he was obligated to assume. Not a penny went into the coffers of the Journal Square National Bank until President Warren had signed an agreement with Edward I. Edwards to deliver the stock, and had placed the agreement of sale with the Guardian Trust Company in Newark, from which institution he borrowed a sum equal to the price of 2057 shares. In effect Warren discounted Edwards' obligation to buy.

Is it possible under these circumstances to conclude that Warren acted lawfully, and in good faith in executing an agreement to sell stock which he did not own and to pay for same in part with the down-payment of the vendee? His agreement to sell was antecedent to his acquisition of the

thing to be sold, and will a Court of Equity permit the chief executive and counsel of this bank to so deal with its properties for his own personal gain without the financial burden of a single dollar, or without a scintilla of risk on his part in making such a bargain? He was the highest officer and counsel in the bank; both a director and an executive and his position is one of confidence and trust (*Marr* vs. *Marr,* 73 Equity 643). To quote the Court below: "He knew that dealings between him and the bank, where his interest is opposed to that of the latter, would be subjected to the closest scrutiny and not sustained against the stockholders unless consistent with good faith and fair dealing on his part. When one is placed in such a relation of confidence and trust to another as Mr. Warren occupied to the bank, a duty rests upon him when dealing with the other to fully and honestly reveal and explain every fact within his knowledge before the negotiations are carried into effect. (Pon. Eq. Jurisp. Sec. 955, *et seq.,* 4th ed.)". At most according to the terms of the resolution of April 11th, 1927, Warren received no greater rights than any other stockholders and his option to purchase expired on June 1st, as every other stockholder's option expired and the stock would then have to be re-offered to all the stockholders upon either the same or a new basis.

POINT V.

The 1925 agreement does affect almost all of the stock in controversy.

As has been said before in answer to point V, of the defendant Warren's brief, we can but reiterate our position. We do not concede that the 2,057 shares came into the custody and control of

Warren as an individual apart from his position as a fiduciary, but if it did, then we submit that in accordance with the provisions of articles of the 1925 agreement, it manifestly comes under the control of that agreement, and before it can be sold to an outsider, it must be offered *pro rata* to the parties signatory to the agreement at $200.00 per share or its book value, which with this additional capital paid in would certainly not have made a loss for Warren.

The agreement of 1925 was entered into for the purpose of keeping out undesirable partners in the enterprise. Warren was under no obligation to increase his stockholdings and if he did so, he did it with full knowledge of the 1925 agreement. The reason that he purchased said stock, if he did do so, was that he was attempting to defraud his partners under this agreement and to sell out to strangers at a higher price and if he did so he was taking the risk and must suffer the consequences of his own act. (See *Pan-American Petroleum and Transport Co.* vs. *U. S. A.*, Oct. Term p. 482, dated March 15th, 1927. See also *Mammoth Oil Co.* vs. *U. S. A.*, Nov. 1st, 1927, p. 1. See also *Strong* v. *Repide,* 213 U. S. 419.)

POINT VI.

Point Six of defendant Warren's brief is answered by the brief filed in answer to brief of Guardian Trust Company.

POINT VII.

The courts of this State have jurisdiction to restore the status quo and rescind the issue of the 2,057 shares of stock in question.

There is an inherent power and authority in the Court of Equity to dissolve a transaction for the purpose of remedying a situation brought about by fraud of one who stands in the position of quasi-trusteeship. Where an attack is made directly against the issue and not an attempted evasion of the obligation incurred upon subscribing for stock and then not paying for it, the Federal Courts have held that said issue is open to collateral attack.

For these reasons, therefore, we respectfully submit that the restraint imposed by the Court below should be held until the final determination of this cause.

THOMAS J. BROGAN,
DANIEL D. LOEB,
Solicitors for and of Counsel
with Complainants.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(5135)

11SMAY.T.1928

117MAY.T.1928

Filed after the Oral Argument
by leave of Court.

New Jersey Court of Errors and Appeals

Between

NICHOLAS W. D'ELIA and
MICHAEL J. SEXTON,
Complainants-Respondents,

and

JOHN WARREN and GUARDIAN
TRUST COMPANY,
Defendants-Appellants,
and others,
Defendants.

On Bill, &c.
ON
APPEAL FROM
CHANCERY.

BRIEF OF COMPLAINANTS-RESPONDENTS IN ANSWER TO BRIEF IN BEHALF OF DEFENDANT-APPELLANT GUARDIAN TRUST COMPANY OF NEW JERSEY.

Statement of Fact.

The facts as stated in our brief in this cause in answer to that of the brief of the defendant-appellant John Warren are here repeated.

(a) To avoid reiteration, our argument as opposed to Point I, in the Guardian Trust Company brief, is contended in Point II in the Warren brief.

(b) Our answer to the argument advanced under Point III in this brief is contended under our Point V of our brief in answer to the Warren brief.

(c) Our answer to Point V in the Guardian Trust Company brief is set out in the argument

made under our Point VII in the answer to the defendant Warren's brief.

(d) Our answer to Point VII in the Guardian Trust Company brief is contended in our argument in Point III in answer to the defendant Warren's brief.

POINT I.

The Guardian Trust Company is chargeable with notice of the 1925 agreement.

(Note: This argument is in answer to Point II of the brief filed on behalf of the Guardian Trust Company.)

It is admitted by the Guardian Trust Company (see affidavit of its officer, Case, pp. 185-189) that Mr. Warren came to the bank on December 29th and negotiated for the loan of $650,000 on his demand note by offering to pledge as security 3,049 shares of the capital stock of the Journal Square National Bank. At that time the stock was selling for much less than its present price. Anyone, in his every-day business experience, seeking to obtain a loan from a financial institution, knows that the collateral is scanned by the microscopic eye of its lending officer. On the face of it, no bank would lend so large a sum on this kind of security without having before it all of the facts. It is not denied by the Guardian Trust Company, although the complainants charge it in their amended bill (p. 170), that the Guardian Trust Company had knowledge of the Edwards-Warren contract. It is not denied by the Guardian Trust Company that it knew that these 2,057 shares of stock were as yet unissued, and the circumstances surrounding the transaction must or

at least should have put this bank upon its inquiry as to the why and wherefore of one individual being able to hypothecate with it almost the entire amount of the increased capitalization of the Journal Square National Bank.

No allusion is made by Mr. Appleton in his affidavit as to the manner in which he got away from the proposition that these shares of stock must have been inclusive of the allotment of a hundred other stockholders in the Journal Square National Bank. This situation, we know from our every-day business experience, is so peculiar and strange that we cannot conclude that the Guardian Trust Company was unaware of the facts in question and that it took its chance with Warren on the strength of the Edwards-Warren contract.

If that contract is invalid or is one that cannot be performed, the Guardian Trust Company is then relying upon an unenforceable contract, and it put itself in that position with its eyes wide open. This stock, the Court will remember, was as yet unissued, and it took a temporary receipt, signed by whom, is not disclosed, and waited for the issuance of the certificates of stock, which came in eight days later. Why the Guardian Trust Company should urge the great danger and peril that now threatens is not quite clear, in view of the fact, as was found by the Court below that the value of the collateral has substantially increased since the time the pledge was made, and its position therefore, has been strengthened, rather than weakened, and should await the determination of the Court on final hearing which will be held on June 10th.

If the collateral of Warren is, in the bank's judgment, insufficient, why does it not do what is ordinarily done in such cases, seek additional collateral from the borrower, or have the borrower pay off part of his loan? If the loan in the first

place was a bad one, but is now a better one, the bank's danger seems to be diminished and its security increasing. Is it not unusual for any financial institution to lend more than eighty per cent of the actual market value of the collateral?

The loan of the Guardian Trust to Warren was an extraordinary one and what the Guardian really discounted was the contract between Edwards and Warren. Under the agreement of 1925 what the parties contemplated was an honest loan and not such a loan as was made by the Guardian and the best way to test the good faith of the Guardian in having made said loan and as to their knowledge of all of the surrounding circumstances regarding said loan, is by *cross examination* at the final hearing.

POINT II.

Any stock lawfully owned by any of the signatories of the 1925 agreement might be pledged.

(Note: This is in answer to Point IV of brief filed in behalf of Guardian Trust Company.)

The seventh paragraph of the 1925 agreement covers the pledging of stock as collateral for loans. Warren violated this covenant of that agreement in that he did not notify the other parties to the agreement that he was pledging such stock for a loan and the Guardian Trust Company now says that it too failed to receive notice from Warren. The agreement provides, however, that the pledgee may offer such stock for sale, if the loan is called and the Guardian Trust Company now has notice of the 1925 agreement and may call upon the signatories to that agreement to redeem in accordance with the provisions of Article 7 of the 1925 con-

tract, but this is not what the Guardian Trust Company applies to the Court for leave to do. How can the Guardian Trust Company be injured by first having to give the complainants and the other signatories of the 1925 agreement the first chance to buy?

Had the Guardian Trust Company upon becoming aware of the 1925 agreement offered to abide by its provisions as a condition precedent to selling the stock in open market, its application would have been free from the sinister atmosphere that surrounded this transaction between Warren and the Trust Company from its inception. The Court below under the circumstances and with the meagre set of facts placed in evidence by the Guardian Trust Company could do nothing else than preserve intact the rights of the complainants.

(a) In conclusion we strongly urge that the position of the Guardian Trust Company is supported by the affidavit of Appleton only. That the said affidavit says what the parties desire said in the premises and is silent upon things charged by the complainants and upon things that we believe this Court ought to know.

(b) That the Guardian Trust Company up to now has suffered no damage, that its security has actually become better.

(c) If the restraint against the Guardian Trust Company be lifted and permission be given that company to sell the collateral, the rights of the complainants are gone.

(d) If the position of the Guardian Trust Company in this whole transaction be innocent, it can then only be concerned about the amount of its loan, and should be willing and should on its own motion offer to comply with the provisions of the

seventh paragraph of the 1925 agreement, giving the complainants and their associates the right to purchase under the covenants therein contained.

We submit that the restraint should not be lifted until after final hearing, and this party defendant The Guardian Trust Company could be subjected to cross-examination, and in the alternative say, if the Court disagrees with this proposal, the complainants should have the right under the seventh paragraph of the agreement above mentioned, to step in and be subrogated to the claim of the Trust Company by making it whole, which these complainants stand ready to do.

Respectfully submitted,

DANIEL D. LOEB,
THOMAS J. BROGAN,
Solicitors for and of
Counsel with Complainants.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(5136)