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EDWARD F. CLORAN, re-called.

Direct-examination by Mr. Hinds:

Q. I understand that since you testified at the last hearing you have put into the form of a prepared statement the result of certain of your findings after examining the Roseville Trust Company's books, and in which you also refer to certain schedules; is that the fact? A. It is, yes.

Q. Do you adopt that statement and those schedules as your sworn testimony? A. I do.

Q. And are they correct to the best of your knowledge and belief? A. They are.

Q. This is the prepared statement, is it not? A. Yes, this is it.

Q. And these are the schedules which you referred to as having been prepared by you and already served on the other side? A. Yes.

Mr. Hinds: The prepared statement, your Honor, I suggest we treat as the other prepared statements.

"*Prepared Statement of Edward F. Cloran.*

The following statement summarizes the results of my examination of the books and records of the Roseville Trust Company, both prior to my testimony given on April 26th, 1917 and also my examination since that date, in the preparation of certain tabulations and schedules which I shall refer to as having been made since the hearing.

The various tabulations, copies of which were served upon the attorneys for the various defendants before the trial com-

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menced, were prepared by me, based upon my examination of the books and records, and are as follows:

A statement collated from the minute book (in evidence) showing the number of depositors and alleged total amount of deposits as reported by Raymond F. Smith at meetings of the executive committee and board of directors:

A statement showing certain embezzlements of A. Randolph Jennings, teller, involving manipulations of individual deposit accounts and referring to accounts in books and records:

A statement showing certain embezzlements of Raymond E. Smith, treasurer, involving manipulations of individual deposit accounts, and referring to entries in books and records:

Two statements showing "cash items" (other than actual cash) carried from day to day in the paying teller's cash, comprising between them the period from October 31, 1912 to the close of the institution.

A statement showing certain instances when "cash" balances were carried forward in the cash book to the next day incorrectly.

I have prepared and brought with me to Court today a schedule showing that the reserves of the trust company were depleted after the beginning of 1913, that is to say, that the available funds (consisting of actual cash and available balances in depositary banks) amounted to less

than 15 per cent of the total actual demand liabilities of the institution. This condition is true whether the bills payable (all of which were payable on demand) be regarded as included in demand liabilities, or not. I found it to be true, as shown in said statement, that cash on hand after January 31, 1913 was less than one-fifth of the required fifteen per cent (3 per cent) of the demand liabilities, whether the latter includes bills payable or not. In preparing this statement I have reconciled on the several dates comprised therein the accounts of the trust company with its several depositary banks, so as to ascertain the true available balances. I have also ascertained the true amount of demand deposits and other demand liabilities as stated. I also ascertained, by verifying the cash, the correct amount of that asset as shown in the paying teller's and receiving teller's books and aggregated in said statement.

Not only were the reserves depleted to the exact extent shown on the several dates comprised in said statement, but I found that it was also continuously depleted on and after January 31, 1913. The reason why I have not included each and every banking day during said period in the said statement is because of the impracticable volume.

An examination of the books on any one of the examination or report days would have disclosed to any ordinary business

man or layman not familiar with accounting or with the banking business that there were serious irregularities which needed investigation.

Any understatement of deposit liabilities could always be discovered by a comparison of the item in the general ledger with the total of the individual ledgers. This understatement of deposit liabilities became so great in 1913—upwards of $200,000—that it could have been very easily discovered by even a hasty examination of the books.

An overstatement of any such tangible physical assets as collateral loans, bills purchased, or cash could have been readily discovered by a careful examination of the physical items, a totalling of the same and comparison with the general ledger, both before and after the columns in the general ledger had been added.

If the eye of the examiner had looked to the left on the day of any examination he would have seen irregularities consisting of under-extensions or over-extensions. These extensions were in most cases easily apparent without pencil and paper. For example, on date of April 11, 1912, the balance of "Individual Deposit Ledger No. 2" is under-extended $50,000, and only three items, which are grouped conveniently for the eye, in one place, need have been looked at, to have shown the under-extension.

The errors in the accounts with deposi-

tary banks could have been discovered by the process of getting a statement from the depositary banks and two or three days later finding out whether items, shown on the Roseville Trust Company's books to have been in transit, had actually been received by the depositary bank. Such an examination would have disclosed to the committee that the accounts would not reconcile. My examination satisfies me that the methods pursued by Mr. Smith in his manipulations were such that at none of the three examinations referred to in the evidence would the bank accounts have been found to reconcile. Any ordinary business man, by following the methods necessary to check up and balance the usual individual or business checking account in any bank or trust company would have found that the accounts in these depositary banks would not reconcile or prove. The figures given by the depositary bank would not agree with the figures found in the Roseville books.

My examination shows me that in all cases where figures have been changed on examination dates a false condition existed at the time of the examinations which would have been apparent to any ordinary business man making a reasonably careful examination.

In the December 14, 1912 examination the figures for collateral loans appears have been changed by adding a 1, making the amount $100,000 greater. The exten-

sions to the left will not produce this figure within $100,000; and if the column in which this changed figure appears had been added up with the correct figure for collateral loans the footing would have been $100,000 less than the liability column.

The same general situation obtains on the date of the May, 1913 examination, where the figures of the M to Z Deposits had been changed. If the former figure correctly represented the extension from the day before, then the total of the column was wrong.

On December 13, 1912 the figure 98, to indicate $98,000 was interlined in the column for balance in Irving Nat. Bank. The examiners on December 14, in order to check the day's work, would have had only to look at the balances on the 13th, and carry out the very simple extensions shown adjoining each of these balances in the general ledger. If they had done so they would have seen this 98, or $98,000 interlined and would have seen that it was not used at all in taking into account the balance as of the 14th.

I made a complete examination of the general ledger from October 1911 to August 1913. I found that there existed on the face of the general ledger obvious falsifications on practically every day during that period. It is impossible to open the general ledger for most of this period at a single page where falsities are not

manifest to even a lay observer. Many of these frauds involve palpably incorrect additions or substractions. On many days the footings are incorrect, or the two columns of asset and liability balances are out of balance. Often there appear interlined figures playing no ostensible part in the day's work except that they are needed to force an arithmetical result. Erasures are most frequent.

I have prepared a statement showing chronologically a small portion of the general ledger falsifications on typical days, and showing the steady accumulation of shortages. A statement showing *all* the false entries on the general ledger would be of impracticable volume, and would differ only in *extent* from the one I have prepared. In addition to the falsifications apparent from an inspection of the general ledger itself, there is scarcely a day after January 1, 1912 when a comparison between the general ledger and the cash book and other books would not have disclosed false debits or credits.

The chronological statement annexed hereto shows that at the date of the closing of the bank on August 13, 1913 there is a total shortage evidenced by the falsifications in the general ledger arising out of under- and over-extensions and obviously false debits and credits either originating in the general ledger or traceable from other books of the trust company, aggregating $312,580.63. An examination

by me of the detailed list of the resources and liabilities of the trust company, as prepared by the banking department following the close of the institution and shown on Schedule A prepared by Mr. L. R. Vredenburgh, reveals a shortage of $393,848.05. This excess of shortage, as found by the banking department's revised statement as of August 13, 1913, over that given by me in the chronological statement, arises out of additional falsification which became apparent upon the actual totalling by the representatives of the banking department of the individual deposit ledgers immediately after August 13, 1913, and their inspection and examination of the tangible physical assets. I am satisfied from a careful examination of all of the books and records of the bank that the said shortage as contained in the schedule of Mr. Vredenburgh, aggregating $393,848.05, accurately sets forth the discrepancy between the actual book resources at their face value and the liabilities as they were found in the individual ledgers and other original sources such as the bills payable held by banks, etc. This figure of total shortage does not include any shortage arising out of embezzlement by Smith or Jennings from pass-books in cases where no record of the embezzlement have reached any of the bank's books, because of failure to enter deposits in whole or in part in any of the bank's books at times when they were regularly entered in depositors' pass-books.

Prepared Statement of Edward F. Cloran

I have also examined Schedule B prepared by Mr. Vredenburgh, which shows that the assets of the bank which were taken into possession of the banking department at a face value of $927,991.27 were, after certain corrections and adjustments (and decreases by reason of expenses, etc.) valued and sold for the sum of $530,284.31, resulting in a shrinkage or loss in the realization of these assets in the sum of $397,706.96, which amount, added to the total amount of book shortage shown in the last column of Schedule A prepared by Mr. Vredenburgh and verified by me, makes a total loss to the Roseville Trust Company of the sum of $791,555.01.

Statement showing accumulations of shortages covered by falsifications of general ledger.

Dates	Nature of Falsifications	Shortages (cumulative)
1911		
Dec. 16	False extension in General Ledger of day's debits and credits to Union National Bank account, resulting in $10,000 over-statement of balance therein. Cash book correspondingly out of balance.	$10,000.
1912		
Jan. 13	The Union National Bank balance in the General Ledger still over-stated $10,000.	

		False extension of day's and credits to bills purchased, resulting in $10,000 under-statement of general ledger balance of bills purchased; assets column being overfooted to the amount of the shortage, which remained as before	$10,000.
	Jan. 13	The Union National Bank balance in the General Ledger still over-stated $10,000. False extension of day's debits and credits to M to Z Deposits results in $10,000 under-statement of that liability	20,000.
	Jan. 19	The Union National Bank balance in General Ledger is still over-stated $10,000, and Bills Purchased balance is still under-stated $10,000. The false extension in day's debits and credits to M to Z Deposits results in correcting the previous $10,000 understatement, bringing balance to true condition. A $20,000 false debit to the Union National Bank results in increasing the over-statement of that account in the General Ledger from $10,000 to $30,000, the $10 000 change	

	from false to true balance in M to Z Deposits having been counter-balanced by a further false credit to Bills Purchased	$20,000.	
Jan. 31	The General Ledger balance of Union National Bank is still $30,000 over-stated. By a false extension of the day's debits and credits the balance of A to L Deposits liability is now under-stated $30,000. A false credit of $30,000 brings the General Ledger balance of the Union National Bank from an over-statement of $30,000 to true condition. The total shortage now is increased to $30,000 as represented by the under-statement of liabilities to A to L depositors	$30,000.	
Feb. 5	The General Ledger balance of A to L Deposits is still under-stated $30,000 (and in fact continues thus until February 20). The day's debits and credits to Bills Purchased in the General Ledger include a false under-debit of $5,000, resulting in a $25,000 understatement of the balance in that account. There is a		

		corresponding false debit of $5,000 in the day's debits and credits in the General Ledger to the account of the Union National Bank, resulting in an over-statement of the balance in that account	$30,000.
	Feb. 6	The General Ledger still under-states A to L Deposits by $30,000. A false debit to Bills Purchased of $5,000 brings the balance from a previous $25,000 understatement to a $20,000 under-statement, and a $5,000 false credit brings the previous $5,000 over-statement of balance in the Union National Bank to the true condition. (While the Bills Purchased balance in the General Ledger perhaps states the true aggregate of the physical terms in possession of the Trust Company, it falls short of stating the aggregate that *ought* to be on hand as shown by the records, because the book shortage now amounting to $30,000 and covered by an understatement of deposit liabilities has in part originated	

	by abstractions from the bills purchased).	$30,000.	
Feb. 20	By means of a $30,000 false extension the previous under-statement in the General Ledger balance of A to L deposits is now brought to a true condition. The liability column in the General Ledger, however, is now $30,000 under-footed, and this figure represents the book shortage, remaining, as before.	$30,000.	
Feb. 21	By means of a $50,000 false extension, the General Ledger balance of the Union National Bank becomes over-stated to this amount, but this discrepancy is partially offset by the fact that the footing of the asset column in the General Ledger is $20,000 below the correct footing, so that the book shortage remains, as before It is probable, however, that this $20,000 of under-footing is the amount of the difference between what the Bills Purchased actually amounted to (as now correctly stated in the General Ledger) and what should have been there as estab-	$30,000.	

		lished by the record, so that the total loss covered by manipulations of the General Ledger amounted to $50,000.	
10	Feb. 23	By a false extension of $20,000, a balance in the Union National Bank becomes now overstated only $30,000 (instead of $50,000); and the footing of the asset column now being correct the ledger is in balance, and the book shortage remains as before,	$30,000.
20	Feb. 26	The Union National Bank General Ledger balance is still over-stated $30,000. A false credit to Bills Purchased of $5,000 results in an under-statement of the balance of that account. A $5,000 false debit to the Irving National Bank results in an over-statement of the	
30		balance of that account (so that two bank accounts are now over-stated). The shortage, however, remains as before	$30,000.
	Feb. 28	The Union National Bank balance continues over-	
40		stated $30,000. A false debit of $5,000 to Bills Purchased adjusts the under-	

	statement of the previous day, and a false credit of $5,000 to the Irving National Bank adjusts the $5,000 over-statement of the previous day, so that the shortage on the face of the ledger still remains $30,000 as represented by over-statement of the Union National Bank		$30,000.
Feb. 29	A $30,000 false extension now brings the Union National Bank balance to the true condition, and $30,000 false extension results in the under-statement of the M to Z Deposits in the General Ledger, thus representing the total shortage on the face of the General Ledger		$30,000.
March 1	The M to Z Deposits is still understated $30,000. A false credit to Bills Purchased results in an understatement of that balance in the General Ledger by $10,000; but a false debit to the National Bank account results in the over-statement of that balance to the same amount.		$30,000.
March 6	The shortage on the face of the Ledger $30,000 is still		

represented by the under-statement of the M to Z Deposits, and a false debit of $10,000 to Bills Purchased adjusts the previous under-statement in that account, and a false credit of $10,000 to Unional National Bank adjusts the previous under-statement of that account. $30,000.

March 9 M to Z Deposits still understated $30,000. A $10,000 false extension to Bills Purchased results in understating that balance. A false extension of $10,000 results in over-stating the Irving National Bank balance a like amount, the shortage on the face of the ledger still remaining 30,000.

March 18 A false credit to Bills Purchased results in increasing the previous under-statement of $30,000 to $40,000. A false debit to the Irving National Bank results in increasing the previous over-statement of that balance from $10,000 to $20,000, the under-statement in one account counterbalancing the over-statement in the other; but the M to Z Deposits

	continued to be understated $30,000.	$30,000.
March 30	The M to Z Deposit liability is still $30,000 under-stated in the General Ledger. The balance of cash in the General Ledger is now overstated $2,500 as revealed by the tellers proof books. The general ledger balance of Irving National Bank, by means of a delayed credit now entered, is brought to a true balance. The M to Z Deposits, by means of a false extension of $20,000 are at the close of this day understated to the extent of $50,000, so that the total shortage is now	$52,500.
April 3	A false credit to the M to Z Deposits in the General Ledger of $50,000 adjusts the previous under-statement, but the footing of the liability column is $50,000 less than the actual total of the liability balances in the General Ledger. The cash balance in the General Ledger is still $2,500 larger than the correct amount as disclosed by the proof books, the total shortage still being	$52,500.

April 4	By means of a false extension the General Ledger balance of M to Z Deposits is again under-stated $50,000, and the footing of liabilities is now correct, the cash remaining over-stated as previously, and the total shortage still being	$52,500.
April 10	A $4,000 false extension to Bills Purchased results in reducing the shortage which originated in that account to $36,000. A delayed credit to bonds and mortgages of $4,000 appears in the day's work. The balance of M to Z deposits, by means of a false credit of $50,000 and a false extension of $50,000 becomes over-stated to the extent of $50,000 instead of (as previously) understated $50,000. The Irving National Bank debits and credits in the General Ledger include a delayed credit of $1,500. The cash balance in the General Ledger which had previously been over-stated $2,500 now becomes over-stated $4,000, the increase of $1,500 corresponding to the amount of the delayed credit in the Ir-	

ving National Bank account. The footing of the column of liability balances in the General Ledger is $100,000 less than the correct footing, the total shortage on that day being made up of the said under-footing less the $50,000 over-statement of deposit liability plus the $4,000 over-statement of cash, a total of $54,000.

April 11 On this day the false extension of $4,000 to Bills Purchased had not yet been adjusted, and the General Ledger shows included in the day's debits and credits to Bills Purchased account on April 11th a falsely over-stated debit of $20,000 in excess of the amount shown in the cash book and a falsely under-stated credit of $30,000, making a total over-statement of $54,000 for that date in the Bills Purchased account, so that the balance, after deducting the $4,000 under-statement prior to April 10 leaves a net over-statement of the balance of Bills Purchased of $14,000, the other $40,000 indicating an abstraction

covered up by the manipulation of some other accounts which could have been definitely revealed by an examination of the physical items of that date. The M to Z Deposit balance, because of a $50,000 false extension, is now brought to a true condition. A comparison of the debits and credits to the General Ledger account of M to Z Deposits with the debits and credits of the side books since the first manipulations of the M. to Z General Ledger accounts in January, 1912 would indicate that the ledger balance on April 11 is $30,000 less than the aggregate of balances in the M to Z individual ledger itself. This discrepancy however is explained by the fact that certain debits and credits aggregating $30,000 were irregularly taken directly into the General Ledger without passing through the side books. There is a minor discrepancy in the account of interest received, because of a $100 false credit, resulting in an over-

	statement of that asset, offset by a corresponding false debit of $100 resulting in an under-statement of the liability of Special Deposits. The cash is still over-stated $4,000 in the General Ledger, and now accords with the cash book total which had been falsely increased $4,000 in carrying the balance of the 10th over to the 11th. The total *book* shortage, based on the changed figures which now appear in the General Ledger is $18,000 ($14,000 over-statement of Bills Purchased and $4,000 over-statement of cash), but in view of the shortage exhibited by the unchanged balances in the General Ledger of the 10th and of the 12th, and the extensions referred to, the total shortage, on the figures in the General Ledger before they were changed, must have aggregated $54,000.		
		$18,000. (changed figures)	
April 12	A $50,000 false under-extension to the M to Z Deposits account results in under-		

stating this liability that amount. A $50,000 false credit to the Bills Purchased account adjusted the false increase in this asset shown on the 11th, leaving an over-statement of $4,000 with respect to the items actually on hand, which however, were $40,000 less than the ledger records called for. At the close of this day the shortage as evidenced by the falsifications in the General Ledger amounted to $54,000, composed of the following items:

M to Z Deposits account under-stated $50,000
Bills over-stated 4,000 $54,000.

April 29 The shortage as evidenced by the falsifications of the General Ledger at the close of this day amounts to $61,544.84 and is composed of the following items: J. R. Claire's (A to L Deposits) account is under-stated $4,000.00
M to Z Deposits account is understated $50,000.
Special Deposits account is understated $1,044.84
Balance of Cash on Hand is understated $6,500.00 $61,544.84

Prepared Statement of Edward F. Cloran

May 10	A false debit to the Union National Bank account of $6,500 results in an over-statement of this asset in that amount. This false debit adjusts an over-state-		
	of Cash at the close of the previous day	$61,544.84	
May 31	The shortage as evidenced by the falsifications of the General Ledger at the close of this day amounts to $66,-500 and is composed of the following items:		
	M to Z Deposits account under-stated $50,000		
	Balance of cash on hand over-stated 16,500	66,500.	
June 29	At the beginning of this day the falsifications in the General Ledger resulted in the following condition: The M to Z Deposits account is under-stated $50,000; Collateral Loans account is over-stated $1,000; Union National Bank account is over-stated $10,000. A false under-extension of $10,000 in the A to L Deposits account results in under-stating this liability that amount. A false over-extension in the M to Z Deposits account		

results in an under-statement of this liability in the amount of $40,000. The balance of Cash on Hand at the close of this date is over-stated $20,510.25. The shortage at the close of June 29th comprises the following:

A to L Deposits is under-stated	$10,000.00
M to Z Deposits is understated	40,000.00
Collateral Loans over-stated	1,000.00
Balance Cash on Hand over-stated	20,510.25
Union Nat. Bank acct. over-stated	10,000.00
	$81,510.25

July 31 The balance of cash on hand at the close of this day is over-stated $20,000. The total of the liability column in the General Ledger exceeds that of the asset column by $10,000.

July 31 The shortage at the close of this day as evidenced by the falsifications of the General Ledger amounts to $109,000 comprising the following:

A to L Deposits account understated	$30,000.

Prepared Statement of Edward F. Cloran

	M to Z Deposits account under-stated	1,000.	
	Union Nat. Bank acct. over-stated	10,000.	
	Collateral Loans acct. over-stated	31,000.	
	Bills Payable account under-stated	17,000.	
	Cash over-stated	20,000.	
	The total of the liability column exceeds the total of the asset column in the amount of	10,000.	
			$109,000.
August 29	At the beginning of this day the following balances in the General Ledger were falsely stated:		
	A to L Deposits account under-stated		$40,000.
	M to Z Deposits account under-stated		1,000.
	Union Nat. Bank acct. over-stated		10,000.
	Collateral Loan account over-stated		31,000.
	Bills Payable account under-stated		17,000.
	Balance of cash on hand over-stated		1,800.
	A false debit of $1,800 to the Union National Bank		

account adjusts the over-statement of cash on the day previous, and results in an over-statement of this asset in the amount of $11,-800.

August 31 A false under-extension of $1,800 in the Union National Bank account adjusts the false debit of August 29th, and results in an over-statement of this asset in the amount of $10,000. The balance of cash on hand at the close of this day is over-stated $23,800. The liability column of the General Ledger is under-footed $30,000.

August 31 The shortage is evidenced by falsification of the General Ledger in the following accounts:

A to L Deposits account under-stated	$40,000
M to Z Deposits acct. under-stated	1,000.
Union Nat. Bank account over-stated	10,000
Collateral Loans account over-stated	31,000
Bills Payable account under-stated	17,000
Cash over-stated	23,800

Prepared Statement of Edward F. Cloran

	Liability column under-footed	30,000	
			$152,800.
Sept. 19	The General Ledger is out of balance $29,300.		
Sept. 20	The balance of cash on hand at the close of this day is over-stated $29,300. This over-statement of cash brings the General Ledger for this day into balance.		
Sept. 30	The total book shortage on this date has dropped to $109,810.13, comprising the following:		
	A to L Deposits account is under-stated	$40,000.	
	M to Z Deposits account is under-stated	1,000.	
	Bills Payable account is understated	$17,000.00	
	Certificates of Deposit acct. understated	10,000.00	
	Shawmut National Bank acct. over-stated	5,000.00	
	Bills Purchased acct. is overstated	6,510.13	
	Cash is overstated	29,300.00	

Prepared Statement of Edward F. Cloran

		Collateral Loans acct. is over-stated	1,000.00	
		Total shortage		$109,810.13
10	Oct. 31	The shortage as evidenced by the falsifications in the General Ledger amounted to $119,293.78 at this date, comprising the following:		
		A to L Deposits under-stated	$40,000.00	
		Bills Purchased over-stated	8,310.13	
		Irving Nat.		
20		Bank over-stated	43,983.65	
		Union Nat. Bank over-stated	27,000.00	
				$119,293.78
	Nov. 30	At the close of this day the shortage as evidenced by the falsifications in the General Ledger comprised the		
30		following:		
		A to L Deposits under-stated	$40,000.00	
		Bills Purchased over-stated	14,310.13	
		Bills Payable under-stated	17,000.00	
40		Certificates of Deposit under-stated	$12,000.00	

Prepared Statement of Edward F. Cloran

	New York State Bank account over-stated	22,256.30	
	Shawmut National Bank of Boston account over-stated	11,115.00	
	Irving National Bank Account over-stated	6,513.27	
	Corn Exchange National Bank acct. over-stated	833.27	
	Total shortage		$124,027.97
Dec. 13	A false under-extension of $100,000 in the A to L Deposits account results in understating this liability $115,000.		
Dec. 14	A false extension of $100,000 to Collateral Loans account results in an overstatement of this asset that amount. A false over-extension of $100,000 adjusts the under-extension of the day previous, and results in an under-statement of this asset in the amount of $15,000. At the close of this day the shortage as evidenced by the falsification of the General Ledger amounted to		$169,520.13

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This shortage was reflected in the following accounts in the amounts stated:

A to L Deposits acct. under-stated	$15,000.00
Bills Purchased acct. over-stated	12,310.13
Union Nat. Bank acct. over-stated	3,210.00
N. Y. St. Nat. Bank acct. over-stated	10,000.00
Bills Payable acct. under-stated	17,000.00
Certificates of Deposit acct. under-stated	12,000.00
Collateral Loans acct. over-stated	100,000.00
	$169,520.13

Dec. 16 A false under-extension of $100,000 in the A to L Deposits account results in an under-statement of this liability in the amount of $115,000. A false under-extension of $100,000 in the Collateral Loans account adjusts the inflation of $100,000 in this account on the previous business day, December 14th.

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Dec. 31	The shortage as evidenced by the falsifications of the General Ledger at the close of this date amounted to $209,111.53 and was reflected in the following accounts:		
	A to L Deposits account is understated	$115,000.00	
	Bills Purchased account is overstated	6,310.13	
	Bills Payable acct. is understated	17,000.00	
	Certificates of Deposit acct. under-stated	12,000.00	
	Fourth Street Nat. Bank acct. over-stated	4,100.00	
	N. Y. State Nat. Bank acct. overstated	25,991.77	
	Irving Nat. Bank acct. is over-stated	12,626.08	
	Corn Exchange Nat. Bank acct. over-stated	11,083.55	
	Nat. Shawmut Bank of Boston over-stated	5,000.00	
			$209,111.53

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1913			
Jan. 2	A false over-extension of $35,000 to the A to L Deposits account results in an under-statement of this asset in the amount of $80,000		
Jan. 11	A false under-extension of $5,000 in the Bills Purchased account results in an over-statement of this asset in the amount of $1,310.13		
Jan. 13	A false under-extension of $10,000 to the A to L Deposits account results in understating this liability $97,762.75.		
Jan. 18	A false debit of $5,000 to the Bills Purchased account results in an over-statement of this asset in the amount of $6,310.13		
Jan. 26	A false under-extension of $7,762.75 in the A to L Deposits account results in under-stating this liability $87,762.75		
Jan. 31	The shortage as evidenced by the falsification of the General Ledger amounts to comprising the following:		$147,652.70
	A to L Deposits account understated	$97,762.75	
	Bills Purchased account overstated	2,310.13	

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	Bills Payable account understated	17,000.00	
	Certificates of Deposit account under-stated	12,000.00	
	The Corn Ex. Nat. Bank of Chicago account over-stated	10,261.46	
	Irving National Bk. acct. overstated	466.01	
	Union National Bank acct. overstated	$6,872.01	
	N. Y. State Nat. Bank acct. overstated $345.02		
	Fourth Street Nat. Bank of Phila. account stated	635.32	
			$147,652.70
Feb. 28	The shortage as evidenced by the falsification of the General Ledger amounts to and is reflected in the following accounts:		
	A to L Deposits acct. understated	$97,762.75	
	accounts:		

Prepared Statement of Edward F. Cloran

		At the end of February Bills Payable account is under-stated	17,000.00
		Certificates of Deposit acct. under-stated	12,000.00
		Corn Ex. Nat. acct. over-stated	15,000.00
		Union Nat. Bank acct. over-stated	20,323.64
			$172,943.95
	Mar. 17	Excepting that the shortage is reflected in the General Ledger accounts in more or less amounts than those shown on February 28, the shortage as evidenced by the manipulations of the General Ledger remains at the beginning of this date approximately the same.	
		A false credit of $10,000 to the Bills Purchased account results in under-stating this asset in the amount of $19,-689.87.	
	March 20	A false under-extension of $48,140.21 to the A to L Deposits account results in under-stating this liability $145,902.96	

Prepared Statement of Edward F. Cloran

March 26 and 27	A false over-extension of $100,000 and a false over-extension of $58,140.21 in the A to L Deposits account results in reducing the over-statement of this liability to the sum of $12,-237.25.		
March 29	A false under-extension of $100,000 in the A to L Deposits account results in under-stating this liability in the amount of $87,762.75.		
	A false under-extension of $81,919.36 in the M to Z Deposits account results in under-stating this liability in that amount.		
March 31	On this date the Union National Bank account is over-stated	$5,972.04	
	The Irving Nat. Bank acct. is over-stated	28,412.91	
	A to L Deposits acct. is under-stated	87,762.75	
	M to Z Deposits acct. under-stated	81,919.36	
	Total shortage		$204,067.06
April 4	The shortage as evidenced by the falsifications of the General Ledger at the close of this date amounts to		190,654.15

		This shortage is reflected in the following accounts in the amounts stated:		
		A to L Deposits account under-stated	$87,762.75	
		M to Z Deposits account under-stated	81,919.36	
		Union Nat. Bank account over-stated	5,972.04	
		Irving Nat. Bank account over-stated	15,000.00	
				$190,654.15
	April 26	A false over-extension to the A to L Deposits account results in over-stating this liability in the amount of $12,237.25.		
	April 30	The shortage as evidenced by the falsifications of the General Ledger at the close of this date amounted to		$242,983.08
		This shortage was reflected in the following accounts in the amounts stated:		
		M to Z Deposits acct. under-stated		$81,918.72
		Shawmut Nat. Bank acct. over-stated	1,000.00	

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	Fourth Street Nat. Bank account over-stated	1,000.00	
	New York State Bank account over-stated	3,000.00	
	Union Nat. Bank acct. over-stated	6,123.41	
	Irving Nat. Bank acct. over-stated	49,940.95	
	Liability column of General Ledger is under-footed	100,000.00	
		$242,983.08	
May 3	A false under-extension of $100,000 to the A to L Deposits account results in under-stating this asset in the amount of $87,762.75.		
May 19	A false over-extension of $100,000 to the A to L Deposits account results in over-stating this liability in the sum of $12,237.56.		
	A false over-extension of $100,000 to the M to Z Deposits account results in over-stating this liability $18,081.28		
May 21	The shortage as evidenced by the falsifications of the General Ledger at the close of this day amounted to	$207,087.47	

Prepared Statement of Edward F. Cloran

		This shortage was reflected in the following accounts in the amounts stated:	
		A to L Deposits account understated	$105,662.75
		M to Z Deposits account understated	$97,018.72
		Irving Nat. Bank account overstated	$97,018.72
		Irving Nat. Bank stated	14,406.00
			$207,087.47
	May 31	A false credit of $100,000 to the A to L Deposits account results in over-stating this liability in the amount of $12,237.25.	
		A false credit of $81,919.36 to M to Z Deposits account results in an under-statement of this liability in the amount of $5,099.36	
		A delayed credit of $58,-732.54 to the Union National Bank account resulted in a true statement of this asset. The shortage as evidenced in the falsifications of the General Ledger at the close of this day amounted to	$297,532.48

Prepared Statement of Edward F. Cloran

This shortage was reflected in the following accounts in amounts stated:		
M to Z Deposits account understated	$5,099.36	
Fourth Street National Bank Phila. . account over-stated	2,500.00	
New York State Nat. Bank Albany account over-stated	2,000.00	
Irving Nat. Bank acct. overstated	32,181.22	
Balance of Cash on Hand at the close of this day was over-stated	15,100.00	
The asset column of the General Ledger is overfooted	140,651.90	
The liability column of the General Ledger is under-footed	100,000.00	
	$297,532.48	
June 2 A false charge of $8,732.54 was made to the Irving National Bank.		

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A false charge of $50,000 was made to the Union National Bank.

These two items are intended to reduce the over-footing of the asset column on the day previous.

A false under-extension of $100,000 in the A to L Deposits account results in an under-statement of this liability in the amount of $87,762.75. A false under-extension of $80,000 in the M to Z Deposits account results in an under-statement of this liability in the amount of $85,099.36. A false credit to the Bills Purchased account of $5,000 results in an under-statement of this asset in the amount of $38,689.87.

A false charge of $5,000 was made to the New York State National Bank of Albany.

June 4 The shortage at the close of this day as evidenced by the falsifications in the General Ledger comprises the following:

A to L Deposits account understated	$87,762.75

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M to Z Deposits account understated	85,099.36	
New York State National Bank of Albany account over-stated	5,000.00	
The asset column of the General Ledger is over-footed	17,019.36	
The Union National Bank account is overstated	50,000.00	
The Irving National Bank account is overstated	8,732.54	
	$253,614.01	

June 16 A false under-extension of $16,219.36 to the A to L Deposits account results in an under-statement of this liability in the amount of $104,782.11

June 23 A false under-extension of $40,000 to the M to Z Deposits account results in an under-statement of this liability in the amount of $125,099.36. An under-extension of $10,000 to the Special Deposits account results in

an under-statement of this liability in that amount. A false credit of $10,000 to the Bills Purchased account results in an under-statement of this asset in the amount of $53,689.87.

June 25 An over-extension of $117,019.36 in the A to L Deposits account results in overstating this liability in the amount of $12,237.25. An over-extension of $120,000 in the M to Z Deposits account results in an understatement of this liability in the amount of $5,099.36.

June 26 An under-extension of $100,000 to the A to L Deposits account results in an under-statement of this liability in the amount of $87,762.75. An under-extension of $100,000 in the M to Z Deposits account results in an under-statement of this liability in the amount of $105,099.36.

June 27 An under-extension of $200 in the M to Z Deposits account results in an understatement of this liability in the amount of $105,299.36.

June 30 An under-extension of $20,000 in the M to Z Deposits

	account results in an understatement of this liability in the amount of $125,299.36. The shortage at the close of this day as evidenced by the falsifications in the General Ledger amounts to	$278,003.06	
	comprising the following:		
	A to L Deposits account understated	$87,762.75	
	M to Z Deposits account understated	125,299.36	
	Special Deposits account understated	10,000.00	
	Shawmut National Bank acct. over-stated	3,000.00	
	Cash over-stated	1,189.05	
	The asset column is overfooted	50,751.90	
		$278,003.06	
July 1, 2 and 3	The balance of cash on hand at the close of each of these days continues to be over-stated $1,189.05. The total of the liability column exceeds the total of the asset column of the General Ledger by $50,751.90 on each of these days.		

July 5	A false under-extension of $5,000 to the A to L Deposits account results in an under-statement of this asset in the amount of $92,762.75.
	The balance of cash on hand at the close of the day is over-stated $1,189.05.
	The total of the asset column in the General Ledger is over-footed $50,751.90.
July 7	The balance of cash on hand at the close of this day remains over-stated $1,189.-05. The asset column in the General Ledger is over-footed $50,751.90.
July 8	A false over-extension of $50,751.90 in the Mutual Alliance Trust Co. of New York account results in an over-statement of this asset in that amount. This over-extension is the amount of the difference that has existed for some time past between the total of the assets and the total of the liabilities columns in the General Ledger. The balance of cash on hand at the close of this date remains over-stated $1,189.05.

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July 9, 10 11 and 12	The balance of cash on hand at the close of each of these dates remains over-stated in the amount of $1,-189.05.		
July 14	A false debit of $20,000 to the A to L Deposits account results in an under-statement of this liability in the amount of $112,762.75.		
July 31	A false debit of $5,000 to the A to L Deposits account results in an under-statement of this liability in the amount of $117,762.75.		
	The shortage, as evidenced by the falsification of the General Ledger at the close of this date amounts to		$318,796.75
	This shortage is composed of the following items:		
	A to L Deposits account under-stated	$117,762.75	
	M to Z Deposits account under-stated	125,299.36	
	Mutual Alliance Trust of New York account under-stated	60,751.90	
	Irving National Bank account over-stated	12,687.48	

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		Corn Exchange National Bank account over-stated	2,295.26
		Special Deposits account understated	10,000.00
			$328,796.75
	Aug. 2	A false extension of $2,500 to the Bills Payable account results in an over-statement of this liability in the amount of $2,500.	
	Aug. 4	A false credit of $15,000 was passed to the Mutual Alliance Trust Co.	
	Aug. 5	A false charge of $15,000 was made to the Irving National Bank account.	
	August 9	False credits aggregating $20,000 were passed to the Mutual Alliance Trust Company.	
	Aug. 11	A false charge of $7,500 was made to the Irving National Bank account.	
	Aug. 12	False credits aggregating $6,551.10 were passed to the Mutual Alliance Trust Company	
	Aug. 13	The shortage as evidenced by the falsifications in the General Ledger at the close of this date amounted to	$312,580.63

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A to L Deposits under-stated	$117,762.75
M to Z Deposits account under-stated	125,299.36
Special Deposits account under-stated	10,000.00
Corn Ex. Nat. Bank acct. over-stated	1,516.78
Irving Nat. Bank account over-stated	22,687.48
Mutual Alliance Tr. Over-stated	8,881.53
National Shawmut Bank of Boston account over-stated	217.86
New York State National Bank account over-stated	7.29
Second National Bank Paterson account over-stated	173.21
Orange National Bank account over-stated	11.47
Union National Bank account over-stated	31,300.86
	$317,858.59

Less:		
Balance of cash on hand at close of day under-stated	$5,161.57	
Bloomfield National Bank account understated	116.39	5,277.96
		$312,580.63

Mr. Hinds: Now as to these schedules that have not been marked but were served on the other side prior to the trial, those I think should be marked in evidence.

Marked Exhibits C-1561, C-1462, C-1463, C-1464, C-1465, C-1466.

Exhibit C-1461 is statement showing the number of depositors and alleged total amount of deposits as reported by Raymond E. Smith at meetings of the Executive Committee and Board of Directors, being a collocation from the minute book already in evidence.

Exhibit C-1462 is a statement showing instances when balances of cash were carried forward in the cash book incorrectly to the next day.

Exhibit C-1463 and C-1464 taken together comprising statements of the cash items other than actual cash which were carried from day to day in the paying teller's cash, with certain other information in connection with the same.

Exhibit C-1465, a statement showing embezzlements of the teller Jennings in connection with certain deposit accounts.

Exhibit C-1466, a statement showing embezzlements by Raymond E. Smith in connection with pass books.

Q. Mr. Cloran, I show you another statement, copy of which has not been served on the other side, but which is referred to in your statement as having been prepared by you, and I ask you whether that is the fact?

A. That is the fact.

Mr. Hinds: Your Honor, I offer this in evidence, being a collocation from the books and records already in evidence, showing or purporting to show that the reserves of the institution were depleted beginning January 31, 1913 and thereafter. We will produce Mr. Cloran for further cross-examination after counsel have studied the statement.

Mr. German: The right is reserved to the defendants to cross-examine this witness the same as the other?

The Court: Oh, yes.

Mr. German: And to object to the statements.

Mr. Hinds: We have certain self-proving documents we would like to offer in evidence, they are all authentic transcripts of the Court records. Shall I refer to them one by one?

The Court: Yes, take them one by one.

Mr. Hinds: Certified copy of an order of adjudication, United States District

Court, District of New Jersey, in bankruptcy, of the Home Ice & Products Company, bankrupt.

Marked Exhibit C-1468.

Mr. German: Shall we object individually or to all of them? The defendant Keim objects to the introduction of this.

The Court: What is your object in offering it?

Mr. Hinds: To support the allegation in the bill that this debtor is bankrupt, and that is part of our proof of loss with respect to claims and irregularities having to do with this particular company, which is already in evidence, simply a part of our chain of proof as to the loss, that the concern is in bankruptcy.

Mr. Stiefel: I object to it. The date of that of course I realize, without looking at it, is subsequent to the insolvency of the Roseville Trust Company and involves a condition arising subsequent to any of the acts of the directors which are referred to herein, and that no tendency to prove what the condition was at that time, or to fasten negligence upon them with respect to any of them.

The Court: Your objection goes on the record; it will be admitted subject to the objection.

Mr. Congleton: I desire to enter an objection.

Mr. DeLaney: I object on the same grounds on behalf of the defendant Bataille, and on the further ground that the

status reflected is entirely too remote so far as that defendant is concerned to produce any liability on his part.

Mr. Newton: The defendant Dunn objects on both grounds.

Mr. German: The defendant Keim objects on those grounds.

Mr. Congleton: Cannot there be objection entered for all of them, because some of the attorneys are not here today, thinking this examination was simply to put in these schedules.

Mr. Clark: That is agreeable to us.

The Court: I take it that any objection made by anyone of the counsel will inure to the benefit of all the counsel. I will so rule now.

Mr. Fairlie: May not this batch of papers be marked subject to objections which may be raised when we look them over, just as the statements were?

The Court: Oh, yes, yes. Of course you cannot tell how objectionable a paper is until you look it over, and in reserving the right to cross-examine, of course reserve the right object to anything that may be objectionable.

Mr. Cornish: Well, let that appear, and go right ahead and introduce them then.

Mr. Hinds: The next one is a similar certification of adjudication order in the bankruptcy of Frank Bruno and Antonio Miele, comprising the firm of Miele & Bruno, also doing business under certain other designations referred to in that order.

Marked Exhibit C-1469.

The Court: That will be marked subject to the same objections.

Mr. Hinds: Similar certified copy of bankruptcy adjudication order, referring to Raymond E. Smith, the treasurer, on bankruptcy, doing business also as the Oakland Motor Sales Company.

Mr. Congleton: The same objection.

Marked Exhibit C-1470.

Mr. Hinds: Similar adjudication order certified in the matter of John B. Scarlette, bankrupt.

Mr. Congleton: Same objection.

Marked Exhibit C-1471.

Mr. Hinds: The remaining papers are all authentic transcripts of the records of the County Clerk of the County of New York, State of New York, also the clerk of the Supreme Court, showing, in the instance of each of the debtors whose names I will mention in order the fact that certain judgments have been entered, filed, execution issued and returned unsatisfied, giving in each case the detailed information whenever it is stated. These are all judgments against the Intercity Land and Securities Company. The first one is $589.69, December 11, 1913.

Marked Exhibit C-1472.

The next one is $930.36, March 18, 1915.

Marked Exhibit C-1473.

The next one is $2,101.27, May 27, 1915, and on this and the previous one there are certain other defendants mentioned.

Marked Exhibit C-1474.

The next is dated December 11, 1913, in the amount of $715.46.

Marked Exhibit C-1475.

The next one is for $554.41, and is dated February 13, 1914.

Marked Exhibit C-1476.

The next one is for $724.74 and is dated February 3, 1914.

Marked Exhibit C-1477.

The next one is for $487.97, judgment perfected January 15, 1914.

Marked Exhibit C-1478.

I might say that all of these transcripts are as of very recent date in May, 1917. $264.65, March 6, 1914.

Marked Exhibit C-1479.

The next one is $6,924.62, October 10, 1914, being the additional defendant John B. Faunce.

Marked Exhibit C-1480.

The next one is for $489.02, dated April 15, 1914.

Marked Exhibit C-1481.

The next one is for $211.19, dated June 9, 1914.

Marked Exhibit C-1482.

The next one is for $321.17, June 19, 1914.

Marked Exhibit C-1483.

Mr. Congleton: We object to each and every one of those.

Mr. Hinds: We offer in evidence the answers of the following defendants—the answers to the interrogatories of the following defendants: Edward D. Dun, Harvey

Mott, G. Roland Munroe, William T. Benjamin, Charles C. Lurich, John B. Scarlett, William F. Keim, Emile C. Bataille, Harvey W. Foster. I wish to call attention to the fact that the defendant Krug is still in default of his answers to the interrogatories.

The Court: They may be put in later.

Marked Exhibits C-1484, C-1485, C-1486, C-1487, C-1488, C-1489, C-1490, C-1491, C-1492.

Mr. Stiefel: As near as my client Lurich is concerned, I object to all the answers to the interrogatories of all the other defendants as against him, and as far as my client Krug is concerned I make a similar objection. I simply confine it to my particular clients; I have had no opportunity to cross-examine those defendants on that, and as far as their answers are concerned I object to them as evidenced against my respective clients.

Mr. German: I make the same objection as to all other answers of all other defendants except defendant Keim, as not binding on him.

The Court: Well, each of the counsel in the case objects to the interrogatories as evidence against his client, the only exception being the interrogatories of his client.

Mr. Hinds: Can that question be passed upon on the argument?

The Court: Oh, yes.

Mr. Clark: If your Honor please, adopting your Honor's suggestion we should like

to have read one question, one of the interrogatories, and if it is convenient have the answers to that one interrogatory either read into the record or considered as in some way specially marked, because it raises one precise question which your Honor will need to cover. Interrogatory No. 267—

The Court: Propounded to whom?

Mr. Clark: To all of the defendants. "After the receipt of the letter of May 14, 1909 from the Commissioner of Banking & Insurance were any members taken by the board of directors to safe-guard the Roseville Trust company against any loss which might be made possible by failure to provide an independent check upon and supervision of the operations of Raymond E. Smith?"

The answer to that interrogatory of Harry W. Foster is: "I do not recall at this time."

The answer of the defendant Bataille is, to interrogatory 267, "Yes."

The answer of the defendant Keim is "Not to my present recollection."

The answer of the defendant Lurich is: "I do not remember at this late date."

The defendant Scarlette says: "The alleged letter of May 14, 1909 as reported by president Odell to the board of directors referred to a single specific transaction of Raymond E. Smith as an officer of the bank, and to the best of my knowledge at that time did not call for any special precau-

tionary measures from the board of directors, and to the best of my knowledge none were considered or taken."

The answer of defendant Dunn is: "I was not a director at that time and do not know."

The defendant Harvey Mott says: "The board demanded the resignation of Smith and he tendered it and it was accepted. The matter was further discussed and later it was unanimously voted to reinstate him after he had made a full statement which was thoroughly discussed by the board."

The defendant Munroe says: "I know with the other officers Mr. Odell and Mr. Fairlie kept as careful check as they knew how, though none of the board anticipated any further trouble, I am sure."

The defendant Benjamin says: "At the meeting when the letter of the Commissioner was considered a report was made by the president on behalf of the executive committee who had investigated the matter, and the gentlemen who investigated in regard to Mr. Smith's previous connections, character and associates, to the effect that he bore the best reputation both as to his personal integrity and as to his ability as a banking officer, and the committee recommended that Mr. Smith should be retained for the reason that there was nothing connected with the transaction which indicated any moral turpitude on the secretary's part; he acknowledged that he made a mistake, and

undoubtedly on that very account would be more careful in the future, and in view of all the circumstances the company's affairs were as safe in his hands as they would be in those of anybody else, and the recommendation of the executive committee was concurred in by the board and supervision of Smith was left in their hands as theretofore."

In certain instances—

Mr. German: Pardon me. I object to the answers of these defendants as being binding upon defendant Keim, except as to his own answer.

The Court: That objection has already been made.

Mr. Clark: In certain instances, at least one, interrogatory No. 267, was answered "Yes." The next interrogatory No. 268, is: "If your answer to the 267th interrogatory is 'Yes,' state as fully as you can recollect what measures were taken in that connection." The defendant Bataille, who answered interrogatory No. 267 by the answer "Yes," said: "The president stated to the board that he would call at the institution every morning, and inquiry disclosed that the general ledger was kept by William J. Thompson and the cash was in the care or custody of teller Jennings."

The defendant Munroe answers: "I do not recall any special details."

The defendant Mott answers: "Regular banking method of examination."

Benjamin repeats his answer to 267.

The defendant Lurich answers: "I do not remember at this late date."

The Court: Have you anything further to offer at this time?

Mr. Hinds: That is all, your Honor.

The Court: The case then would seem to be concluded as far as the complainant is concerned. I understand that the complainant will rest at the close of the cross-examination.

October 2, 1917.

EDWARD F. CLORAN, re-called:

Judge Collins: I might say with regard to Mr. Cloran's testimony I was not present when he gave it, but I read it, it was in the shape of a statement, if your Honor will remember, and the right to make objections was reserved. I desire to object, and perhaps they all do, to all the testimony that was given by Mr. Cloran in the nature of an expert opinion, that the various discrepancies of the books that would show defalcation could have been detected by any person of ordinary business ability. I think that is a matter for the Court, and that it is not proper to call upon a witness to state what he thinks about it; it opens a collateral inquiry; your Honor knows there were alterations and changes made in the books, and I think

there should be noted and considered by your Honor an objection to testimony of that character.

The Court: I had some considerable doubt about that testimony, but I admitted it because Vice Chancellor Pitney had admitted similar testimony in the Perth Amboy case, and that raises at least a doubt as to the propriety of tis admissibility, but the rule is that wherever there is a reasonable doubt the evidence is admitted subject to objection and the objection considered at the time when the Court is considering the case.

Mr. Cornish: In connection with Mr. Cloran's testimony Mr. Hinds introduced a number of exhibits having to do with bankruptcy proceedings and judgments obtained in a foreign jurisdiction, and I think that the way it was left was that we objected to them, and I do not think the matter was disposed of except in this way, that we were to have an opportunity to look over them and object to them.

The Court: You may adopt the course.

The Court: Your objection is now on record and will be considered when I come to consider the case.

Mr. German: It is understood that these objections and this motion of Judges Collins relates to all the defendants?

Mr. Collins: I so stated; I assumed they wanted me to do it, I made it in behalf of all.

Mr. Stiefel: I understand your Honor

has already ruled that an objection made by one is available to all without all rising and repeating the objection.

The Court: Oh, yes, that will be understood.

CROSS-EXAMINATION by Mr. Cornish:

Q. You will recall that you filed a sort of a statement giving the results of your examination in schedule form, examination of the books, and day by day you gave the condition of the bank as you found it from the books, not every day but picking out a day here and there, covering one or two or three days in a month? A. My only effort was to prepare a schedule of accumulated shortages; I did not claim that that is all there was.

Q. Do I understand you to say you did not claim that the schedule as it refers to any particular day covered all the shortages of that day? A. Covers all the shortages of that day?

Q. Up to that day? A. Yes.

Q. On the date of the examination of April 11, 1912, you give the total discrepancy as $18,000 but you added about fifty-four thousand dollars in your comment on that date, and I am not able to determine which you mean as the total loss, the $18,000 or the $54,000. Perhaps you would like to look at this.

Mr. Hinds: I think the question is inherently—

The Court: Well, let counsel proceed.

Q. This is April 11th (showing witness paper). A. I am dealing with the figures here; the operations on April 11th—

Q. I am not asking you about the operations; all I wanted was the accumulated shortage on that date and the items of it? A. The accumulated shortage as shown by the books on this date?

Q. Yes. A. Is $18,000.

Q. And the items of that? A. $14,000 in the bills purchased and $4,000 not adjusted in the bills purchased on opening of April eleventh, and the operation of the $30,000 under-credit and the $20,000.

Q. Well, that is not the question. I want only the accumulated shortage at the end of the day, which was the time of the examination? A. $18,000 on this day, as shown by the figures.

Q. What items does that consist of? A. Bills purchased.

Q. All of it in bills purchased? A. All of it in bills purchased.

Q. Then you are mistaken when you say there is cash book decrepancy of $4,000? A. No, I wouldn't say that I was; I am testifying from my memory; I haven't the books in front of me, nothing but that statement.

Mr. Hinds: I show the witness his statement which is referred to.

A. I was wrong there, Mr. Cornish. The bills purchased is $14,000, and the cash is $4,000; that makes up the $18,000.

Q. Now I call your attention to your testimony given on a previous day in regard to this, in which you say: "The cash account in the general ledger occurs on this date with the balances shown by the cash book and with the actual cash on hand as shown by the receiving and paying tellers proof books, but on this date a false charge of $4,000

in currency was made to the account of J. R. Clare in the A to L debit book and cash book. This $4,000 was credited back to J. R. Clare on May 2, 1912 but was not entered in either the credit book or the cash book.'' Then is not your statement wrong that this discrepancy was not in the cash on that day but in the A to L deposit ledger? Shall I show you your testimony? A. No, I have it here.

Q. Well, this is the first statement you made.

Mr. Hinds: If your Honor please—

The Court: He has the right to cross-examine.

Q. I simply want to get it straight, that is all. A. I think, Mr. Cornish, that there is $4,000 in the A to L ledger in the Clare account, and I think there is $4,000 in the cash.

Q. Then your statement given on this date when you were first on the stand is incorrect? A. Well, I have skipped $4,000 that is all.

Q. How long had you been examining the books prior to that time? A. I think I undertook the examination of the books the first day of March.

Q. You had been examining them a month before the trial? A. Yes.

Q. And you had an assistant, an expert accountant, with you? A. I had an assistant I think from about the third week in March.

Q. Now am I right in supposing that you had examined portions of these books before in connection with criminal trials involved in this case? A. Yes.

Q. A number of them? A. Yes.

Q. So that you were familiar with the books when you started this examination? A. Yes.

Q. Do I understand you to say that there was on this eleventh day of April, 1912 a discrepancy of $14,000 in the bills purchased? A. Yes.

Q. And $4,000 in the cash? A. Yes.

Q. And $4,000 in the A to L ledger; so that neither your statement the first time you were on the stand nor the second time you were on the stand nor the prepared statement is correct as to that date? A. That is my opinion now, I think there is $4,000 more.

Q. But you don't know it, do you? A. I am not sure unless I look at the book.

Q. Mr. Cloran, the schedules showing the embezzlements by Smith and Jennings are included in your—the amounts of them are included in your total deficit at the end of the bank's existence, are they not? A. Yes.

Mr. Hinds: There are several totals at the end of the bank's existence.

A. I think he has reference to $791,000.

Mr. Hinds: A question like that brings out absolutely nothing, and it leaves nothing but confusion; the witness may understand one thing and we understand another.

The Court: If the cross-examiner has induced the witness to say something that the witness did not intend to say you can bring it out on the re-direct examination.

Q. On page 1295 of this statement you give the total discrepancy between the actual assets and the books as $317,858.59, and then there is a credit of $5,277.96, leaving a total discrepancy of $312,580.63? A. That is right.

Q. That is the total difference between the as-

sets of the company as they existed and the assets of the company as they should have been according to face value? A. I never saw the assets of the company, that is the difference in the manipulation of the figures of the books; starting with the first manipulation in the general ledger and following it on through the result was that on the thirteenth day of August these figures showed or the general ledger showed a shortage by these manipulations to the extent of $312,580.63.

Q. If the books had been properly kept they would have shown that much more money?

Mr. Hinds: Your Honor, it is so obvious.

The Court: The question is perfectly proper on cross-examination.

Q. (Question read) A. They would have shown that much more assets or less liabilities.

Q. Now doesn't that figure include the cash that was paid out by the receiving teller for checks that were not good, such as the Armstrong, Miele & Bruno, and other items of that sort that went into box 55? A. It does if these items found entry on the books; if they did not it doesn't.

Q. That is, every item that was paid by the teller must have been entered on the books, must it not? A. As a matter of fact they were not.

Q. Well, every item then that was paid by the paying teller and entered on the books at the direction of Smith when there were no funds and held by him in the cash and later put into box 55 is included in this total ?A. Yes, if they form a part of the book figures they are included in that total.

Q. How about the manipulations of Jennings and Smith of the pass books, isn't that included

in this total? A. It wouldn't be included in the total unless the record got upon the books. In the case of Jennings, a man brought a thousand dollars in there; one thousand dollars got on the pass book all right, but one dollar got on the bank books, so that there was nine hundred and ninety-nine dollars that never found an entry on the bank books at all, and the assets were never affected, or the liabilities never affected.

Q. And in figuring up this total you merely took the figures that were entered on the books? A. That is all I had to go by.

Q. And have left out of account in making up this shortage the difference between the amount entered in the book and the amount entered in the pass book? A. It is out of that figure, yes, but it is in that seven hundred and ninety-one thousand dollar figure.

Q. You don't know anything about that $791,000, do you? A. Certainly I do.

Q. Is that a part of your calculation? A. It was part of my calculation in so far as I examined the proofs of claims and found the difference between the proofs of claims and the amount recognized by the bank, there was that much difference.

Q. I understand that you examined the books of the company and found a book shortage of three hundred and twelve odd thousand dollars? A. Yes, sir.

Q. And that you examined these individual pass books and compared them with the deposit ledgers and found entries in the pass books to the extent of eighty-nine some thousand dollars more? A. That is right.

Q. What else did you find? A. Then I audited

Mr. Vredenburgh's statements as to his liquidation.

Q. Well, that is a subsequent transaction, is it not? A. Absolutely.

Q. I am talking about the loss that stood at the time the bank closed? A. That is all, those two items.

Q. Those two figures are all? A. Yes.

Mr. Hinds: You mean the book losses?

Q. Is not Mr. Vredenhurgh's statement of total loss based on entirely different figure to start with from yours? A. His liquidation statement you have reference to?

Q. Doesn't he take the assets and liabilities at the time the bank closed as showing a greater loss than you show? A. Well, he starts at the closing of the bank where I start 1911, December, 1911 I think, or October, 1911. You understand he is dealing with the physical items and I am dealing with book records.

Q. Well, then it is possible that an examination of the physical assets and an examination of the book records as you made them would not always agree? A. I don't think they would ever agree from the time he first started.

Q. Well, what I mean is the examination of the book records might show a different deficit from the examination of the physical assets? A. You mean on August 13th? What date would you say?

Q. I will say on August thirteenth? A. Examination of the book records might show a different deficit than an examination of the assets?

Q. Yes. A. Not if taken at book value; the shortage would be manifest, both cases identical, if taken at book value.

Q. This item of three hundred and ninety-three odd dollars that Mr. Vredenburgh gives as the deficit would be the same as yours if he had taken the assets at the book value? A. If he had taken the assets at the book value at the close on August thirteenth.

Q. So that an examination of the assets, of the physical assets, taking them at their book value, would give an equally correct examination as an examination of the books beginning with the beginning and sweeping down through? A. Would give the same shortage.

Q. Would it give as correct an examination? A. It would give even a more correct examination, examination of the books.

CROSS-EXAMINATION by Mr. Stiefel:

Q. Mr. Cloran, after examinating the books have you formed any conclusion as to the conduct of other epmloyes besides Smith? A. Yes.

Q. Was there any employe that worked on those books that was not concerned in the making of false entries, as far as your examination goes? A. I think the paying teller, receiving teller and the bookkeeper were concerned in making false entries.

Q. Those false entries could have really been discovered by anybody working on the inside of the bank, inside of the cages there, couldn't they, day by day? A. You mean to have gone back and checked up the work? A. No, I mean a person coming in contact with those books during the course of the necessary banking work and working there constantly couldn't have avoided seeing that something was crooked with regard to

the other employes? A. Well now of course when you get down there you are getting down to one of the most difficult things in banking. In other words, in order to detect most of the work that these fellows were doing, that is, the paying, receiving teller and bookkeeper, it would be necessary to call in all the pass books, which was a thing which was never done. In other words, you cannot tell whether a customer's account is manipulated until you get his pass book.

Q. That is what tells the story? A. Yes.

By Mr. Fairlie: Q. You say a thing which is never done? A. In calling in all the pass books?

By Mr. Fairlie: Q. Yes, I did hear you say that? A. I don't think any bank calls in all the pass books; it would start a run on them I am afraid if they did.

Mr. Hinds: You are referring to the minor employes?

Q. Never mind, I am satisfied with the answer. The manipulations and improprietres are not confined to the general ledger, they run into the other books too? A. Oh, yes.

Q. And there is no question in your mind that there was co-operation between one or more of the employes and Smith? A. Well, at times there was.

Q. And that these other employes must have known of Smith's improprieties? A. I imagine in the particular cases in which they assisted him they did.

Q. And they were of such character that any experienced bank clerk would know that something was wrong and should be disclosed as a result, is not that so; they were of such charac-

ter that no honest bank clerk, honest, efficient bank clerk could pass them over? A. Well, I wouldn't exactly say that, that is, I would say that so far as the paying and receiving teller is concerned, but I would not say that so far as the bookkeeper up there was concerned.

Q. There might be a question with regard to him? A. Yes. In other words, where he assisted Smith was in re-writing some of the ledger accounts and that showed overdrafts and Smith gave him as the reason that he did not want those overdrafts to show.

Q. At any rate they should have excited suspicion in the mind of a capable banking man? A. Oh, yes, indeed.

Q. Now Mr. Cloran, will you please take up the ledger of May 31, 1913, the general ledger. Will you turn to the balances on that day? A. Yes.

Q. Did you ever investigate to see whether that balance of $209,563.42 individual deposit No. 2 actually corresponded with the balance as shown on the individual ledger on that day? A. Did I take the individual ledger and total the balances on the machine, corresponding to this?

Q. Yes. A. No.

Q. Referring to individual deposit No. 2? A. No, I don't think so.

Q. Then you are not prepared to tell us from your examination whether or not on that date the actual balances shown in that individual ledger did not total that figure? A. Not on that date, I wouldn't say on that date, no.

Q. Similarly with regard to individual deposits No. 1, you are not prepared to tell us whether the

sum total of balances shown on that individual ledger did not aggregate $239, 215.30? A. No, I wouldn't say so.

Q. You have spoken in your deposition of May 21, 1913 being the examination day, have you not? A. In my deposition?

Q. Yes, or your oral testimony? A. I may have in the oral testimony.

Q. You have in your deposition stated that a school boy or any person of ordinary intelligence studying these books on examination days could have seen these manipulations, or words to that effect, have you not? A. Well, I will state that any man—

Q. Answer my question. A. I will answer it. Any man possessed of the ability to read and eye sight could have seen it, yes.

Mr. Stiefel: I move that the answer be stricken out, your Honor. I asked whether he made a certain statement, and the question was susceptible of an answer yes or no.

A. I will answer yes, then.

Q. Now you had certain examination dates in mind then, did you not, when you made that statement? A. No, I had no special examination dates; I had the books in general in mind.

Q. You mean on any date whatsoever? A. Most any date.

Q. That statement then was prepared without reference to the question or to the facts with regard to examinations independent of what dates they were actually conducted? A. Independent of any dates.

Q. Then you are not prepared to say, Mr.

Cloran, that on May 31, 1913 or on May 21, 1913 the actual physical assets in the bank did not correspond with what is shown on the general ledger with respect to actual physical assets? A. I came into this examination when there were no physical assets.

Q. All right, but you can answer my question, Mr. Cloran.

(Question read.)

A. No, I am not prepared to say.

Q. You are also not prepared to say whether on the dates of the examinations by the examining committee of the bank the assets shown on the individual ledgers No. 1 and No. 2 and special deposit did not correspond with the books? A. I am prepared to say that the balances in the individual ledgers No. 1 and No. 2 and special deposits on May 21st did not agree with the ledger.

n May 21st? A. On May 21st.

Q. Why did you select May 21st? A. This was an examination date.

Q. How do you know it was an examination day? A. From the minutes in the board.

Q. From the minutes in the board? A. Yes.

Q. How do you know they examined with respect to that day, actually examined on that day with respect to that item? A. Well, I can get you that.

Q. Just answer, you do not need to point out anything? A. I do not recall it just at the present time.

Q. Only from the minutes, is that all? A. I don't know, I have absolute dates upon which those examinations were made from the report of the

examining committees as I recall it; I also have, yes, I have some letters from the banks when they requested the banks to render the statements covering these bank accounts down here as of the close of a certain date which gives me the examination date.

Q. From that you assume that the examination as to individual deposit ledgers No. 1 and No. 2 was confined to May twenty-first? A. That was the date they were examined, yes.

Q. Your examination did not extend to May thirty-first at all, did it, 1913, in connection with individual deposit ledgers No. 1 and No. 2? A. You mean taking the balances each day up to that time?

Q. No, I mean on that date, May thirty-first? A. No, I don't think I touched May thirty-first at all.

Q. Will you look at the balance column under date of May 29, 1913, is it not true that in the credit balance column under head of individual deposits No. 1 and individual deposits No. 2 there was originally written in the hundreds of thousands column a "2" where there now appears a "1"? A. That is true.

Q. Can you without taking a piece of paper mentally make the necessary calculations involved in the balance on May 29, 1913, the debits and credits of May 31, 1913, and then answer whether the credit balance under head of May 31, 1913 is correct with respect to individual ledger No. 1? A. You want me to take this figure in, do you? (indicating)

Q. No, I want you to take individual ledger No. 1? A. No, 1 is all right.

Q. Individual ledger No. 1 is that right? A. Yes, sir.

Q. I call to your attention the fact that the credit item under head of individual deposits No. 1 and under date of May 31, 1913 as it now stands on the ledger is $110,818.93? A. Yes.

Q. If the balance under the same general head on May 29, 1913 now stood as it originally stood, to wit, $244,382.02, then in order to produce the balance under that same general head of May 31, 1913 this figure $110,818.93 would have to be $10,-818.93, would it not? A. That is right.

Q. Doesn't that lead to the conclusion that at the same time the person having charge of this book charged under date of May 29, 1913 the figure 244,000 which we have spoken of to 144,000 and simply put a one in front of the $10,818.93 which appears on May 31, 1913? A. Well, I should want to see the credit side book before I say that $110,818.93 is not a correct figure.

Q. That may be a correct figure? A. That may be a correct figure.

Q. Will you turn to the April 11th examination, I think that is 1912, is it not? A. Yes.

Q. Will you turn to bills purchased there? A. Of 1912 you say?

Q. I think it is 1912; will you turn to the bills purchased item; taking the previous day's balance $502, 725.65 and the account of transactions of April 11th as they are shown on the ledger is not the balance under date of April 11th shown in the book correct? A. It is.

Q. And you can tell that without using paper? A. Yes, five from twenty-seven is twenty-two.

Q. Now on that date what was there wrong

with regard to the books? A. The figure appearing in the cash book to the debit of bills purchased was $7,645.44, and the figure appearing to the credit was $35,300, so that the manipulation in here was $50,000. In other words, there was twenty thousand dollars less debited and thirty thousand more credited.

Q. Is that all that is wrong with regard to that day? You can look over your testimony, I have it here, if you want to refresh your recollection? A. I think you will find $4,000, this $4,000 that he has got in here which is a delayed credit I think you will find taken in here on that day.

Q. Just read over your testimony. A. You see, Mr. Stiefel, on April 9th—

Q. Just a moment, I don't want to go back there. A. This $4,000 false extension here is still there because this calculation is correct, so that is false by $4,000.

Q. Now let us confine ourselves just to April 11th 1912, leaving out April 10th and April 12th; what is wrong with regard to April 11th, what you have pointed out to me with regard to bills purchased or something else? A. There is a false extension here of $50,000 in the M to Z ledger, there is a false extension of $50,000 under extension that is.

By Mr. Hinds: Q. Is this still April 11th? A. April 11th.

Q. That false extension is based upon the present balance of April 10th $250,760.84? A. That is right.

Q. But can you tell us whether or not on April 11th that figure $250,760.84 was there or not? A. I cannot tell.

Q. That may have been $200,760.84? A. Yes.

Q. If that was originally $200,760.84 then the error of which you have just spoken would not be attributable to April 11th, 1912, would it? A. Yes, because he goes even further back than that.

Q. Let us confine ourselves to April 11th, and answer my question, Mr. Cloran? A. Yes.

Q. What is your answer? A. My answer is that that couldn't have been two hundred thousand dollars there.

Q. You say that that could not have been two hundred thousand? A. No, not if this calculation was made right.

Q. I am asking you whether it is not a fact that there was written $200,760.84 before there was written $250,760.84? A. No, I think there was even less than that written before.

Q. Where that "5" is now you mean to say that was not an "O" A. No, I mean to say that "2" was a "1."

Q. I asked you whether the "5" was an "O" originally? A. Yes, I think it was, I think it was one hundred and fifty thousand there, well, it might have been one hundred and fifty thousand and it may be one hundred thousand.

Q. Coming back then to the original question of mine, the only falsification on April 11th, exclusively shown under the head of April 11th is the falsification with respect to bills purchased? Will you please note my question carefully, Mr. Cloran? A. The interest account has a false credit of $100; the special deposits account has a false deposit of $100; that agrees with the cash book, but the cash book was brought $4,000 in excess of what it should have been.

Q. Are you prepared to tell us what the actual aggregate of balances in individual deposits ledger No. 1 and No. 2 and the special deposit ledger were on that day? A. No, I am not, on that day.

Q. Are you prepared to tell us what the aggregate of bills purchased, physically in possession of the bank and openly in possession of the bank, on that day were? A. No.

Q. You spoke of this $100 which is noted in between two lines there? A. Yes.

Q. You say a "1" was added under the head "Interest received"? A. Yes.

Q. Would that interest received be merged in some other account or asset of the bank on that day, would it disappear in cash or would it remain at a separate item in possession of the bank? A. Interest received?

Q. Yes? A. If they actually did receive the interest it would be in the cash I suppose.

Q. It would be in the cash? A. Yes, sir.

Q. Now turn to December 14, 1912, I refer to your deposition page 14, you say "This shortage was reflected in the following accounts in the amounts stated, A to L deposits account understated $15,000." A. That is this figure here. (indicating in book).

Q. Was that under-statement produced by putting down the correct debits and credits for that day and using a fictitious balance for the previous day, or by using a balance for the previous day shown by the transactions of the previous day and bringing forward the new balance incorrectly on the basis of that? A. Now these figures here—

Q. No, here is where I mean? (indicating in book). A. Now those figures there are the re-

sult not of this calculation but is the result of the condition of this account on that day as a result of all of the figures combined; for instance, this manipulation here may have been to adjust something back here. (indicating).

Q. One moment. You mean the manipulation or the result shown on December 13th may be due to prior manipulations? A. Yes, to adjust in part or whole prior manipulations; for instance, here is a thirty thousand dollar credit, and here is a thirty-three thousand dollar debit.

Q. Under date of December 14, 1913? A. Yes.

Mr. Hinds: Just label your remarks so that the stenographer can get it and at a future date we will know what date you are talking about.

A. On December 14, 1912 the total credits to the A to L ledger was thirty thousand five hundred odd dollars, and the total debits was thirty-three thousand.

Q. Plus? A. Plus, a difference of about twenty-five hundred dollars debit. Off of this—

Q. That is to say, off of the credit balance? A. On December 13th would have given him about ninety-three thousand three hundred and he had one hundred thousand dollars here, he has one hundred and ninety-three thousand or one hundred thousand in excess of what the calculation shows.

Q. So that involves a change right on that day of $110,000? A. Right on that day of $100,000 false extension.

Q. If we took the figure of the previous day $95,734.82 under head credit balance individual deposits No. 1, December 13, 1912 we should have produced under the same general head on December 14th $93,351.55? A. Right.

Q. Is it not a fact, Mr. Cloran, that at some time in the history of this book that figure $93,734.82 was not as it now is? A. Certainly was.

Q. You cannot tell us when that change was made? A. I certainly cannot.

Q. You cannot tell us whether the aggregate of individual deposits in book No. 1 on December 14, 1912 did not amount to $193,351.55? A. No, I did not determine the balance on that day; there was only one balance I determined, May 21st.

Mr. Stiefel: I want to stop a minute and say this, I think it is fair to the Court and counsel, I have in my possession here a paper which I only recently discovered, which was given to me in July, 1915 by Mr. Krug, who is now absent, it is the only paper he gave me, and it was filed away by me in my files under Roseville Trust Company vs. Krug, and I did not discover its full importance until this morning; it bears these figures under date of May 31st and one under date of May 21st; that is the reason why my examination was directed towards these two points; I will try to discover before we close what this means. Mr. Krug was a member of one of the examining committees, and those items there say "Balance found correct," "Balance found correct" in each instance.

Q. Now with regard to the bills purchased item on that date, December 14, 1912, Mr. Cloran? A. There was only sixty dollar credit, so it would be $644,755.

Q. That balance is brought forward correctly if we assume the previous day's balance to be correct? A. That is right.

Q. And you are not prepared to say that on that day the bills purchased in the physical possession of the bank, and openly there to the inspection of all, did not aggregate that? A. They are over-stated, that over-statement is the calculation from the biginning, you understand.

Q. In other words, that is the accumulated shortage? A. That is the accumulated shortage.

Q. It does not involve that particular day's transactions? A. No, sir.

Q. In other words, it is the result of how many months labor on those books? A. On my part?

Q. On your part? A. Oh, about nine weeks.

Q. Now with regard to the bills payable account under stated $17,000, I am now referring to the bottom of page 14 of your deposition, how do matters stand there, is there any error confined to that date, December 14th? A. No, not to that date.

Q. Now bills payable represent the paper of the bank held by other institutions or creditors? A. Yes.

Q. As far as that day is concerned you cannot tell us whether or not the bills payable on that day aggregated the amount shown in the book, the general ledger, or not, can you? A. Only so far as that $17,000 is in their cash book where they got the money and didn't put it into the ledger; they would know that; it is either one of two things, either those bills payable have got to be seventeen thousand greater or that cash has got to be seventeen thousand more.

Q. One of the two? A. Yes, either the cash is under seventeen thousand or the bills payable under seventeen thousand.

Q. You really cannot tell which? A. I placed it there because they didn't take it into the ledger, they took it into the cash book and not into the bills payable.

Q. In other words, that item bills payable account understated involves a conclusion on your part? A. They have got the asset but they haven't taken on the corresponding liability, they have taken advantage of the asset without charging themselves with the liability.

Q. You do not mean to say that you or any other man could get at the fact on that day through the maze of Smith's transactions? A. Oh, no, we can only form our conclusion from what we see.

Q. Now the same statement may be made with regard to certificates of deposit account understated $12,000? A. There is a certificate of deposit book and when these certificates of deposit—they are in the form of checks, a certificate certifying that a certain deposit has been made, when that certificate is surrendered why it is pasted in that book and we have the stamp on the back of it the day it was paid, so that I can determine that at that time those certificates of deposit were under-stated that amount of money.

Q. You don't know whether the stamp on the back is correct or not, do you? A. No, excepting that there is the stamp.

Q. In other words, you take the record as you find it at the close of the bank and upon that you base your conclusions? A. That is right.

Q. You made no endeavor to attempt to reconcile this fact that an examination was made by committees and that those committees went away

from that bank apparently, according to the testimony, thinking that everything was all right, to reconcile that fact with what you found on the books there, did you, and try to exculpate those men, using your knowledge as an expert, did you? A. What did I have to reconcile it with?

Q. I ask you whether you did that? A. I read their reports but their reports didn't say anything.

Q. I ask you whether you did that? A. I would have been glad to do it if I was able to.

Q. Well, you did not? A. They didn't provide me with the means to do that.

Q. Well, you didn't? A. No.

Q. Now take up the collateral loans account, that on the bottom of page 14, you show on December 14th accumulated shortage of $100,000; was that shortage a result of December 14th transactions? A. Yes, distinctly December 14th.

Q. That is produced there by the addition of a figure "1"? A. In the hundred thousand place.

Q. In the hundreds of thousands place under the debit balance head, without any justification at all from the figures which appear in the general debit and credit columns there? A. None whatever.

Q. You cannot tell us when that figure was put there though, can you? A. No.

Q. Whether it was put there a week afterwards? A. I cannot tell you anything about it.

Q. You cannot tell us whether on that day the collateral loans in the physical possession of the bank amounted to one hundred and fifty one thousand dollars plus or fifty one thousand dollars plus? A. No, I cannot tell you.

Q. While we are on that date I want to call your attention to this, on page 1129 of the transcript appears this statement as emanating from you: "We are unable to reconcile the New York State National Bank of Albany by $514.60, being an item on November 6, 1912 of $256.30" and on the summary in your prepared deposition you state that the New York State Bank account is overstated at $10,000 on December 14, 1912. I will show you what is written in the transcript with regard to the New York State National Bank of Albany, and ask you to reconcile those two statements if they need reconciliation, or explain them if they need explanation? A. Yes, I can. In all reconciliations of this character there are two classes of discrepancies, one being such items as are legitimately charged by the correspondent bank, but of which the Trust Company had no knowledge until the receipt of the bank's statements, and those items are generally adjusted in the next month, items of such interest charges, returned checks for instance, protest of which they had no knowledge; those items I do not treat in my cumulative statement because there is nothing there that tends to fraud, but I found that a remittance in a reconciliation of that New York State bank, the claim of a remittance of $10,000 did not appear on their statement in any way, shape or form, and that was simply a false charge, and that is the one to which I refer in my cumulative statement.

Q. Had you discovered that when you made your first statement? A. When I made my first statement?

Q. You made your first statement orally in

Court on April 20, 1917, or you made that statement at any rate on April 20, 1917, reading from a prepared statement? A. I think I had, but I may have overlooked that item.

Q. Can you tell us how you came to overlook that, Mr. Cloran? A. No, sir, I cannot.

Q. Now let us turn to the next examination, May 31st, or May 21st, 1913, let us confine ourselves to that date, employing however the balances of the previous date; are there any false extensions on that date? A. The individual deposits No. 1 were falsely extended $117,900 and individual deposits No. 2 falsely extended $5,000.

Q. Those are the only two calculations of that day which involved false extensions? A. Yes, there are some false figures, debits and credits, but the extensions are all right with the exception of those two items as far as I can see.

Q. The false extension in the first case of $117,900 is in excess of the under-statement cumulative under-statement of that account on that day, is it not? A. Yes.

Q. The error with regard to individual deposit No. 2 is only $5,000 as against cumulative error of $97,018.72? A. That is right; they evidently had those figures in there you see previously and scratched them out and that creates these shortages (indicating).

Q. You cannot tell us, Mr. Cloran, what figures were originally in the debit and credit column of that day, May 21, 1913, can you? A. Some of them I can, yes, not all of them.

Q. What ones can you tell? A. Why I should say in the debit column of May 21st there was $31,904.67.

Q. Just stopping there, isn't that written over an erasure, look again? A. The light is bad here, it may be, I cannot say, no, I don't think so, I think the erasures came above it; and in the individual deposits No. 2 I think the $12,817.54 are the original figures, never been changed; I believe the credit to the A to L ledger on that date $10,150.48 has never been changed; the other figures look as though they have been altered.

Q. Especially those in the credit balance column? A. Oh, absolutely, the balance column.

Q. Now aside from those deposit items to which you have called my attention and about which we have just spoken, the only other item is May 21, 1913 which involved either under-statement or over-statement with the Irving National Bank account item? A. Yes, I think so.

Q. Do you recall during the course of your oral testimony in this case before, the following question: "How were the bank accounts on that day, namely May 21, 1913," your answer being as follows: "The Irving National Bank account, there was legitimate difference in the Irving National Bank;" do you remember answering that way, Mr. Cloran? A. I do not, but I may have.

Q. I will show you page 1132 of the transcript so that it may be of assistance to you, and point out the question and answer which I have just read? A. I shall say that I answered that way from the transcript.

Q. Can you explain how you came to answer that way? A. I think I answered that way from a sheet I had before me at that time which was made up of just this week in here, and I believe we made up a sheet for each of these examination

dates, and that that difference at that time was the accumulation of that week and nothing else, whereas this is an absolute reconciliation of the bank account.

Q. But you speak of a legitimate difference, where is the legitimate difference? A. Where I had reference to legitimate difference was the items I just told you about, which would be charges made by the bank that would not be known to the Trust Company until after they received the statement. I can explain that probably a little better. At the time of testifying the reconciliations as were made up at that time were made up as at the close of May, May thirty-first; we hadn't even the statements rendered by the bank on May twenty-first, we had got the statements at the close of the month, and we made it up as of May thirty-first, and then worked back and tried to establish a figure as of May twenty-first, whereas since then I have worked, or since that oral testimony I have worked it out as of May twenty-first and have the correct figures now before me.

Q. Then with the May thirty-first statement of the Irving National Bank before you it appeared to you when you orally testified before that there was a legitimate difference? A. On May twenty-first, but that wasn't the case, you know.

Q. You since say that you have discovered in some way that that is not the case? A. Well, I have since reconciled it as of May 21st.

Q. When you gave your oral testimony before how many weeks work had you put on the books of the company? A. Well, actual weeks work on the books, I think about three, probably a little over that.

Q. A little over three? A. Yes.

Q. And you had the benefit of conversation with Mr. Vredenburgh, did you not? A. Well, much of my time was taken up with Mr. Vredenburgh.

Q. And all statements which had been prepared before under Mr. Vredenburgh's management of the bank's affairs? A. I never saw a statement prepared by Mr. Vredenburgh, nor did Mr. Vredenburgh render me any assistance whatever in my work.

Q. Was not your examination directed particularly to the dates of these or supposed dates of these examinations? A. No, sir.

Q. You had been furnished with a memorandum of what they were though, had you not? A. What do you mean, those dates?

Q. Yes. A. Yes.

Q. And you were working with a view to establishing that on those dates the examining committee should have discovered the falsifications? A. No, I was not working to establish anything of the kind.

Q. You did not have in mind making impressive that fact through your examination and statements with regard thereto, Mr. Cloran? A. Not at all, not at all, sir.

Q. Then on that day, May 21, 1913, the errors or improper entries or perversions of this book that are involved are confined to these two heads, individual deposits No. 1 and individual deposits No. 2? A. Yes, I should say they were.

Q. Now you are not prepared to tell us with regard to that day, Mr. Cloran, what were the actual aggregates of balances in individual deposits No. 1 or No. 2 or in the special deposit book? A. I am with that date, yes.

Q. What were they with respect to that date? A. The individual deposit balances in the individual ledgers aggregated $105,662.75 more than this ledger shows.

Q. State the figure that the ledger shows there now? A. $124,192.20, and the M to Z deposit account balances total $97,018.72 more than is shown on this ledger, which is $128,497.25.

Q. That is as the book is there shown? A. Yes, sir.

Q. You cannot tell us what the aggregate of balances in these respective books were on any one of the ten days succeeding May twenty-first? A. No.

Q. You only took it with respect to that one day? A. Yes; it takes you one day to get off those balances, four people.

Q. One day with four people? A. Yes, sir, one day of about ten hours with four people to take those balances off.

Q. You cannot tell us what figures originally stood in the credit balance column there, can you? A. No.

Q. You cannot tell us for example— A. Well, I can say there was a "2" under the "1's," that is sure.

Q. Is it not a fact that the whole thing was erased and new figures substituted? A. Yes.

Q. On page two of your deposition you have referred to what you say was the condition of the bank with respect to the ratio between cash on hand and demand liabilities. Do you recall that, Mr. Cloran, if not look at your copy? A. Yes, I see what you mean.

Q. Now you state there "I have also ascertain-

ed the true amount of demand debits and other demand liabilities as stated," fixing your attention on that and on whatever else is written on that page is it not a fact that in preparing this tabulation you have not taken what the books showed but have determined the ratio between what the bank actually should have had or was supposed to have and the actual amount of cash. Do you get my question? A. I think I do; I will try to answer it this way; if I get it wrong I will answer it again. Beginning with October, I think it is, 1911, I have day by day worked out from the original books of entry of this bank its liabilities, and on that working day by day of what the liabilities amounted to, if correctly shown by these books, I determined the ratio of reserve that they should have held there, by the proof of the receiving and paying tellers I determined the actual cash they had in the bank, and by reconciling the bank accounts, the correspondent bank accounts I determined their available cash, and on that basis I worked out those percentages.

Q. In order to get the record clear, the fact is then that this tabulation that you prepared is not upon the basis of the general ledger as it came into your possession but is on the basis of what is in the general ledger plus facts ascertained by you from examination of all the books and records of the bank? A. Yes, I should say that.

Q. I am correct in my statement of what you did? A. Yes.

Q. Now Mr. Cloran, during the course of this examination I asked you one or two occasions to add up and substract without the aid of paper and pencil figures that appeared on that ledger

and you did so. That is not uncustomary for you, is it, you are quite accustomed to do that? A. I am quite accustomed in this piece of work, but not as a rule; I had to here.

Q. You can do that with relative facility, can you not? A. Yes, I can probably do it a great deal easier than a man that is not accustomed to that work.

Q. Can you add two columns of figures, if not too long, at the same time? A. I can add two columns of figures no matter how long they are at the same time.

Q. You have been able to do that for a good many years? A. Yes.

Q. Would I astonish you if I told you I had to add one column of figures over twice in order to be reasonably sure to be correct? A. I have to add them over some times six times to be sure they are correct.

Q. Not often though, do you? A. It is all according to how my mind is running.

Q. In your estimate of what might be perceived by the ordinary lay man from a cursory examination of the figures haven't you been moved at all by your own powers, your own facility in that respect? A. No, not in this case; if there was any possibility of saying that a lay man could not see these things I would be only too glad to say it; they are too manifest on the face of them.

Q. Absolutely manifest? A. Absolutely.

Q. Absolutely manifest, there is no question at all about it. Do you think any ordinary lay man could have gone through those calculations you had to go through on the page to determine this without pencil and paper, do you think the ordin-

ary lay man could have done what you just did here during the course of your examination? A. Why certainly.

Q. Are you as sure of that as that the ordinary lay man could have discovered this? A. I am sure he can add and subtract.

Q. Without the aid of pencil and paper, figures extending horizontally across a book like this? A. If he couldn't do it mentally he should take paper and pencil.

Q. I am asking you whether you are sure that the lay man could do it as you did it right here in this court room? A. Every individual has different abilities, I will admit that, according to who the individual is.

Q. You have made your statement with regard to what a cursory examination by an ordinary many would show, without any knowledge of what actually was on that ledger on the critical dates involved, isn't that so? A. I made my examination as an expert, if that is what you have reference to.

Q. Yes, and you made your general assertion as to the powers of individuals, knowing that your statement would necessarily reflect on the members of the examining committee, did you not? A. No.

Q. No? A. No.

Q. Why was it made, if not for that purpose, in order to condemn as an expert the examination of the members of the examining committee?

Mr. Hinds: I must object to asking this witness the purpose of his answer to a question which I put to him. If he wants to ask me what the purpose of it was that would

be proper on the argument. The function of the witness is to answer questions and not indulge in speculations as to the purpose of those questions.

The Court: What is the object?

Mr. Stiefel: I feel the way Judge Collins does with regard to that, that Mr. Cloran cannot testify with regard to it; I am not surprised that he should; he is an expert on behalf of the complainant. I want to show your Honor the elements, I want to show by cross-examination the elements of Mr. Cloran's mentality which let him to make that statement; he is an expert, testifying as an expert with regard to this fact, and sitting here and doing what your Honor has the power really only to do, to condemn these gentlemen and say they should have seen that. With regard to that I think the door to cross-examination should be opened very wide to me.

The Court; I overrule the question.

RE-CROSS-EXAMINATION by Mr. Cornish:

Q. Just a small matter I forgot, Mr. Cloran. You stated that your examination of the books was cumulative, and from October or December of 1911 continued day by day until the bank closed? A. Yes.

Q. Through every day? A. Through every day in some accounts only. That is, you take your A to L and M to Z ledgers and your special deposits accounts, every day right straight through. You take your bills purchased, every day right straight through. You take your bank accounts

and they were only on the end of the months, when I got the statements I reconciled them, couldn't reconcile them in between, didn't know anything about them.

Q. In your statement as to September 30, 1912 you give the total shortage as $109,810.13? A. $109,810.13, yes.

Q. And on October 31, 1912 you give the total shortage as $119,293.78? A. Yes.

Q. Was there any time between those two dates when the total shortage was less than on the first date or more than on the last? A. I do not think so.

Q. Then during all of the month of October, 1912 this shortage as shown by the books of the company was upwards of $109,000? A. Yes, upwards.

RE-DIRECT-EXAMINATION by Mr. Hinds:

Q. In discussing the accumulated shortages as existed on April eleventh you spoke of an accumulated shortage on the books of eighteen thousand, and you also spoke of a discrepancy or shortage which must have aggregated fifty-four thousand; will you explain what you mean by those two statements; there seems to have been some confusion about that on cross-examination? A. On April 11th, 1912—

Q. You were being cross-examined as to what was contained on page 9 of your typewritten statement? A. On April 11th, 1912 the figures on the general ledger here have been practically altered in every account, all of the bank accounts, collateral loans, bills purchased A to L, M to Z ledgers, special deposits, interest received, cash, and the

day before that the actual shortage was $54,000, that is on April tenth, the day after it is $54,000 actually but it drops by reason of the figures that I find here on April 11th to $18,000 based on these figures. Now I am led to believe by reason of April 10th and April 12th the shortage being $54,000 in there that the difference on April 11th is represented in physical assets that were actually removed from the bank, and that these figures that are shown here do not represent what was actually there in the physical assets on that day.

Q. Now you say that, and in fact it has been pointed out on cross-examination that some of those figures are changed? A. Yes.

Q. You cannot tell when they were changed; can you say whether or not the footings are correct as the figures are now given? A. On April eleventh?

Q. On April eleventh? A. Yes.

Q. Can you say whether or not the footings would have been correct if the figures were not as they are now given? A. The footings would not have been correct.

Q. And has the footing been changed? A. No.

Q. There were some general questions asked respecting what other employes must have known in many instances respecting Smith's irregularities; you made answer once that you thought the receiving and paying tellers must have known in some instances; by that did you refer to one man or did you refer to a receiving teller and a paying teller? A. To one man.

Q. What was his name? A. Jennings.

Q. Other than in that one instance has your examination disclosed that there was any guilty cooperation or participation on the part of any other employe? A. No, I don't think so.

Q. The question was asked you respecting the April eleventh examination and similarly respecting the other two examinations, as to what falsification appeared on the work of that particular day, we will say April eleventh, and in each case you would reply by pointing out the under or over extensions that appeared in the work of that day; did you mean to indicate that there were no misstatements of fact as to the total amount of a liability or the total amount of an asset on that date? A. Oh, no.

Q. Now what is the fact as to that, just in general? A. The fact is that the figures shown here on this date, the figures shown on the day before would show anywheres from one hundred to two hundred thousand dollars shortage; on this day they may show accounts all right, and on the next day show the same hundred or two hundred thousand dollars shortage again.

Q. That is to say, the figures may be innocent in so far as they connect up with the day before or the day after? A. Yes.

Q. And yet your prior development of the accumulative shortage indicates to you that the figure is a lie in so far as it purports to describe what was there or what was owing; is that correct? A. On that actual day, yes.

Q. Now turn to December 14th, the figure, collateral loans $151,000? A. Yes, I have it.

Q. What is the precise amount? A. $51,438.

Q. One hundred and fifty-one? A. No, fifty-one.

Q. On what date? A. On December 13th the collateral loan debit balance was $51,438, and it never was anything more than that as far back as

you want to go; there were no debits or credits of December 14th to that account, and he brought it over as a balance of $151,438, or 100,000 in excess of what it truly should have been.

Q. Is it not a fact that the amount is precisely one hundred thousand less on the following day and continues along for weeks afterwards about fifty-one thousand? A. Yes.

Q. Now you were asked on cross examination as to whether that one might not have been added at a time unknown to you on the December fourteenth date, and you said yes; well now, I ask you is the footing of that column correct with the present erroneous one hundred and fifty-one? A. It is.

Q. And obviously would not be correct if it were not for that erroneous one hundred and fifty-one? A. The liabilities would be $100,000 in excess of the assets if that "1" was not in there.

Q. That is to say, while you cannot positively say whether or not that "1" was there, you know that either the "1" was there or the footing was wrong at the time of the examination; is that correct? A. Yes.

Q. And has he footing been changed? A. It has.

By Mr. Stiefel: Q. The footing has been changed? A. It has.

Q. Has the footing of both columns been changed? A. It has.

Q. Let us take May 21, 1913, on cross-examination it was brought out that the present erroneous figures for the two individual deposit ledgers may have been changed? A. Yes.

Q. Are those erroneous figures needed to make up the present footing? A. They are.

Q. Is the present footing in balance? A. It is.

Q. What would be the fact respecting the footing and the balance of those present erroneous figures were not there and if the correct figures had been there? A. Something in excess of $200,000.

Q. Now you have ascertained, have you not, from a physical adding up of the individual ledgers what the correct figure was? A. On that date I did, yes.

Q. Did you find any indications that that correct figure was there underneath the present erroneous figure? A. I did not, no.

Q. Do you find indication that some other figure was there? A. Yes.

Q. But not the correct figure? A. No; the footings on May 21st were not changed either.

Mr. Hinds: If your Honor please, there are two further questions I want to clear up on the re-direct-examination, as I think Mr. Cloran was confused, but I want to have him look at his books and papers first, so I will suspend, if I may, this re-direct-examination except as to the two matters, the Clair four thousand dollar note, and the question of his not having testified orally to the bank reconciliations. I want to bring those two matters out after lunch.

Mr. German: I insist that counsel ought to ask these questions and let the witness state what, if any, records he desires to look at.

The Court: You can ask the witness whether he is prepared to answer those questions now; if he is not then he can take time to answer them after lunch.

Edward F. Cloran—Re-direct

Q. Now, Mr. Cloran, on cross-examination you said that you appeared to have omitted a four thousand dollar discrepancy which did not appear on your statement; are you prepared now to tell us fully how you happened to omit it and what the true situation is? A. If I can see that cash book yes, I can tell you that.

By the Court: Well, you want to look at your cash book? A. Yes.

The Court: You can do that during the recess.

Q. When you testified orally, as contained on 1132 of the record, one of the things you were asked about was what was the prepared statement, if any, that you had on that occasion. I will refresh your recollection further by telling you that that is the instance where you started to give us a long repetition of the development of the cash items and finally a matter would have taken the entire afternoon, when his Honor finally suggested that the matter be reduced to writing, and then you will recall that you proceeded to testify in general about these examination dates. Now what I want to ask you about is, did you have a prepared statement there with you, as stated by one of the counsel, respecting those examination dates? A. I did not, no.

Oct. 3, 1917.

Mr. Stiefel: We desire to cross-examine Mr. Monroe whom you called as a witness.

Mr. Clark: That was settled by his Honor in June by stating that Mr. Monroe should be called by you on your affirmative case;

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if you will look at the testimony you will find that that matter has already been passed upon.

The Court: Well, Mr. Monroe will go upon the stand, he is an intelligent lawyer and he will state the facts as he recalls them; now whether you call it direct-examination or cross-examination is a matter of no consequence whatever.

Oct. 3, 1917.

G. ROWLAND MUNROE, re-called:

Direct-examination by Mr. Stiefel:

Q. You are an attorney at law, I believe? A. I am.

Q. How long had you lived in Roseville prior to the formation of the Roseville Trust Company? A. I should think twelve or thirteen years.

Q. Are you well acquainted up there? A. Quite well.

Q. With the business community? A. Yes.

Q. And the Church community? A. Yes.

Q. Did you hold stock to any extent in the Roseville Trust Company? A. I had one hundred shares originally, and I think I was the third largest stockholder at the time the bank collapsed.

Q. Those hundred shares had a nominal par value of how much? A. About one hundred and eighty I think, or one hundred was the par value.

Q. And their value was supposed to be about $180? A. About $180.

Q. Did they represent a large part of your assets or a small part? A. A large part.

Q. Did you carry your deposit there? A. I had six or seven different accounts there.

Q. Your office was in the bank building? A. Upstairs, yes, sir.

Q. Did you attend the meetings of the board of directors frequently or infrequently? A. I was there whenever I could, whenever I was within reach and I was practically always there.

Q. You have a recollection I presume with regard to the course of the directors meetings? A. Very clear.

Q. Were you also a member of the executive committee at any time? A. I was at all times.

Q. Have you a recollection with regard to the course of the executive meeting? A. I have.

Q. Now will you just picture to us the course of the directors meeting, as you recall them? A. At all directors meetings the attendance was always large.

Q. Let me ask how many directors were there approximately? A. Twenty-one or twenty, and the attendance was large and the interest was always keen. The minutes of the executive committee meetings were always presented first, and any items that required explanation or which the members desired explanation on were fully discussed; there was always a list of the notes that had been purchased in the interim between the previous board meeting, and each member was furnished a copy. Any questions that arose in the minds of any of the members in connection with those were items were asked and discussed and answered. Then the report was always made by

the treasurer and put in typewritten form so that each member had a copy, showing the number of accounts, the deposits, increase in the number of accounts or deposits, or if there was a decrease, which very seldom had to be reported, that was reported, and then the president was very apt to supplement the treasurer's report with a statement, and all the matters of the bank were talked over fully and freely; the meetings usually lasted perhaps an hour or an hour and a half.

Q. Was it the custom of Mr. Odell to be present at these meetings? A. He was practically always there.

Q. How about Mr. Fairlie? A. The same was true of Mr. Fairlie and Mr. Foster.

Q. How about Mr. Banister? A. Mr. Banister was always there when he could be.

Q. Can you tell us any of the notable characteristics displayed by Mr. Banister during the meetings?

Mr. German: There are two Mr. Banisters, which do you refer to?

Q. I am referring to both, but will you let the witness say, because I do not know either. A. Mr. William J. Banister was a man who always had to be shown.

Q. What business is he in? A. He was a member of the firm of Banister & Pollard.

Q. And they are in business on Market Street? A. One of the leading hardware firms of Newark.

Q. This is Mr. William Banister you are speaking of? A. Mr. William J. Banister; he was a member of the executive committee, and was the man I suppose who raised more questions and

more objections than any other man, because that was his temperament.

Q. Was he a frequent attendant? A. He was always present when he could; during the latter time his health wasn't good and he finally had to resign for that reason, but his interest was always very keen, always present and always on the alert.

Q. Can you tell me whether Mr. Yurich attended frequently or infrequently? A. Mr. Lurich was in the neighborhood and always present, when he was not present was very seldom.

Q. Tell us something about the personal of the directorate, so that the Court may know who these parties are; take up Mr. Odell, what was Mr. Odell's position in the Roseville community? A. Mr. Odell was a man who lived in Roseville for very many years, he was very prominent in the Roseville Presbyterian Church, one of the leading spirits in the Men's Club there, he had a very beautiful residence on Seventh Avenue running through from one street to the other; we regarded that we were extremely fortunate in getting a man of his standing and his experience and standing in the business world and in the community in Roseville to be president of the trust company.

Q. Was his experience with the Claflin Company known to you and to the board of directors? A. It was; as I remember he had been for many years, I believe seventeen or twenty years, a cashier of the Chaflin Company, and in that regard he was very conversant with the affairs of that great corporation, he had charge of selling their commercial paper, for instance, or re-discounting their banking.

Mr. Clark: I object to the hearsay knowledge of this gentleman as to Mr. Odell's experience, when Mr. Odell is in Court almost every day, one of the parties joined in this case.

The Court: I do not think that the witness's statement of Mr. Odell's connection with the Chaflin Company is at all important. What we want to know is his connection with the Roseville Trust Company. Mr. Odell has described his connection with the Chaflin Company and that is enough. I will overrule the witness's evidence in reference to Mr. Odell's duties in the Claflin Company unless the witness was himself a member of that company.

A. I know that Mr. Odell was able to arrange and did arrange with the Roseville Trust Company to collect virtually all the out of town items of the Claflin Company; in the New York bank they took care of the New York items, and we handled for a time, for quite a long time practically all their out of town items.

Q. Now go to Mr. Fairlie, what do you know about Mr. Fairlie, and who was he? A. Mr. Fairlie was the Fairlie & Wilson Coal Company, one of the largest coal dealers in this section, and for many years was the president of the board of trustees of our Roseville Methodist Church; he had been a director of the German National Bank, I think it was, one of the banks that was consolidated with the Union National Bank, and he was up to the time of his death and during all the time of his connection with the Roseville Trust Company a director of the Franklin Savings Institution.

Q. The Fairlie & Wilson Coal Company of which you speak is the coal company that has those enormous pockets over in Harrison? A. Yes.

Q. Visible from the D. L. & W. Railroad? A. Yes.

Q. Do you know what Mr. Fairlie's reputation was in Roseville and in Newark? A. I don't think there was any many that stood higher in the respect and esteem of everyone in Roseville or in Newark.

Q. What qualities, business qualities did Mr. Fairlie display in the meetings, and his dealings with the Roseville Trust Company, as far as they came under your observation? A. Mr. Fairlie was naturally conversative, and he was always exceedingly careful to scrutinize every matter that came before the board or came before the committee; he was exceedingly jealous of his own reputation, naturally, and of the reputation of the institution, and he was in the habit of stopping at least once a day and usually twice a day at the Trust Company, as I know of, I frequently saw him entering there and frequently met him there, his home was on Roseville Avenue, so that he passed each time when he went to and from business, and he always came home at lunch.

Q. Were there any other bankers—

The Court: Well, you say he is dead now? A. Yes.

By the Court: Q. When did he die? A. He died about a year after the collapse of the bank I think.

Q. Were there any other bankers members of the board of directors? A. Mr. Bataille had been with the Federal Trust Company as a clerk, he

was one of the tellers at the City Trust Company, he organized the Mutual Trust Company of Orange, he also organized and put on its feet the Bernardsville National Bank, and about the time the Roseville Trust Company was started he organized the American National Bank, of which he was president until a recent date; he was very broadly versed in banking matters.

Q. Did he take part in the directing of the affairs of the Roseville Trust Company by the board? A. He was one of the committee that organized the trust company and established its bookkeeping system, and so on, he was very much interested in seeing that the right system was installed.

Q. Do you know whether James B. Banister had any banking experience? A. Mr. James B. Banister was vice-president of the American National Bank, and of course a member of its executive committee and very actively connected with the conduct of that bank.

Q. Were there any members of your directorate who were simply directors of other banks, if so, name them? A. Mr. Ingersoll and Mr. Woodward were both directors of the American National Bank; I myself had been director of the City Trust Company for five years, and I was director of the American National Bank.

Q. And Mr. Harry W. Foster? A. Mr. Foster was director of the American National Bank and chairman of the examining committee there.

Q. Now can you state to us the business experience of any other directors, for example Mr. Lurdo you know anything about that? A. Mr. Lurich, ever since I have been in Roseville, had been in the real estate business there and had a

very wide business acquaintance and very intimate knowledge of the business standing and of real estate values.

Q. Was his real estate knowledge made use of at all in the directors meetings? A. Very often.

Q. In what way? A. On questions of loans on real estate, the question of the standing of men who were asking for accommodation. Mr. Lurich's knowledge of the real estate holdings and of the business dealings was of great value; and the same is true of Mr. Harvey Mott, he lived in East Orange and his operations were largely concerned in East Orange and we had a good many of our customers lived in East Orange; his knowledge and diligence was always very helpful.

Q. Was he there frequently or infrequently? A. He was always there, you might say.

Q. Are there any other members of your board of directors to whom you ought to call attention along this line? A. Mr. Bell.

Q. Who was Mr. Bell? A. John S. Bell, or Chief Bell as they called him, was a resident in Roseville for many years, he lived just across the street from Mr. Fairlie; he was I believe president of one of the leading ice companies here; he was a man who had been chief of police in Newark and head of the Secret Service of our government; he was a very keen man.

Q. He is now deceased? A. He is now deceased.

By the Court: Q. When did he die? A. He died since the failure of the trust company, about a year ago I think. Mr. William T. Benjamin has been on the stand; he was a man who was very prominent in the Junior Order, of which we have

one of the largest chapters, meeting in the same building there; he was also a director of the Junior Order Building & Loan Association, which is a very prosperous institution, and lived for many years in Roseville. Mr. Frederick Kilgus was another resident in Roseville; he recently completed the building of the Essex Troop Armory there; a man who has built many of the large buildings of Newark and this county, and he had a large acquaintance among Germans; he was prominent in building and loan associations, which was of great help to us. Mr. Krug was an architect who had a great many acquaintances in the Oranges, and his knowledge as an architect, building, and so on, was helpful. Mr. Clinton F. McCord was the State agent, as I remember, of the Penn Mutual Life Insurance Company, an old resident in Roseville, and had a very wide business acquaintance and experience. Mr. Sexton has been on the stand, and his training as a building and loan man for many years and his wide experience in connection with the financial side, you might say, of the school system of the city, made him an exceedingly valuable man; he was a man who always gave the closest attention to every detail, in my experience, and I thought him the most admirable man to be chairman of the examining committee. Mr. Edward D. Dunn was a young man who had had a valuable experience in building operations and in real estate and had a wide business acquaintance. I think that pretty well completes the list.

Q. Now when you were with the City Trust Company as a member of the board of directors did you have any banking experience there? A. I was attorney for the City Trust Company, in fact I organized the City Trust Company.

Q. Did you attend the meetings frequently there? A. Always present.

Q. And came in contact with the affairs of the City Trust Company? A. I was in there pretty nearly every day, my office was just across the street.

Q. Now from your knowledge gained in that respect what can you tell us comparatively of the method of conduct and management of the affairs of the Roseville Trust Company? A. Well, the procedure and the method of conduct of the two institutions was very similar; there was a wider and a closer interest on the part of the board, in my opinion, of the Roseville Trust Company than at the City Trust Company.

Q. You mean more attended and more active? A. Yes.

Q. Do you remember organizing the Roseville Trust Company? A. I do, very well.

Q. And when was that about when they started business? A. We began about 1909, as I remember, December.

Q. And what steps, if any, had been taken to secure active employes, people who were going to really run the bank on the inside? A. In my previous testimony I think I told of the care with which Mr. Smith's selection was made. The National Bank Examiner, Mr. Bryan, first suggested—

Mr. Clark: May I suggest to the Court that there are eight or nine pages on this subject given by Mr. Monroe in his previous testimony.

The Court: Well, Mr. Monroe of course need not repeat what he has already said.

Q. I understand that Judge Davis and Mr. Calhoun will be here this afternoon at two o'clock? A. Yes.

Q. Those are two of the people interviewed? A. Yes.

Q. Now we will assume that you found out all about Smith; did you make the arrangements with Smith personally? A. I did, as representing the preliminary committee.

Q. Now let me ask this one question which I do not think you answered before. What was Smith's actual position in the conduct of the business of the second National Bank prior to his coming to the Roseville Trust Company?

Mr. Clark: I object to that, if your Honor please, we have had Mr. Raymond E. Smith here for days at a time, with opportunity to get first hand information.

The Court: I presume that what was said in the board with respect to Mr. Smith's duties would be evidence; what this witness has learned from others of Mr. Smith's duties in the bank is pure hearsay.

Q. What was said in the board, if anything, by you with regard to Mr. Smith's position there? A. I reported first—

Mr. Clark: Is this in accordance with your Honor's ruling; anything which this witness may have said in a board meeting is to be introduced as evidence; I object, if your Honor please, on the ground it is incompetent and immaterial.

The Court: The question I take it is whether the directors were careful to select a proper man, and anything that was said

in the board that influenced the conduct of the directors on this subject it seems to me to be evidence.

A. Mr. Smith, I reported, was the assistant cashier of the Second National Bank, and I reported my visits to the bank and my interviews with him there, also my interview with Judge Storrs, who was one of the directors of the bank. Then Mr. Smith came and met the preliminary committee, and up to the time that we engaged him, as a preliminary committee, he was the assistant cashier there, and virtually the acting cashier; I met the old gentleman who was cashier, and he was not active.

Q. Did you discuss that with the other memmittee? A. I did; I think in my previous testimony I quoted what Mr. Bryan had said about Mr. Smith's conduct of the bank while the president was sick in Florida for several months.

Q. After the organization of the bank was completed did the bank regularly and in due course employ Mr. Smith? A. They did, yes.

Q. How was it done, by resolution or what? A. By resolution.

Q. And that resolution succeeded your statement to the board? A. At the time of the board meeting engaging Mr. Smith I repeated to them what I have testified concerning the investigations made of Mr. Smith and the very high recommendations that were given to us of his character and his experience and his standing.

Q. Mr. Smith I suppose took charge of matters then at once, practically? A. He took charge before the bank began business; the reconstruction of the building was a very considerable item,

and the securing of the stationery and all that had to be done in a way before the bank was actually organized.

Q. Do you know whether any of the public or prospective depositors said anything about the fact that Mr. Smith was to be the cashier of the bank? A. I placed a good deal of—

Mr. Clark: I object upon the ground that we are going too far afield; there is little enough relevancy in the detailed information concerning Smith's prior position and character, since everything that this case has developed has shown that no matter if he had borne the best reputation in the world it would not have afforded any excuse for these directors to have disregarded the plain warning that he had been guilty of irregularities of the most serious kind within four or five months after the bank opened. I have not objected to Mr. Munroe's partisan recital of Mr. Smith's record previously, but I think, if your Honor please, it is going too far when we are asked to have this interested witness tell about what some depositor or stockholder thought about Mr. Smith. I object upon the ground that it is irrelevant, immaterial and incompetent.

Mr. Stiefel: I want to show that the selection of Mr. Smith was by the business community generally, hailed as a splendid thing for this bank to do. I want to establish in the first place through Mr. Munroe's testimony and through his telling us what occurred at that time that this was a wise

and judicious thing on the part of the directors to do, and I want to show why it appeared to be a wise and judicious thing to do; then I want to go to the first source of trouble, the Nones affair and examine that.

The Court: I have allowed you to go into anything that was said during any meeting of the board concerning Mr. Smith, anything that happened in the board at meetings you may examine him on.

Q. Was the attitude of the prospective—

The Court: No, not the attitude; what was done in the board or said in the board.

Q. What was said in the board, if anything, with regard to the way the public viewed the appointment of Mr. Smith? A. Mr. Smith, as I have said, was engaged by the preliminary committee, as I remember, several months before the bank actually started, and he met a number of the business men in Roseville, of course being about there and directing the reconstruction of the building, and he met the members of the board, I personally introduced him to many of them and personally introduced him to those who were prospective stockholders, and the impression that was made—

The Court: No. You will have to confine yourself to what was said.

A. I was going to say, sir, it was a factor with the directors because of their personal meeting with him, most of them, in forming their conclusion when they finally engaged him as a board officially, for the bank.

Q. Was anything said about what you were

going to tell us about in the board? A. Well, of course the matter of Mr. Smith's characterizations and qualifications was a matter of discussion a number of times, and the standing he had and the experience he had and the character he bore of course were large factors in the hopefulness with which the institution was started.

Q. How long after the opening of the bank did that Nones affair occur? A. As I remember it was three or four months.

Q. Will you tell us the whole history of the Nones affair as far as it is known to you? Did you speak about the bookkeeping system? A. I said that Mr. Bataille was very much interested in the installation of the system of bookkeeping and the general plan for the conduct of the bank, he went over that very carefully and devoted quite a little time to it, and we were very glad to have his judgment because of his wide experience in these various institutions.

Q. What was his judgment on the system of bookkeeping as communicated to the board? A. He said it was excellent.

Q. Now take up that Nones matter and tell us all about it? A. The first I remember hearing about Mr. Nones in the board or the committee is the fact that Mr. Smith reported that he had opened an account there himself and had brought several good accounts from friends in New York; Mr. Smith stated that Mr. Nones and his family had been doing business with the Second National Bank in Orange for a number of years, Mr. Nones' father had died, he had been a valued customer of the Second National Bank, and Mr. Smith had told us that Mr. Nones Junior and his moth-

er were the heirs of the estate, and I very well remember that Mr. Smith commented on the fact that Mr. Nones had introduced several men who had brought good accounts there from New York and who were living in the Oranges. Then we purchased a note of his; there was some member of the board of the committee who did not seem to think as highly of Mr. Nones as Mr. Smith did, as to his financial standing, and when a subsequent note was presented ther was some question raised as to how large a line we should give Mr. Nones; so that nothing more was said about the matter at that time; Mr. Smith said to me privately that he thought Mr. Nones could do us a good deal of good.

Q. That Mr. Nones could what? A. Could do us a good deal of good in bringing us customers.

Mr. Clark: I object to the statements, your Honor has confined this hearsay testimony to statements made in the board.

The Court: I do not see any objection to this, what Smith told this witness influencing his conduct.

A. The next step I remember was a call or telephone call from Mr. Odell, and as I remember Mr. Odell and Mr. Fairlie and myself met I think at my office, and Mr. Odell then told us that Mr. Smith had come to him and stated that he had made a further purchase of a Nones note.

Q. Let me get that. Mr. Odell said that Mr. Smith had come to him, Mr. Odell, and had told him this? A. That is as I recall it.

Q. All right? A. Saying that he had made a further purchase of a note from Mr. Nones which he hadn't reported to the board.

Q. How much was that? A. My recollection of the amount is not clear, I don't remember, and we had a talk with Mr. Smith about it.

By the Court: Q. Well, you are now speaking of a note given by Mr. Nones himself? A. Yes.

By the Court: Q. To the bank, cashed by Mr. Smith? A. Yes, as treasurer.

The Court: The word "purchase" is utterly inappropriate, but still it is the term that has been applied to all this dealing of commercial paper, and unless there be an explanation to the contrary I shall assume that when any of the witnesses speak of notes purchased what they mean is that the customer came to the bank and got cash for his own note. In other words, in ordinary parlance had his note discounted. That is what I shall understand unless there be some evidence to the contrary.

Mr. German: If your Honor please, there is no claim on the part of the complainant that this manner of proceeding was irregular.

The Court: I am not speaking of that at all, I am merely speaking of the misuse of the word "purchase."

A. I at Mr. Odell's request came to his house, I think that evening, and met Mr. Appleton of the banking department, who, as I recall, stated that Mr. Smith had come to him and explained the fact that there was this transaction which had not been entered on the books, and Mr. Appleton expressed his opinion of the proceeding and made his suggestion as to what ought to be done. The matter was afterwards taken up in the executive

committee and later in the board, and the letter which is in evidence from the banking department which came along some two months afterwards which always made me feel that the banking examiner was not satisfied—

Mr. Hinds: I object to that and ask that it be stricken out.

The Court: Yes.

A. After an interval of two months the banking commissioner brought the matter officially to the attention of the board, the language of his letter was urgent, and the matter was again taken up and fully discussed and action taken at that time.

Q. Did you communicate in the executive committee and the board in the interval in those two months before the receipt of the commissioner's letter the facts as you have stated them here, and as you definitely and distinctly recall them? A. I cannot recall just when the matter was taken up in the committee or in the board, but I know it was taken up promptly, and that the thing was very fully and frankly discussed, Mr. Smith appeared before the board and made a very straight forward frank statement.

Mr. Hinds: I object to the characterization and ask that it be stricken out.

The Court: Yes. You may say what the statement was.

A. He said that he had been perhaps over zealous in his desire to get business for the institution, he was very anxious to accommodate Mr. Nones because he had known him very long, Mr. Nones and the family, and knew what a valuable asset their business had been in the Second National Bank, that already Mr. Nones had brought some

good accounts, and he believed that he was in position to bring other business; he knew about the Nones estate and knew that Mr. Nones was expecting or had been expecting daily to receive his portion of the estate; that on the strength of his expectation of the settlement of the estate which would place him in very considerable funds, he had made certain agreements to make certain investments, I do not remember the details, and had made an advanced payment, which as I recall the first note was presented to give him the funds to make that advanced payment, and he had come to Mr. Smith with an official notice from the Surrogate explaining some delay postponing for a few days, and only a few days, the time when he should be in receipt of these funds, and Mr. Smith said that Mr. Nomes had explained to him that he would be in a very embarrassing position and was likely to lose money if he was not able to have the money to carry out his contract, and that Mr. Smith knowing how well prepared Mr. Nones was to take care of the matter had ventured to make him the advance that he wanted believing that it was going to be very much to the benefit of the trust company to do this favor for Mr. Nones, and as Mr. Smith stated to us if any question arose about it he was prepared to make good the advance personally.

By the Court: Q. What was its amount? A. My recollection is it was about three thousand dollars, sir. He said that because of the objection that had been made in the committee he had hesitated to bring the matter before the committee and he had supposed that before the next meeting of the committee the matter would be settled

and he then had meant to report it; he said he realized now that he had done a thing that was wrong, a thing that was irregular, and he was very sorry for it, it was only his great interest in the institution and his belief and his knowledge of the ability of Mr. Nones to take care of the matter, and his desire to do him a favor because of the good effect it would have on the institution that it led him unthinkingly to do this thing; he said "Gentlemen, my resignation is before you, and I shall feel that you are entirely justified if you accept my resignation," he said "On the other hand, if you see fit to trust me I shall appreciate it more deeply than you can realize perhaps, and I need hardly say it will be a lesson to me which I will never forget, and you will never have occasion in the slightest degree to criticize me again."

Q. Was after that on any occasion anything brought to the attention of the board of directors to your knowledge which would have justified criticism of Mr. Smith?

Mr. Hinds: I object, your Honor, that question contains the vice of permitting the witness to be the judge of what would justify something else, going to the very vitals of the legal issues in this case.

The Court: I shall overrule the question in point of form, it calls for an expression of the witness; you can elicit the facts, but the opinion of witnesses in this matter of course it not competent.

A. As a matter of fact, if I may answer the spirit of the question—

The Court: You may state the facts and not your opinion on those facts.

A. As a matter of fact I do not recall any act of Mr. Smith's after that time which was brought to my attention in any manner which indicated that he had not been true to his promise, which was made to us on that occasion, anything that excited in my mind the slighest suspicion that Mr. Smith was not entirely straightforward and honest in all his dealings with that institution.

Q. How soon after Mr. Smith took the Nones note and gave him the money for it was the Nones note paid? A. It was paid as soon as the matter was brought up. I might say further that in the discussion before the board I reiterated the facts which I had learned and which I have already testified about concerning Mr. Smith's long standing as a banking man in Orange, the high reputation that he bore there and the confidence of the business community in Orange in Mr. Smith, and I remember urging that this was the first time that Mr. Smith had ever been guilty of any lapse, and that his explanation showed the motives which inspired him and the sure knowledge he had that the matter could be taken care of, and personally I expressed the opinion that we would make a mistake to besmirch a man's character and discharge him for a matter of that kind when he showed such a manly recognition of his mistake, I thought it would be a bad thing for the institution and a bad thing for Mr. Smith, an unnecessary thing, because when all the facts were taken into account it looked as if it was a matter which could well be forgiven and which would certainly be a lesson to Mr. Smith in the future. The matter was fully discussed in the board and when the vote was finally taken it was unanimous.

Q. To retain him? A. To retain him.

Q. Do you remember how many men were present at that meeting, approximately? A. Well, I don't know surely, but it was a special notice that was sent out and they realized it was a very important matter.

The Court: The minutes show, do they not? A. A. I think there were sixteen.

Mr. German: Yes, they do.

Q. How long was the discussion, do you know? A. I should think an hour or so.

Q. To your knowledge from any source was notice given in any way, shape or form of any irregularity by Smith subsequently to the Nones matter? A. Absolutely none. I must say that Mr. Smith on occasions was careless, careless of details; so far as anything that suggested in any way the slightest irregularity or dishonesty there was absolutely nothing of the kind.

Q. Do you wish to say anything further with regard to the Nones matter?

The Court: What is the line you draw between carelessness and irregularity, I do not understand.

A. Well, for instance a matter like this, Mr. Smith secured a bond and mortgage as collateral and he did not give it to me to be recorded, I didn't happen to be at the meeting when the matter came up, and I just found out incidentally after several weeks that he had those papers and they hadn't been recorded; that is the sort of thing I mean, sir.

Q. Is there anything else with regard to the Nones matter which you think might be profitable that you want to say? A. I don't think so. As a matter of fact Mr. Nones did bring a number of

good accounts to the institution after that time.

By the Court: Q. What was None's business? A. Why I think he was a broker in New York, my recollection is.

By the Court: Q. Stock broker? A. Stock broker.

Q. Did the banking commissioner or examiner Appleton ever tell you anything of Smith's past history? A. No, not that I recall. I say that there was never anything brought to our attention by the banking department after that time in all its minute investigations and voluminous suggestions.

Mr. Hinds: I object to the witness voluntarily interposing these characterizations; the witness is a counsellor-at-law and he knows the vice of all this just a swell as your Honor and I do.

The Court: The witness is not answering any question.

A. I considered I was answering the question whether anything was brought to our attention; I was about to say that—

By the Court: Q. You said nothing was brought to your attention, that is what you have stated. A. I did say that, and I was amplifying it further to the effect that nothing was brought to our attention by the department reflecting on Mr. Smith.

Q. Did you have communications from the department after the department's examination of your affairs? A. Several times.

Mr. Stiefel: If your Honor please, I think I ought to say here, in answer to what my learned opponent has said, that I think Mr.

Munroe's characterization of that was amply justified by the proofs in this case produced by the complainant himself. If your Honor will look at the letters attached to the bill of complaint, with all their detailed criticism of this, that and the other thing, and this, that and the other feature of this that and the other transaction you will see that Mr. Munroe was perfectly justified as a reasonable man trying to give us a picture by using that characterization in place of attempting some involved and strictly accurate description in accordance with legal terminology. Were besides these letters we see in this case here and part of the bill other letters sent to you by the commissioner?

Q. No, to the board? A. You mean subsequent?

Q. Yes. A. Yes.

Q. Was there anything in those letters with regard to Mr. Smith's past history or not?

Mr. Hinds: I object.

The Court: No, that will not do.

Q. What was Smith's conduct with reference to the bank subsequent to that Nones affair? A. Mr. Smith seemed to me to be one of the most faithful servants the institution could have; he was always at the bank before it opened at a quarter to eight in the morning; I say always, I mean that he practically always was there, and he was apparently always diligent and attending to his duties in a spirit of earnestness, and he had frequently spoken to me of his hopes for the future of the institution, he hoped that some day when Mr. Odell retired that he might be made

president, he seemed to have the greatest pride in it and an interest which was more than formal, as I happen to know he was purchasing stock from time to time, accumulating all he could, and his interest seemed to be untiring.

By Mr. Fairlie: Q. You mean stock in the Roseville Trust Company? A. Stock in the Roseville Trust Company. He was apparently devoting himself whole heartedly to it, and his favor grew with the people as time went on, and his devotion to the interests of the bank was frequently commented on in the board; the fact that he took no vacations was one thing that seemed to us then to indicate his zeal.

Q. Did he attend the meetings of the executive committee in the board regularly? A. Always there.

Q. Would there ever be any discussion between him and other members of the board regarding paper that had been purchased by the bank or taken by the bank? A. Very frequently, Mr. Smith had always prepared for the meetings carefully, he had his statements clear and in business like form, and any new customer he spoke of he always gave his reasons clearly and fully for the belief that certain notes should be purchased and a certain loan made, and when he was overruled he always accepted gracefully and seemed to have only the bank's interest at heart at all times.

Q. Did he ever make reports to the board of directors of the overdrafts which he had allowed or permitted? A. That was one of the regular items which he presumably always reported, and if any overdrafts existed he reported them, and I remember particularly that Mr. Fairlie and Mr.

William J. Banister were apt to follow up the matter at the next meeting and see if the matter had been taken care of. I might say that Mr. Smith's reports went into detail and we supposed we were fully informed, every note that was purchased he gave the name of the maker of the note, gave the name of the endorser or endorsers, if any, gave the aggregate of any other notes by the same individual which we had in the trust company, gave the due date, and one or two other items; every transaction was reported to us in detail in that manner. I neglected to say that the average balance carried was one of the items reported.

Q. What is the largest aggregate of overdrafts permitted, if you can remember, if you can remember any? A. We did not presume there were to be any overdrafts.

Q. But reported? A. Never very large.

Q. Can you tell us anything about the Miele & Bruno account, and the attitude of the board with regard to Miele & Bruno? A. Miele & Bruno were Italian contractors, who were one of the accounts which followed Mr. Smith from Orange, as a good many did.

Q. You mean they had an account at that Second National Bank? A. Yes. I might say that a number of the customers in the Second National Bank came to Roseville and opened accounts with us, Mr. Smith told us without any direct solicitation on his part. Miele & Bruno I remember had a contract, I think it was in Chatham or Summit, some place up the Lackawanna road, a sewer contract, and from time to time when work had advanced to a stage where they were entitled to a

payment but for some reason the payment was withheld or was not forthcoming, we had the engineer's certificates or whoever was in charge, showing that they were entitled to the payment, and we advanced them money to help them with their pay roll, and so on.

Q. Were those moneys repaid? A. Always promptly, and taken care of in a very business like way. After that—

Q. Just a moment. Do you know what the line of credit was of Miele & Bruno, do you remember that? A. I should think offhand it was twelve or fifteen thousand dollars, something like that.

Q. In that neighborhood? A. Yes.

Q. That was passed on by the board? A. Yes. Subsequent to that Mr. Smith reported to us that Miele & Bruno had obtained a large contract in connection with the sewering of the city of Baltimore, he said that the whole city was being sewered for the first time and Miele & Bruno had been awarded a section of the sewer, which involved a good deal of money, that it looked as if it ought to be a very profitable contract for them but that their capital was limited and they would need to have help in financing their contract, and he presented to us a written request from them if we would agree to finance them up to an amount I think of thirty-five thousand dollars. The matter was fully discussed in the executive committee, and the highest opinion was expressed of Miele & Bruno and their dealings and transactions, but the conclusion reached was that that was a larger amount than we were in position to advance to any concern, specially to those whose capital was as limited as Miele & Bruno's was,

that it might be that there would be a failure in the issuance of the bonds to take care of the city's work, and that men with as slender capital as they had might not be able to tide the thing over; so the matter after careful deliberation was definitely declined, and Mr. Smith apparently agreed in the wisdom of the decision and acquiesced fully in the action that was taken; I was intensely surprised therefore to learn that—

Mr. Hinds: I object.

A. —when the institution closed that Miele & Bruno's notes were in Mr. Smith's lock box to the extent of fifty-six thousand dollars. Mr. Smith never after that, that I recall, brought up the matter of Miele & Bruno at all, and we had no idea we were handling any of their paper.

Q. At the time you turned down this application for loans, or whatever it was, all prior indebtedness of Miele & Bruno to the bank had been paid? A. There might have been at that time a current note, but they had always taken care of their matters, and there wasn't any hesitation as to their honesty or anything of the kind, but simply we felt that it was disproportionate that we couldn't properly do it.

Q. You don not recall hearing of Miele & Bruno after that at any rate? A. I do not.

Q. How about the Home Ice & Products Company? A. Home Ice & Products Company, as I testified before, was a matter which in its beginning I was personally interested in.

The Court: Only testify now in so far as you have not already testified.

A. I sold my stock to Mr. Smith, and after that time, my recollection is now that we didn't have

any dealings with them in the way of purchase of any of their paper or any advances to them, and the notes that were found at the close of the institution were entirely unknown to me and I am satisfied to any member of the committee or the board, entirely unauthorized.

Q. You never heard any such loans, or any of them, spoken about or broached in the meeting? A. No.

Q. What can you say in general with regard to this mass of paper that has been discovered since the closing of the bank? A. It was entirely unknown to me and of course a matter of great surprise.

Q. Now will you tell us about this feature of the bank's transactions, namely, the effect that the change of status, financial status of borrowers had upon transactions; take up, for example, the case of Peter Weber, if you know the name? A. I saw in the list attached to one of these schedules a note of Peter Weber for $5,000; I do not know what the outcome of that note was, but I do know, as I acted as attorney for Peter Weber on several occasions I do know that he was doing a large business and had done an increasingly large business, and if the note of Peter Weber of $5,000 was not paid it was a matter of great surprise to me because I know he was abundantly able to pay it.

By the Court: Q. What is his business? A. He used to be manager for Mr. Edison, the Edison Works in Orange; he bought the control of the Sloan Chase Manufacturing Company to make precision machinery, between Roseville and East Orange, on the edge of Roseville. There were several instances where at the time the notes were

purchased there was no question in our thought the ability of the makers to pay the notes, but that afterwards a change in condition of business led to inability to pay it; for instance, the note of Mr. John B. Scarlett.

Mr. Clark: If your Honor please, I should like to ask counsel to state where in complainant's bill at any point the note of Peter Weber is mentioned, and if it is not mentioned anywhere in the bill I would like to have the testimony of this witness as to the Peter Weber note stricken out.

Mr. Congleton: Page 66, just below folio 30.

Mr. Fairlie: Now do I understand no claim is being made on that?

Mr. Clark: No, that note was paid at the time the bill of complaint was formulated, that claim was defended against by the persons involved upon the ground that it was given without consideration, subsequently the action was terminated favorably in favor of the note, and that amount is withdrawn.

Mr. Stiefel: May I ask whether that is shown on any of the statements which have been submitted with respect to salvage in this case?

Mr. Hinds: The proof has been the other way around; we have submitted schedules showing the notes that have been unpaid, and I think you will find that this is not among them, in other words, that no proof is offered at the trial in support of that particular item of loss.

A. As I remember the testimony was general that there was nothing realized from—

The Court: If the Weber note is no longer a matter of consequence it is hardly worth while to give evidence about it.

A. That is just one item that I happened to light on, that I happen to know about; I don't know how many others there may be.

The Court: Well, it is not worth while to pursue the subject.

Mr. Clark: At this point, for the record I will say that the record shows that the Weber claim is withdrawn from the case.

Q. Now take up some other matter? A. I was speaking of the note of Mr. John B. Scarlett for $10,000. That note was held by the First National Bank of Orange, as I remember it, and at the time of its purchase it seemed to the members of the board to be perfectly proper and conservative purchase, the standing of Mr. Scarlett in the financial world at that time, his interests in land development companies, the success which they had met in their land developments, after discussion was regarded by all the members present as making that a perfectly proper purchase. Later Mr. Scarlett became involved in hat manufacturing business, which was not his line at all, and became badly involved financially. Efforts were made to collect this item, there was a special committee appointed to keep track of it and keep in touch with Mr. Scarlett, and it was not deemed wise to, when a man in a critical condition financially, press him to a fall; we were also in consultation with the committees of several other banks that had also held Mr. Scarlett's paper,

and there was concerted action to try not to break Mr. Scarlett's back financially at that time but to help him hide over so that he could meet his obligations.

Q. Was it known to you that Mr. Smith had advanced moneys of the bank, if he did advance them, to Mr. Scarlett? A. Absolutely not. Mr. Scarlett gave us his insurance policy.

Q. What was the amount of the note? A. That was $10,000.

Q. What about the insurance policy? A. He gave us an insurance policy as additional collateral. It got finally to the point where Mr. Scarlett was not able to pay the premium on his policy and we had to pay the premium ourselves, but it showed his good faith at the time; I am just quoting this to show the care with which we endeavored to handle these matters.

Q. Outside of this ten thousand dollar transaction you knew nothing about Smith's dealings with Scarlett? A. Absolutely nothing at all.

Q. How about this Tobacco Company, this International Tobacco Company? A. International Tobacco Company was a concern in which Mr. Foster was interested, and we received reports from time to time which showed that they were doing a large business and increasingly large; they had a self-lighting cigarette which seemed to be very popular and seemed to demand an increase in their ability to turn out the product; the orders were quoted to us and everything indicated that it was a perfectly proper thing to advance them the money they needed to secure additional machinery, etc., to manufacture their product to keep up with their orders; later there came a turn

in the affairs of the company, which was a disappointment to them and prevented their being able to meet their obligations; but I want to say further that the notes were so arranged by Mr. Foster's care so that instead of being a lump sum note with a number of endorsers on they were divided into separate notes with individual endorsers, and it was deemed then on the knowledge that we had after careful investigation that the men who were endorsers on the respective notes were able to take care of their portion of the obligation and were able to take care of the note to which their name was attached as endorser.

Q. Did you ever have any knowledge as to the fact that Mr. Smith kept the general ledger? A. My knowledge of the bookkeeping of the bank was, I fear, in view of all the testimony on that matter meager; I never knew much about bank bookkeeping and I do not now. I knew that Mr. Smith was working in all departments of the institution, wherever there seemed to be need for his help he was helping, and I had seen him working on what undoubtedly was the general ledger, I seen him working in all departments of the bank; it never occurred to me, if the question had been asked me I wouldn't have realized that it was not a proper thing for him to keep the general ledger; no suggestion of that kind was ever made to us by the banking department or anybody else as far as I recall.

Q. Were the books kept open or were they concealed in the cages there while Mr. Smith and the clerks were working on them? A. They were open all the time; I was often back there getting papers from the safe and in consultation with Mr.

Smith about various matters and the book that I see is general ledger was lying there and various clerks apparently were making entries in it.

Q. Do you know whether or not the Commissioner of Banking and Insurance ever rendered bills to the Roseville Trust Company for the examinations made by its department, whether they were paid or not? A. I know that they rendered the bills.

Mr. Hinds: I object and ask that that be stricken out as totally irrelevant and immaterial and having no bearing on the issues whatsoever.

The Court: What difference does it make who paid the gentlemen who made the examination, whether it was paid by the State or whether it was paid by the bank. It is admitted that it was paid by the bank, as already appears in the evidence, and I suppose the bank books will so show.

Mr. Stiefel: If it is admitted I won't ask it.

Mr. German: If your Honor please, I am going to insist that it is very material in this case, and I would like to have it appear on the record, if the books show that these payments were made by the Trust Company all right, or if it is admitted by counsel.

The Court: I suppose if the books are properly kept in this regard they will show it, but I do not think it has anything to do with the case, and I will overrule the evidence.

Q. How were the dividends declared, Mr. Munroe, what happened with regard to the declaration of dividends? A. The matter of dividends was always considered first in the executive committee, as the quarterly period approached the matter was considered, as a matter of fact at the meeting in advance, not only Mr. Smith but Mr. Odell had the figures, as I recall them, and the net earnings up to that time, and the things that might need to be charged off were carefully considered, and if it was apparent that a dividend had been earned according to the statements that we received and according to the showing which the books made the dividend was recommended by the executive committee to the board, and the report was rendered to the board at the next meeting, was discussed, and if the board saw fit they approved the recommendation; I think they did in every case. After a time the earnings seemed to warrant it, and in addition to the regular dividend which I believe was one and a half per cent there was some extra dividend declared on two or three occasions, but always after consideration not only of the net earnings, but of the question of whether there were any items that should be deducted, should be charged off.

Q. Was the entire board of directors and the executive committee apprised of the fact that examinations had been made by the Commissioner of Banking and Insurance of the State of New Jersey after those examinations were made? A. It was always reported at the executive committee and at the subsequent meeting of the board when the examiners had been there, and after the course of some time we would get a report from

the department in the form of a letter which would give all the items, and they were taken up first in the committee and they were later taken up in the board, and the reply which was made to the letters from the department was also read in the committee and in the board, and as a matter of fact in the committee they were a matter of discussion on a number of occasions, I remember the draft of the letter which Mr. Odell had prepared some time after consultation with Smith or myself or Mr. Fairlie, was submitted and the form of the letter was approved.

Q. Now we have forgotten perhaps our executive committee, talking so much about the board of directors. How long did the executive committee's sessions last, as a rule? A. As a rule we met at four o'clock, and I know I was often late for dinner, it was after half past six often times before we would get through.

Q. What was the rule in the institution with regard to paper of one thousand dollars or less that was offered?

Mr. Hinds: If your Honor please, we had great difficulty over the very repeated objections of counsel in getting proof in and were very strictly limited to the minutes, and now on direct-examination he asks a wide open question as to what the rule was that prevailed respecting this thousand dollar matter. We were not permitted to have our witnesses give an informal discussion of what the rule was, and I think he should be confined to the minutes.

Mr. Stiefel: I wanted to find out what the practice was of this executive committee.

The Court: Did loss arise from loans under a thousand dollars?

Mr. Stiefel: No.

The Court: Then why do you go into it?

Q. What did you do in the executive meetings in these two hours or so? A. We always of course had the reading of the minutes of the previous meeting and any matters of unfinished business which were suggested or shown to be open were first taken up.

By the Court: Q. Do not the minutes show all that, do not the minutes of the executive committee show all that? A. I presume they do, sir.

The Court: If there is anything in addition to what the minutes show you may go into that, but as I understand the rule of the Supreme Court is that you must first show the minutes; then if you want to supplant the minutes and show that they were inaccurate you may do so by oral testimony, if you want to add to the minutes, under that rule, you may do so, but if you merely want this witness to state what the minutes contain, why the Supreme Court says that is not proper.

Mr. Stiefel: If your Honor please, I want him to supplement, because I say the minutes appear to me to be very meagre, they simply show a certain paper was passed, they do not show any discussion, etc.

The Court: Under the rule you will have to call his attention to the minutes and let him state, if he can, what else occurred beyond what is stated in the minutes.

Q. You have seen the minutes during the course of years that you were a member of the executive committee, you saw the minutes? A. I also read over some of them here since this case began.

Q. Supplement them, if there is anything that you know which relates to your transactions or the course of the proceedings in the executive committee, in addition to what is shown in those minutes.

The Court: Let us first find out whether the witness can state anything in addition to the minutes; if he cannot that ends the matter. Can you state anything in addition to what appears in the minutes of the executive committee.

A. The minutes of course show the action taken.

By the Court: Q. Can you or not? A. I can, sir.

By the Court: Q. Then you will have to do it by stating what occurred at some particular meeting, you cannot state generally, now are you prepared to do that? A. Well, after this lapse of time I cannot without reference to the minutes supplement the transactions of any particular meeting.

Mr. German: Isn't it competent for the witness to state, if he can, there was a certain discussion by those present, even though it be not recorded?

The Court: If it is not recorded, but you must first show that it is not recorded.

A. For instance, in connection with the meeting at which that Miele & Bruno matter came up—

Mr. Hinds: I object. This obviously makes the rule which your Honor has referred to and which was enforced on us a farce for him to start off to identify any meeting in any such vague way; let him do as we were obliged to do, turn to the page of the minutes, give the date, and then proceed to add to them if he can. I object to the answer and ask that it be stricken out.

Mr. Stiefel: Does your Honor say I will have to identify the minutes by giving the date?

The Court: You will have to show him the minutes and ask him whether or not he has anything to add to any particular minute to which his attention is drawn.

Mr. Stiefel: Well, if I wanted to renew the matter, I suppose after examination of the minutes I could recall Mr. Munroe?

The Court: Yes.

Q. I will ask a few questions with regard to yourself, because you are a defendant in this case and cannot very well examine yourself. What were your duties in connection with the bank? A. I was a director and a member of the executive committee and I was attorney for the bank.

Q. What did you do in the performance of your duties as such? A. As a member of the board and a member of the committee I attended the meetings whenever it was possible, which was usually the case, and I gave my attention, according to my best ability and knowledge, to all the details that were brought before us, always tried to perform conscientiously the duties that developed upon me, having only in thought the best

interests of the institution, which meant a great deal to me, and as the attorney of the bank I did whatever was assigned to me by the board to do in the way of legal services.

Mr. Clark: Your Honor, how shall we proceed?

The Court: It is immaterial to me.

Mr. Clark: Since it is immaterial to your Honor may we suggest that since this is practically direct-examination on behalf of these other defendants, although called cross-examination, it should precede the complainant's cross-examination.

The Court: I should think that would be the more orderly course of procedure.

By Mr. German: Q. You say that when the State Examiners made their examination that you received a letter from the department; did you receive anything else besides these letters from the department? A. The examiners made—

Q. From the department? A. —oral suggestions to Mr. Smith, which he reported to us.

Q. Now regarding this general ledger, did anything come to your knowledge or to the knowledge of any criticism on the part of the Comedge of any criticism on the part of the Commissioner of Banking and Insurance concerning the keeping of the general ledger as it was kept? A. I do not recall anything of the kind.

Q. Other than the letters or the letter which is in evidence in this case, produced by the complainant, was any criticism on the part of the Commissioner of Banking and Insurance ever made regarding the retention of Mr. Smith in the employ of the bank? A. No.

Q. Are you able to state whether the system of bookkeeping in the City Trust Company was like that of the Roseville Trust Company?

Mr. Hinds: If your Honor please, I object; the answer obviously calls for the expression of opinion by an expert, and he has voluntarily disqualified himself by stating how little he knows of bank bookkeeping.

The Court: The witness has stated that he knows nothing about bookkeeping, and how can you ask him to compare the bookkeeping in one bank with the bookkeeping in another and express an opinion about it?

Q. Did you now this box 55 before the bank failed? A. No, I didn't know that Mr. Smith had a box there at all, never heard of such a box.

Q. To your knowledge did any of the other directors know that? A. Not to my knowledge, no.

CROSS-EXAMINATION by Mr. Clark:

Q. Mr. Munroe, you testified to the reputation and standing in the community of the various gentlemen making up the board of directors, you regarded them as business men of standing? A. I did, yes, sir.

Q. And familiar with the conduct of business particularly in their own field? A. In their own field, yes.

Q. You had a pretty complete recollection, Mr. Munroe, of the facts in connection with the employment of Mr. Smith and the discussions before the board of directors; do you recall whether sub-

sequent to the letter of May 14, 1909, not only immediately subsequent but during any year thereafter, there was any further discussion in the board of directors concerning Mr. Smith's antecedents? A. I do not recall any.

Q. You have told us quite fully concerning Mr. Smith's conversation with you on the Nones matter; will you tell us as fully concerning Mr. Appleton's conversation with you on that same matter? A. Mr. Appleton's conversation is not so clear in my mind; I know that he was strongly of the opinion, and expressed it to us, that we ought not to retain Mr. Smith, and I know that he gave his reasons for it, but I do not recall in detail any further than that, Mr. Clark.

Q. Your recollection is very hazy on that conversation? A. Yes.

By Mr. Stiefel: Q. When you say "us" who do you mean? A. Well, I mean Mr. Odell and myself, met him at Mr. Odell's house.

Q. Now after that conversation with Mr. Appleton who represented the banking department and was the man who had discovered this shortage—A. To whom Mr. Smith had reported it, but he hadn't discovered it up to that time.

Q. Well, we will say the man who was making the examination. A. Yes.

Q. After he had this talk with you did you report concerning the incident to the other directors? A. I did.

Q. How soon? A. I don't remember exactly, but of course it was a matter naturally of great importance, and my recollection is it was taken up promptly.

Q. Will you say within a day or two? A. I should say so.

Q. Do you recall the statement in the letter from the banking department signed by Vivian Lewis, as Commissioner, dated May 14, 1909, the following: "The Examiner states that the matter is known only to yourself"—the letter being addressed to Mr. Odell, the president—"and directors Foster and Munroe, and that at the interview he had with you and Director Munroe, at your home on the eveninng of March 18th, the matter was thoroughly gone over and that he informed you and Director Munroe that the facts must be made known to every director, which I assume has been done." Do you recall that being read as part of the letter? A. I do, yes.

Q. Was there any discussion in the board at that time concerning whether or not there had been any withholding or delay on your part in giving information? A. I do not recall.

Q. Don't remember anything of that kind? A. I do not, no, sir.

Q. Did Mr. Appleton tell you, you may recall one specific thing about that conference, did he tell you that Mr. Smith's record in some other bank previous to the Roseville Trust Company had been bad? A. He may have done so.

Q. Did you investigate it? A. Yes.

Q. Did you report that to the board of directors? A. I reported to the board of directors everything I learned, yes.

Q. So that if Mr. Appleton told you that you reported it, among other things, that is your best recollection? A. Yes, that is my best recollection.

Q. You have testified that other than the letter of May, 1909 you recall no further warning of

any kind from the banking department with regard to the practices of the trust company? A. That is my recollection.

Q. You are familiar with the banking law, of course? A. Yes.

Q. You were at that time? A. Yes.

Q. You know that an overdraft by a director is a misdemeanor? A. Yes.

Q. Mr. Smith was in sole charge of the trust company as the active officer? A. He was the active officer, he was not in sole charge.

Q. How long during the day was Mr. Munroe present to your knowledge? A. You mean Mr. Smith?

Q. No, during what part of each banking day was Mr. Odell, the president, at the bank? A. Well, he ordinarily would stop in on his way to business and I presume was there perhaps half an hour.

Q. You have heard Mr. Odell's testimony to that effect too, have you not? A. I heard his testimony, as I recall, saying that he was apt to stop there.

Q. Now then, the bank was open from early in the morning, eight o'clock or something, until three? A. A quarter of eight I think, as I remember.

Q. Was any other officer present during any part of the day for more than a half hour, except Mr. Smith? A. Well, not ordinarily, that is not regularly.

Q. Now in the City Trust Company, or first I will ask you do you recall a letter being read before your board in which the department called attention to an overdraft by a director and re-

minded the president, and through the president the board, that such action was a crime? A. I do remember such an item.

Q. And was there any investigation made concerning either the conduct of that director in making that overdraft, or Mr. Smith in permitting it to be made? A. I remember the matter was brought up; I do not remember who the director was, it may have been myself for all I remember.

Q. Since you have put it that way, the letter mentions you. A. Yes.

Q. Do you recall any investigation being made by the board concerning Mr. Smith's conduct in passing it? A. Yes.

Q. And what was the result? A. The fact was that I was in Ohio at the time, as I recall it, and that the thing went through my office in my absence, and was the result of simply carrying forward a wrong figure, adding up a column wrong, and the explanation was made at that time.

Q. No, if you will kindly have in mind the question; not what occurred in your books, but what did the investigation disclose concerning Mr. Smith's conduct in passing and paying the check when there were no funds and the law made it a crime A. I do not recall that; the matter was brought up and I made my explanation, and it was understood that it was simply an error and was not a thing that was countenanced by anybody.

Q. You were with Mr. Smith a joint endorser on a note of the Home Ice & Products Company, were you not? A. I was, yes.

Q. I think you have told us that you told the

board that both you and Mr. Smith were engaged in this enterprise? A. That is my recollection.

Q. I think you have told us that you told the board that you knew that Mr. Smith almost from the outset of the trust company was engaged in the automobile business under the name of the Oakland Motor Sales Company? A. It was not, as I recall, near the outset or the beginning of the trust company, it was considerably later.

Q. Whenever it was did you tell the board that? A. I don't remember whether I told it or not, I don't know that I had any occasion, Mr. Smith never handled any business in connection with the Oakland Motor Sales Company through the trust company that I know of.

Q. Do you know whether he did through the American National Bank of which you were director? A. I remember one transaction in connection with the purchase of some accessories, a concern that had accessories.

Q. Do you recall only one? A. That is the only one? A. That is the only one I recall.

Q. Would you say there weren't many? A. I would not, no.

Q. Do you recall also that the Home Ice & Products Company had business connections with the other institution of which you, both you and Mr. Bataille and several others of these directors were interested? A. I think they had.

Q. And that Mr. Smith was endorser on their note at that bank? A. I do not recall that.

Q. What was the salary that was paid to Mr. Smith at the outset of the trust company? A. My best recollection is it was three thousand dollars.

Q. Your recollection is that it was $3,000 at the

outset? A. That is my recollection, I am not certain.

Q. You say he continued to purchase stock of the trust company? A. From time to time I knew he purchased stock.

Q. Did you understand and report to the board that Mr. Smith was a man of means? A. I do not remember that the question was ever raised.

Q. Nor was any investigation made to disclose whether or not he was a man of means? A. I don't think that question was ever raised.

Q. Or whether he was obliged to live on his salary of $3,000? A. That question was never discussed as far as I know.

Q. You sold your stock, you have testified, in the Home Ice to Mr. Smith? A. Yes.

Q. And one of your office staff, a lawyer in your office, or a clerk, was codirector with Mr. Smith in the Home Ice & Products Company? A. Yes.

Q. Do you know that the Home Ice & Products Company went into bankruptcy? A. I do.

Q. And a comparatively small dividend was paid? A. I don't know what dividend was paid.

Q. You were also interested in the Postcraft Company which borrowed money from the trust company? A. No, the Postcaft company didn't borrow any money from the trust company; I was interested in the Postcraft Company.

Q. Now there was purchased by the trust company while you were a member of the board and of the executive committee the note of one Jane A. Curtis? A. Yes.

Q. For how much? A. My recollection is it was $5,000, but I am not sure.

Q. That was given to the order of the Postcraft Company? A. No.

Q. Were the proceeds paid to the Postcraft Company? A. No, the note was the note of Jane A. Curtis with an endorser or two.

Q. Did the proceeds, to your knowledge, reach the Postcraft Company? A. Yes, I think they did.

Q. Did you know as the attorney for the trust company that Mrs. Curtis was a married woman? A. I did.

Q. Do you know that she has since established in this county that she was under no liability to pay that note? A. We had a suit and that was the decision of the Court.

Q. Mr. Munroe, you recall these meetings of the committee and of the board—and do you recall also that no one else paid that note? A. I don't know about that.

Q. Do you know that anyone else did? A. I don't know.

Q. Did you have anything to do with the purchase of that note by the trust company? A. I presume I did.

Q. Now Mr. Munroe, you have stated that you recall a great deal about the executive committee meetings and the board meetings, do you remember that at each meeting there was present a statement of the number of depositors and the aggregate of the deposits? A. Yes.

Q. Do you know that the statement which has been offered in evidence, Exhibit C-1461, shows that the number of depositors grew in 1911 from 1955 with a total aggregate of deposits of $746,000, to a date that we will show, June 17, 1913,

at which time the number of depositors had increased to 3400 and the aggregate of deposits amounted to only $708,000, and that on July 30th with 3479 depositors the aggregate of deposits was only $640,000, as reported by Mr. Smith to your board? A. I don't have any recollection of those figures.

Q. Do you recall that there was ever any investigation made to determine why, although the number of depositors was increasing rapidly, the amount of deposits in the aggregate was decreasing, as reported to the board? A. I remember that that matter of the decrease in the amount of the deposits was frequently discussed.

Q. What steps were taken to investigate the cause? A. The matter was discussed, and Mr. Smith explained from time to time, and we all knew the fact that there were some very heavy accounts that had been reduced, notably the Claflin and the McCreery accounts which in the aggregate amounted to several hundred thousand dollars.

Q. Do you know now, Mr. Munroe, that if you had investigated the facts you would have found that the reported aggregate was false?

Mr. Stiefel: I object. What kind of a question is that. Does he know now that if he had investigated then he would have found it was false?

Q. Now coming back to the Nones matter, did Mr. Smith at the time he explained it to you mention that he had advanced unlawfully to Nones on more than one occasion? A. I do not recall that there was more than one occasion.

Q. Your recollection is that he mentioned only

one occasion, one specific instance? A. That is all I recall.

Q. Now when the letter of the Commissioner of May 14, 1909 was read, which disclosed that the incident had occurred on two different occasions, when that letter was brought to your attention did you then doubt Mr. Smith's word, and take steps to investigate it? A. I do not recall distinctly whether it was one transaction or more than one, and at that time if there were two occasions I undoubtedly knew about them or it would have struck me.

Q. Do you think you have stated to us fully in substance all that Mr. Smith told you about that incident? A. As near as I recall, yes.

Q. You have not told us that Mr. Smith revealed to you that he had been obliged to falsify the depositary bank accounts in order to carry that through? A. I do not remember that he did.

Q. When the letter from the Commissioner was read which showed that such steps had been taken by Mr. Smith did you regard that as of importance? A. That was part of the whole transaction.

Q. And to be forgiven with the rest? A. Yes; details aren't clear in my mind now as to how the matter was conducted by Mr. Smith, he confessed that he had done this thing and he had failed to make proper entries, and that was the onus of the thing in my mind.

By the Court: Q. Do I understand that it was simply a matter of omission, or was it a matter of commission? A man might neglect to make an entry and the moral aspect of the case might be insignificant; a man might falsify the figures

and then the moral aspect of the case would become of importance. Now which do you understand Mr. Smith did, did he merely omit or did he falsify. I am speaking of your recollection. A. Yes. Now that Mr. Clark speaks of the matter I remember there was something in connection with the case about a Philadelphia correspondent bank, the matter was put through in that way, as I recall it, but I do not remember the details.

By the Court: Q. That does not explain. A. I do not remember there was any falsification, that is not in my recollection.

By the Court: Q. You think then it was a matter of omission as it came before the board and not a matter of falsification; is that your recollection? A. That is my recollection.

Q. Mr. Munroe, were you willing to take the judgment on that of the Commissioner and his assistant? A. No, I didn't think the commissioner had all the facts before him, as we had; I thought that we were in a better position to judge of that matter than he Commissioner.

Q. So that in this particular instance so far as you were as a member of the board concerned you placed no reliance upon the judgment of the Commissioner and his assistant? A. I thought the Commissioner's recommendation from his view point was entirely proper; I thought the men, the twenty-one men on the board who had their investment there and who had their reputation at stake and knew all the details and knew the human elements of the problem were in better position to judge than the Commissioner.

Q. Do you recall the statement in the letter referred to: "the stubs not being filled in, hence

there were no telltale stubs to show these two transactions." A. That is the thing I had in mind. That was the Philadelphia bank, was it not?

Q. You do not regard that as a falsification? A. I regard that as an omission.

Q. And not a falsification? A. Yes.

Q. Without going into the entire letter—it is familiar to you? A. I have read it.

Q. As a defendant and lawyer? A. I read it when the matter was up several weeks ago.

Q. Without going into the entire letter you would say that in spite of any statements which were called to your attention, any facts which were called to your attention by this letter, that you did not regard Smith as having been guilty of any falsification of the record? A. I do not remember the detail, Mr. Clark; I do regard that Mr. Smith did wrong in that connection and he admitted it frankly; the particular details are not clear in my mind at this time.

Q. The Court asked you whether you regarded it as simply an omission or falsification. I ask you in view of the statements which were called to your attention by this letter whether you will now say that there was not any element of falsification on the part of Mr. Smith growing out of this transaction? A. I regard that the failure to fill out the stubs was in itself an act of omission, the effect of it was a falsification of the record, just as the effect of his failing to report to us as he should have done that he had made this advance was a falsification in effect, but I did not recall and do not now recall that he made any deliberate entries which were false.

Q. So that your answer is that there was nothing in that letter to draw the conclusion from you that Smith had committed any deliberate falsification or manipulation in the accounts? A. He certainly did, was guilty of a manipulation.

Q. He was guilty of manipulation? A. And he confessed it. Literally I do not regard there was any falsification; in effect it was a falsification, there is no doubt about it.

Q. You recall that the practice in the trust company was that all of the funds in the depositary banks were subject to check upon the single signature of Mr. Smith as Treasurer? A. That was not so originally, but there was a meeting in which that action was provided for.

Q. And that was subsequent to May, 1909? A. Yes.

Q. Do you recall that the Board gave to Mr. Smith authority, as one officer, to borrow monies and pledge securities and notes of the company? A. Yes.

Q. And do you recall that the commissioner notified Mr. Odell, as president, the letter having been read to your Board, that Mr. Smith had borrowed up to $55,000. at some bank, although the resolution on the Minute Book only authorized the borrowing up to $25,000? A. I remember that instance.

Q. And did the Board thereafter meet and ratify and correct the situation? A. They did not meet specially to do that; they did take up that matter at the next meeting of the Board, and they did send a letter to the Commissioner stating that it was an omission, but it was thoroughly understood it was nothing Mr. Smith had done without

authorization or without the knowledge of the Board.

Q. What other items of carelessness on the part of Mr. Smith can you give us in addition to the one mentioned of the bond and mortgage? A. Well, I remember he lost a note, when we wanted to pay it off, we couldn't find it, it was mislaid.

Q. Any others? A. I do not recall individual instances at the moment, but every now and then something would happen which indicated to me that Mr. Smith was not as careful a detail man as he might be, or as he should be.

Q. Now it has been testified here, or been brought out, that an examination was made by the Banking Department in October, 1912, the last one before the bank closed; do you recall when any examination was made by the Banking Department earlier than that? A. No.

The Court: You say the Bank closed in October, 1912?

Q. No, August, 1913, but the last examination made by the Banking Department happened to be in October, 1912. It is a matter, if your Honor please, when they can get around the State with their limited force? A. I do not recall that it seemed to me that for a bank that was supposed to be under suspicion they let the thing go quite a long while.

Q. Oh, was the bank under suspicion? A. Why the commissioner said so.

Q. Oh, when did he say that? A. Why in his letter he said that he could never trust Mr. Smith again.

Q. And you regarded the bank as being under suspicion? A. I regarded that the commissioner

regarded Mr. Smith under suspicion, because he said so.

Q. Did you know whether that opinion was shared by the rest of the board, that the bank was under suspicion? A. I know what the letter said, it plainly implied that.

Q. Do you know whether that opinion was shared by the others? A. I do not. I know the effect on my own mind of his letter, that he regarded the bank as under suspicion because he did not trust Mr. Smith.

Q. But Mr. Lewis ceased to be commissioner in 1910 or 1911, did he not? A. I remember he ceased to be commissioner, I do not remember just when.

Q. You have testified that you were satisfied with the Miele & Bruno indebtedness, do you recall that that indebtedness was several times referred to by the commissioner in his letters as something which must be reduced and cut down? A. There were so many suggestions of that kind by the commissioner that I do not remember the details, but we always acted on them.

Q. There were a great many requests by the commissioner for reduction of your loans to various persons and corporations? A. Yes, he usually—

Q. No, no; there were? A. Yes, there were.

Q. Your argument will come later? A. Yes.

Q. The International Tobacco Company was frequently mentioned? A. Yes, I think it was.

Q. And its line to be reduced? A. Yes.

Q. Do you recall the commissioner calling to the attention of the Board the fact that as the Department viewed it there had been an attempt at

concealment on behalf of the trust company in relation to the International Tobacco Company's indebtedness? A. I remember some such reference.

Q. Do you recall that he referred to the fact that the Trust Company had endorsed and guaranteed indebtedness of the International Tobacco Company to the extent of, I think, $25,000 which the International Tobacco Company had then lodged with the Irving National Bank for funds.

Mr. Stiefel: Are you referring to an exhibit?

Mr. Clark: I am referring with as much accuracy as possible from recollection to some one of the letters.

Mr. Stiefel: Why not read that if it is in the case.

Q. Do you recall what the facts were in connection with that, Mr. Munroe? A. I do, I remember that that was—

Q. First I will refresh your recollection, since counsel has asked for it. This appears on page 111 of the bill of complaint, around between folio 20 and 30. "The line of the International Tobacco Company is a very precarious item in the judgment of the examiner, even though it shows a reduction since the preceding examination. The company's statement shows, as reported, that its business for the year ending July 31, 1912, was conducted at a loss of $3,875.75. The assets total $322,630.23, but of this sum $205,000 represents various patents the value of which, even assuming that there is any, is liable to be materially affected by the introduction of later devices. The book surplus is only $48,107.10, the

concern has no commercial rating, and the average balance carried is insignificant, as reported. The examiner discovered what appears to have been an attempt at evasion in the statement of the International Tobacco Company's lines. It developed during the course of the examination, in a purely accidental manner, that your company had negotiated, as a broker, two loans with the Tobacco Company, one of $20,000 at the Irving National Bank of New York, and one of $5,000 at the National Bank in Newark. The treasurer stated that the company had at no time owned these notes, did not regard them as a rediscount, but had consented to guarantee them, and had endorsed them with that end in view. If, as stated by the examiner, this were a true statement of the case, no particular harm would have been done, beyond the fact that it was an injudicious and perhaps illegal act on the part of your institution. He further says that the statement was borne out by the fact that the loans appear nowhere on your company's books; that they were not on the credit ledger, the tickler, the bills purchased register or anywhere where they might be expected to show. The cashier of the Irving National Bank informed the examiner, however, in writing, that his bank held four notes of the International Tobacco Company, for $5,000 each; that these notes are endorsed by Roseville Trust Company, per R. E. Smith, Treasurer, Chester L. Cotton, T. T. Hutchinson, W. J. Bowerman, Paul E. Heller, George V. Strahan, George H. Harman, H. W. Foster, M. Athanasious, Herman Lobel, F. S. McDonell, Colin E. Ross; that the notes were discounted for account of the Roseville Trust

Company, and that the proceeds were placed to its credit, subject to its draft. This places an entirely different phase upon the matter. If your company received credit for the proceeds and drew against them, it is clearly liable. The examiner expresses the opinion that these notes were omitted from your company's records for the purpose of keeping the line down, but that just how far the directors were implicated in this particular part of the transaction he is unable to say. The only reference to the matter in the minutes is the record of a motion to have the contract for the commission in writing. It appears that this commission was to have been $2500 but has not yet been collected. The liability of your company on the $25,000 of notes mentioned should be shown on its books and also appear in its reports of condition as bills rediscounted, a like credit to be added, of course, as 'bills purchased,' but as a doubtful item. The examiner's analysis of the statement of the said International Tobacco Company make it reasonably clear to him that the concern is over-extended, that its assets are padded, that it is unable to compete with the tobacco trust that its business is conducted at a loss, and that it is liable to come to grief at any time. He also expresses himself as convinced that no such extension of credit would have been granted to the International Tobacco Company were it not for the fact that Mr. Harry W. Foster is an officer of both corporations. What answer have the directors to make to the examiner's allegation that the notes in question were omitted in your company's records for the purpose of keeping the line down? A full reply is requested. The department also

desires to be informed as to whether or not the individuals who endorsed the $25,000 of notes under consideration are financially responsible for the amount or not. It seems quite evident that dependence must be placed upon the endorsers for the security of the obligations. If no proper inquiry or investigation has been made as to the responsibility of such endorsers there should be no delay in finding out whether they are good for the notes.''

Mr. Stiefel: I think before the question is answered the reply of Mr. Odell on behalf of the board of directors should be read too; the witness has stated that he has a hazy recollection. Now the complaint is read, and the answer on behalf of the board is unknown to him.

Mr. Clark: This is my cross-examination. I am perfectly willing that Mr. Munroe shall look at the reply before making his answer.

A. I have already done so.

Q. We have a counsellor on the stand? A. That particular transaction is quite clear in my mind.

Q. Now then, since at the request of counsel I have been obliged to read the entire portion, I will shorten the record on this point by asking you whether the board as a result of this information contained in this letter from the commissioner made any investigation of the facts and attempted to provide any safe guards against recurrence? A. It was not necessary to make any investigation, the facts were fully before the board and properly taken care of; that was a matter which

was fully secured by a purchase of tobacco by a Turkish gentleman who represented this company and was then in Turkey, secured by warehouse receipts, and every bit of it was paid, and the trust company made a handsome profit on it. The letter to the commissioner explained that the implication in that letter was enirely unjustified, that there was no attempt at evasion, and that he was very sorry that the commissioner should have seen fit to put such a construction on the matter.

Q. So that no investigation was made as to the conduct of Mr. Smith or anyone else in omitting to make the record of these notes as a liability of the trust company? A. Mr. Smith was not responsible for that, it was done by the executive committee, and the executive committee assumed the responsibility; it was simply a question of bookkeeping, whether there was any reason under the banking laws for that to appear on the books; we didn't think there was, and the commissioner did not agree with us.

Q. You discussed it then in your committee? A. We did, after the letter was received.

Q. No, let me get this right. You say, Mr. Smith was not responsible for the fact that the books did not show the transaction, and you say the executive committee was responsible for that; now was that matter discussed in the executive committee before the transaction was put through or immediately after? A. There was no discussion as to whether the matter should appear on the books, it never occurred to us that it should appear on the books.

Q. Was or was not that a matter for Mr. Smith, whether or not it should appear upon the books?

A. Well, it was a matter of knowledge and judgment, the fact was simply that—

Q. No, the question calls for a simple answer. A. I don't think Mr. Smith was responsible any more than anybody else.

Q. You won't say that the executive committee itself discussed the question whether or not there should be any entries made or omitted from the books? A. The matter never occurred to us until we got the commissioner's letter.

Q. When it appeared that there had been no entries made on the books there was no discussion then, or was there? A. Yes, there was discussion.

Q. What was the discussion? A. The discussion was whether it was a proper matter to appear on the books. In the light of what the commissioner said we thought possibly we made a mistake, simply as a matter of bookkeeping, and we explained very fully, as appears in the letter here which you printed, letter of Mr. Odell on behalf of the bank, November 25, 1912, explains just why the matter was not put on the books.

Q. So that in this other instance again the board felt that its judgment as to the mehod of keeping the books was quite as good as the commissioner's? A. In that particular item we thought perhaps the commissioner was right, but we did not regard it as an important matter.

By the Court: Q. I do not quite understand that, it may be explained in Mr. Odell's letter, but if the New York bank as the result of this transaction gave credit to the Trust Company for $20,000, why was not that a matter proper to be put on the books, and in the report to the depart-

ment? A. As I say, your Honor, when the matter was brought to our attention by the commissioner, we thought that probably he was right, and we explained in the letter to him why it had not been done, and stated that there was no attempt at evasion. That was the only thing that we thought the commissioner was not justified in saying, that there was an attempt at evasion. The commissioner was justified in calling our attention to it, it was his duty to do so, and no doubt his judgment was right, but it hadn't occurred to us at the time that there was any occasion for the transaction to appear on the books, and Mr. Smith was not to blame for that; I am willing to take my share of the responsibility.

By the Court: Q. Why was it not put upon the books in the regular course of business? A. It never went through the hands of the Roseville Trust Company as I understand it.

By the Court: Q. You say it never went through the Roseville Trust Company. How could it help not going through the Roseville Trust Company if the Roseville Trust Company had endorsed the paper? A. I do not remember the details of the transaction. We were responsible to the bank, we advanced this money for the International Tobacco, and we had the security to protect us, but I do not think that the money ever went through the hands of the Roseville Trust Company or was ever put to the credit of the Roseville Trust Company; that is my recollection, I may be mistaken.

By the Court: Q. Your idea is that when the Bank official in New York said that it had been put to the credit of the Roseville Trust Company he was mistaken? A. That is my recollection.

Mr. Stiefel: Or perhaps the bank in New York did not understand the transaction as the Roseville Company did and put it that way. Your Honor, there was twenty-five hundred dollars commission payable to the Roseville Trust Company which did appear on the books of the Roseville Trust Company in this case—so that it appears in the form of commissions—there was a record there.

A. There was a record of the transaction but it did not show as a liability of the bank, and that was the point of criticism of the commission.

The Court: Well, I am trying to get at the facts. I cannot understand how if the Roseville Trust Company's endorsement was put upon the note it was not a Roseville Trust Company transaction. Mr. Monroe said it was not a Roseville Trust Company transaction. Now if the Roseville Trust Company got the benefit of it, and only got the benefit of it, but had endorsed the note, it seems to me it was a Roseville Trust Company transaction, and I am asking the witness to explain why in his judgment, it was not.

A. I did not mean to say it was not a Roseville Trust Company transaction, but I do say it did not go through the Roseville Trust Company's hands, and for that reason it had not occurred to us that it should appear on the books of the company.

Mr. German: May I call your Honor's attention to the letter, page 124 of the bill of complaint, which is the letter of Mr.

Odell explaining this transaction, and in which he says, line 38 "Since having received your letter we have treated these notes as regular purchased paper, and have made the proper entries on our books."

Q. Then Mr. Munroe, refreshing your recollection by that they did determine that the commissioner was right and made the correcting entries? A. As far as that was concerned the commissioner was right.

Q. And they made the correcting entries? A. The inference the commissioner made was wrong.

Q. Answer, won't you, please? A. Yes, they made the proper entries.

Q. And they did not make any investigation of either Mr. Smith or Mr. Foster, or any other person in connection with this, to determine whether or not a mistake had been made in failing to enter up the records? A. There wasn't any need for it, the facts were all known to the board.

Q. Answer please, did they? A. They did not.

Q. You are familiar with the fact that an examining committee was required by statute to make certain semi-annual examinations of the Trust Company's condition? A. Yes.

Q. And that is required by law? A. Yes.

Q. And that a committee in the trust company did make those examinations or purported to make them during the life of the trust company? A. Yes.

Q. Will you please tell me what information you acquired as a director concerning what particular steps were taken by the examining committee on, for instance, the examination in April

1912? A. I do not remember any particular examination, but I remember that the reports were made that the committee had counted the cash and checked it up, they had examined all the securities of the trust company an checked them up, they had examined the collateral and checked it up, and generally had examined all the assets of the company and checked them up with the reports which had been rendered to us; they had also examined the notes, as to whether there were any past due and any that lacked endorsement; I remember on several occasions they jacked me up as attorney because I failed to file some paper to make complete the record of my examination of titles, showing that they had gone into the matter, it seemed to me, with a good deal of care to find those minute points in connection with my own work.

Q. That latter matter was also called to the attention of the bank by the department, was it not? A. I think it was on one occasion.

Q. Do you remember what other information you acquired concerning steps taken by the examining committee in any instance to find out and intelligently and accurately report to the board the condition of the trust company? A. Well, I remember hat Mr. Sexton reported that in finding the amounts in the correspondent banks that he made inquiry directly and had the answer sent to his house, I remember that.

Q. Do you remember any more about that, just what he said he did? A. I do not remember any further than that.

Q. Did he say he went back to them later for other information? A. I do not remember whether he spoke of that or not.

Q. You did not ask him? A. No.

Q. Did you ask Mr. Sexton, or any member of any examining committee, what they had done with regard to varifying the figures in the general ledger? A. No, I had the fullest confidence in those men, they were very careful.

Q. We will take that for granted. You also had the fullest confidence in Mr. Smith? A. I did.

Q. Did all of the board? A. Yes.

Q. As far as it came to your knowledge? A. Yes.

Mr. Stiefel: I object.

Mr. German: I object to that, the question as to whether all of the board had confidence in him; that is a question not for Mr. Munroe to answer.

A. He is just asking my opinion. In my opinion they did have.

Mr. German: I move that that answer be stricken out.

Mr. Clark: They have asked over and over again, if your Honor please, about all of the board, to his knowledge.

The Court: If the board expressed itself in a board meeting on the subject why this witness is competent to testify to it. If members of the board outside of the board meeting so expressed themselves and did not so express themselves to this witness, why then the witness is not competent to testify.

Q. Mr. Munroe, you have replied to numerous questions on behalf of the defendants concerning the knowledge of directors upon various matters

so far as it came within your knowledge; did you have any knowledge, or did any of the directors state to you that they had implicit confidence in Mr. Smith? A. I do not remember any of them using that language.

Q. Did they say anything to indicate that they had any confidence in Mr. Smith? A. Their actions always indicated that they had confidence in Mr. Smith or they would not have retained him, certainly; I am sure I wouldn't.

Q. At the time that those matters came up, like May, 1909, or the International Tobacco Company incident, there was no investigation made by the board concerning Mr. Smith? A. I didn't see there was any occasion for any.

Q. There was no change made in the routine administration of the trust company? A. After the letter of the banking examiner we naturally were awaiting developments, but we would not have retained Mr. Smith then if we hadn't had confidence in him.

Q. No, no, the question must to you as a counsellor be very clear. (Question read.) A. Yes, there was, the matter was brought to our attention in connection with the failure to make entries in the check stubs, and the improvident nature of the book which was being kept in that connection was corrected at once; that is the only specific matter that required any change so far as we could see.

Q. So that except for that nothing else was done? A. I do not recall there was.

Q. Now then, at the time that the loans, the bills purchased were reported to the committee at each weekly meeting, the minutes show that—I

will ask you first, do you recall in connection with the loan to Director Scarlett, concerning which you testified, that the loan was made in some hurry? A. Yes.

Q. Why was that? A. It was explained at the time that the First National Bank of Orange which had had the note made a certain demand on Mr. Scarlett which he wanted to meet, and so Mr. Smith had gotten in touch with Mr. Odell, and I think Mr. Odell had consulted with perhaps one or two others, at any rate the note was taken over without waiting for a meeting of the board because there seemed to be some special reason for it.

Q. And that note was for $10,000? A. Yes.

Q. One of the largest single notes you had? A. I judge so.

Q. Mr. Scarlett was a director? A. Yes.

Q. Speaking of Mr. Scarlett, I want to ask you about the International Tobacco Company's indebtedness; do you know what happened to that company? A. I know in a general way that it went into bankruptcy or failed, haven't any detailed knowledge of it.

Q. You mentioned the fact that Mielle & Bruno had followed Mr. Smith down from the Second National Bank; do you know of any others; was Nones one? A. Yes, Nones was one.

Q. Did you ever make any investigation of the responsibility of the Intercity Land and Security Company? A. No.

Q. Did you ever have occasion to? A. No.

Q. Did you ever make any investigation of the responsibility of William C. Armstrong? A. Yes.

Q. And it satisfied you that he was responsible? A. It did.

Q. And also with regard to F. W. Holbrook? A. Mr. Holbrook as far as I know had no accommodation in the trust company; I knew Mr. Holbrook, knew all about him.

Q. You did not regard him as responsible financially? A. No, not personally.

Q. Did you know that his checks on the trust company were being paid as they came in although there were no funds there to meet them? A. I did not.

Q. Did you know that Mr. Holbrook was using those funds in connection with the Home Ice and Products Company, of which you were a stockholder? A. I did not.

Q. Did you know or not? A. I didn't know that he was doing it at the time I was a stockholder.

Q. But he was at some time? A. I learned so since, Mr. Smith told me that he was advancing money to Mr. Holbrook personally, and for that reason he said he ought to have control of the company, and I sold him my stock.

Q. Did you know that Mr. Smith and Mr. Holbrook were associated at all? A. Absolutely not.

Q. You recall the incident of the election of Mr. Armstrong as a director of the company with which you were identified with Mr. Smith, The Home Ice and Products Company? A. I heard about it but I was not identified with it at that time.

Q. What do you recall, if anything, about a conference in your office upstairs over the bank premises during the period of one of the committee examinations? A. I do not recall any.

Q. You do not recall any? A. No.

Q. I may be able to refresh your recollection by saying that if such a conference was held, and our information is that there was, or I would not be asking you this question, it related to the bills purchased register and the fact that certain pages were omitted? A. I have no recollection of any such conference or any such facts.

Q. And therefore you are able to say that to the best of your recollection there never was such? A. That is my best recollection.

Q. I want to ask you to identify your signature on Exhibit C-186 and ask you to tell me what that is? A. That is my signature, and that is a report to the Department of Banking and Insurance.

Q. Of what? A. Of the condition of the bank at that time.

Q. And of what date? A. March 26, 1912, apparently.

Q. And it purports to give this detail information concerning the resources and liabilities of the trust company? A. Yes.

Q. What examination did you make of the books and records of the company for the purpose of determining whether or not the information shown on this report was true and correct?

Mr. Stiefel: Is he an attesting witness there? A. Yes.

Mr. Stiefel: I object, first on the ground that this is not cross-examination, and secondly on the ground that there is no obligation on his part as an attesting witness to this to make any examination whatsoever. The statute distinctly requires how the report shall be made, by whom it shall be signed, by whom it shall be verified, and

how the execution of it shall be attested by the signatures, so the statute says, of three witnesses, one of whom is Mr. Munroe.

The Court: I think the examination is cross-examination. You asked him whether he took due care, that was the gest of your examination, and he said he did, that he did every thing that a director ought properly to have done and this is cross-examination on that subject. The word "correct" may not have been authorized by statute, but it is there, and I will not say that it is, but it looks as if it were the representation of the three directors that that report is correct. The matter is so doubtful that I will allow the question to be asked.

Mr. Stiefel: I want to add at this point that of course it has not escaped your Honor that the signatures are verified under oath.

Q. (Question read.) A. I do not now recall.

Q. Do you recall whether or not you made any examination? A. I do not recall now, I presume I did, undoubtedly.

Q. And what examination did you make of the books and records on any occasion, in your experience as a director of the Roseville Trust Company? A. I never attempted to make any examination of the books, I on occasions did look at the books to get some totals which I probably did on this occasion.

Q. You say you probably examined the books to get totals on this occasion; do you recall whether or not you verified information as to the

amount due depositors? A. I don't know, Mr. Clark, no.

Q. Do you know what it would have required to have verified that figure? A. Why if I did anything I looked at the general ledger I presume.

Q. You did not go back of the general ledger? A. I did not, no.

Q. Are you sure you looked at the general ledger? A. I am not sure I did; that is a good while ago.

Q. I show you Exhibit C-57 and ask you what date that report purports to show the condition of the trust company? A. It is endorsed on the back September 4, 1912.

Recess.

WILLIAM A. CALHOUN, sworn.

Direct-examination by Mr. Munroe:

Q. Where do you live? A. Orange.

Q. How long have you been there? A. Since the fall of 1900.

Q. What is your profession? A. Lawyer; I practiced law there prior to that; I went to Orange in the spring of 1899; I have been a resident there since the fall of 1900.

Q. Do you remember on or about the year 1909, I think it was, my calling upon you to ask you about Mr. Raymond Smith in connection with a suggestion that we should employ him as the chief executive officer, that is the active executive offi-

cer of a trust company to be formed in Roseville? A. I do.

Q. Do you remember what you said to me about Mr. Smith's character and experience and desirability? A. I remember distinctly recommending him very highly, I do not remember the exact language I used at that time, I remember the incident very clearly.

Q. As a matter of fact how long had you known Mr. Smith? A. I am not sure as to the year, I think that I knew him ever since I came to Orange, about 1900, I had known him a number of years at that time and had seen more or less of him in his capacity in the bank where I was a depositor, and also I was associated with him in the Orange Common Council, we were both members for a year or two at the same term.

Q. About that time did you do some business for the Second National Bank? A. I did; I wasn't the regular counsel at that time.

Q. But you were doing business for them? A. Yes.

Q. And how long had you had opportunity to observe Mr. Smith in his duties there with the Second National Bank? A. I cannot say in years, I should estimate five or six years at least; I had known him for a number of years prior to your speaking about him.

Q. What was your opinion of him as a banking man?

Mr. Hinds: I object.

The Court: The witness has already said what he stated to you, and it seems to me that is all you need.

A. Do you remember the cause of my making the inquiry, you understood just what was proposed? A. I recall that you stated that you contemplated employing him in connection with a new bank at Roseville.

Q. As secretary and treasurer? A. I do not remember what office you said, but I know he was to be a banking man connected with this new bank.

Q. Now as a resident and business man there in Orange during the interval between that time and the time that the Roseville Trust Company failed in August, 1913, had you had any occasion to revise your opinion of Mr. Smith?

Mr. Hinds: I object to that as calling for a conclusion, among other things, and also being totally irrelevant.

The Court: I am rather inclined to think that you can show Mr. Smith's reputation, at all events I will allow you to do that if you want to, but it seems to me that is as far as you can go, reputation in the business community.

Q. Did you know Mr. Smith's reputation and standing in the business community, as a man and as a banker?

Mr. Hinds: I object on the ground that it is irrelevant, incompetent and immaterial.

The Court: I have some doubt about the evidence but I will let it go in.

A. His reputation was good.

Q. And during the time that I have indicated, up to the closing of the Roseville Trust Company did anything come to your knowledge—

The Court: Oh, no, that will not do.

Q. Was there any change in Mr. Smith's reputation in Orange up to that time?

Mr. Hinds: The same objection, your Honor, and also the additional reason that it does not bear on the issues.

The Court: I understood that that covered the entire period of Mr. Smith's connection with the bank, if I am mistaken you can ask the question.

Q. Was that your purpose to cover the entire period? A. Of his connection with the Second National Bank, yes, sir.

Mr. German: Did your Honor's remark relate to Mr. Smith's connection with the Roseville Trust Company?

The Court: If you choose to ask that question I think I shall allow it; I will hear what counsel has to say.

Mr. Clark: That will also be over our objection, if your Honor please.

Q. Does your remark apply also to the period during which Mr. Smith was connected with the Roseville Trust Company? A. I heard rumors that he had trouble with the Second National Bank in reference to money matters; now whether I heard those rumors right after the failure of the Roseville Trust Company or shortly before I cannot say positively.

Q. It was either one or the other? A. Yes.

Q. Just shortly before or shortly after? A. Yes.

By Mr. German: Q. Did you communicate that information to Mr. Munroe? A. I did not, no, sir.

By Mr. German: Q. Or to any of the other

directors of the Roseville Trust Company? A. No; in fact I did not know that it was so, it was merely a rumor; I don't know now positively.

Q. You are one of the Commissioners of Orange under the Commission Government of Orange? A. Yes.

Q. How long have you been so? A. About three and a half years, four years next May.

CROSS-EXAMINATION by Mr. Clark:

Q. Mr. Calhoun, do you recall from whom you heard the rumors regarding Mr. Smith's former misconduct? A. No, I do not, sir.

Q. Did you have any business dealings with Mr. Smith at any time? A. Yes, I had; back in the neighborhood of 1905 I think I made one or two loans for him on bond and mortgage, drew one or two papers such as deeds and mortgages.

Q. Do you recall the aggregate amount involved? A. No, I do not.

Q. Was it over ten thousand dollars in the aggregate or less? A. My recollection is that one loan was on the dwelling house where he formerly lived.

Q. Oh, he was borrowing the money? A. Yes.

Q. He was not lending money? A. No.

Q. This was a loan on his dwelling house? A. Yes.

Q. Would you say from your knowledge of Mr. Smith that he was a man of independent means or one dependent somewhat on his salary?

Mr. German: Is that material?

Mr. Clark: One reason why it is material and very much in point is that it has been disclosed by the evidence that Mr.

Smith was engaged in other enterprises requiring presumably big capital, he was acquiring more and more stock of the Roseville Trust Company, according to Mr. Munroe, his salary was $3,000 per year. Now it is quite in point for us to determine from this man who knows all about his reputation whether he knew whether or not he was a man of independent means.

The Court: If this witness has knowledge of his means that is one thing; if he does not know and is merely stating what he supposes or thinks, why that is another. If this witness knows that he was a man without property, for instance, if Mr. Smith had told him just before he went in the Roseville Bank that he had nothing, why that might be evidence going to show the situation at the time when he became the cashier of the bank; I would allow evidence of that sort with some misgivings but still I would allow it, but I would only allow it in case the witness is able to state that he knows what Mr. Smith's circumstances were at the time when he became cashier of the Roseville Trust Company.

Q. Can you answer the question? A. What is the question?

Q. Will you state from your own knowledge, if you have such knowledge, what was Mr. Smith's financial responsibility, what were his financial circumstances at the time he became treasurer of the Roseville Trust Company?

The Court: One moment. That should have been preceded by a question whether

he knows, and if the witness says he does not know of his own personal knowledge that is the end of it.

Q. Do you know? A. I do not.

Q. You have just testified that you acted—was it for him? A. Yes, in replacing a loan on his house or granting a new loan, I do not recall which.

Q. Were you his attorney? A. I was in that transaction.

Q. And that transaction involved borrowing some sum of money on his dwelling house? A. Yes.

Q. Do you recall what the dwelling house was worth approximately?

The Court: No, I will not allow that.

Q. Did you, other than that single transaction, have any opportunity to observe Mr. Smith's conduct other than as he appeared in the cage in the Second National Bank? A. Yes, I was associated with him in the—

Q. And other than in the Common Council? A. No, except occasionally I would meet him on the street; we both lived in the same general direction at that time, and walked to and fro at lunch, or something of that nature.

THOMAS A. DAVIS, sworn.

Direct-examination by Mr. Munroe:

Q. Judge Davis, where do you reside? A. Orange, New Jersey.

Q. How long have you resided there? A. All my life time.

Q. Your profession is? A. Counsellor at law.

Q. You were formerly judge of the Court of Common Pleas of this County? A. Yes.

Q. For how long a time? A. Why I served for about three and a half years and then resigned.

Q. Do you recall an occasion just before the beginning of the Roseville Trust Company in 1909 when I called to see you concerning Mr. Raymond Smith? A. Why I am not very clear as to the date, but I remember you calling at the office in Orange regarding Mr. Smith.

Q. And do you recall my saying that the committee had in thought engaging him as secretary and treasurer for the new trust company to be formed there? A. Well, I would not attempt to remember the words, but I know that you stated the object of your visit was to ascertain something of him because of some contemplated employment in the new bank; that was the general trend of your statement.

Q. And do you remember what you said in reply to my inquiry? A. Why it is quite a number of years ago and I can only state in a general way that I told you what I knew about Mr. Smith, I think I told you something to this effect, that my first acquaintance with him was when he was employed in the Orange National Bank as a clerk, it was when I first came to Blake & Howe's office, that after I had been there for a few years that he changed from the Orange National Bank and went up to the Second National Bank in Orange to a more responsible position, and I think, I told you also that his father was formerly president of

the Orange National Bank, Thomas J. Smith, and I think I referred to the fact that his uncle, J. Warren Smith, was for a great many years cashier of the Orange National Bank; that I think was the general trend of my statement to you, giving you whatever information I had as to him.

Q. Do you remember what you said about his qualifications as a banker and his character as a man? A. No, I do not, except in the most general way, that I think I told you that all I knew about him was good, or words to that effect, that I knew nothing against him up to that time.

By Mr. German: Q. Where was your office in reference to Mr. Smith's office in the Orange National Bank building? A. Why, while he was in the Orange National Bank our offices were on the floor just above the bank, the first floor in the same building.

Q. Had you occasion to meet Mr. Smith frequently during that time? A. No; not meet him, I would see him frequently down in the bank but not to carry on very much of a conversation with him or to meet him frequently.

Q. Were your firm the counsel for the Orange National Bank at that time? A. Yes.

Q. Did you have occasion to go to the bank at times? A. When Mr. Smith was there, I don't know just how long I was in the Orange office before I was admitted to the firm, that is I was in Blake & Howe's office about two years before I was admitted to the bar, and I am not clear as to when he left the Orange National and went up to the Second National, so that I am not able to say whether Mr. Smith was in the Orange National during the period after I was admitted to the bar.

Q. When did you become identified with this firm? A. I was admitted in—

Q. No, when did you become identified with the firm as a clerk? A. It was June first, I think it was, 1893.

Q. And when were you admitted? A. In June, 1895.

Q. Was Mr. Smith employed as a clerk in the Orange National Bank when you first became identified with this firm? A. My recollection is that he was, that he was with the Orange National for several years after I entered the office of Blake & Howe.

Q. Did you know Mr. Smith's reputation as a business man in Orange and vicinity at the time you gave this information to Mr. Munroe? A. Well, I thought I did.

Q. What was that reputation so far as you knew? A. So far as I knew it was good.

CROSS-EXAMINATION by Mr. Clark:

Q. Judge Davis, you represented Mr. Smith upon his trial for the misdeeds of the Roseville Trust Company, as attorney? A. I don't think he had a trial.

Q. In connection with the indictment? A. Yes, I think I advised him to plead nonvult, which he did, I represented him through in all these matters.

Q. Had you any knowledge concerning Mr. Smith's means or lack of means in 1908 when he entered the Roseville Trust Company?

Mr. Fairlie: Objected to as not cross-examination.

Mr. German: And as incompetent.

The Court: The question calls for knowledge, not for information.

A. I should say no, I wasn't intimate with him at all; I was more intimate with him after he got into the Roseville trouble than any time before.

Q. So that your relationship with him and your observation of him was not very close? A. No, I should say that it was not very close.

Mr. Fairlie: There is a matter I should like to present. Counsel for the defendants have requested me to put in evidence the releases which were given to the nine directors who settled; they are set forth verbatim in the respective answers of those directors to the counterclaim; I have in my hand a couple of the originals which counsel can inspect if they so desire, but I propose that it be stipulated on the record that the releases set forth in the respective answers to counterclaim be treated as the original, with like force and effect as if the originals were put in evidence, and if any of the counsel have objection I wish they would state it.

Mr. Cornish: I will consent to that on the part of Mr. Benjamin.

Mr. Hinds: We will of course assume that Mr. Fairlie's statement that they are correct is a correct statement, but we do not like to have them labeled releases because they are only a part of course of the documents and transactions which could possibly be labeled so, if at all.

Mr. Fairlie: Releases or covenants not to sue.

Mr. Hinds: Why don't you say instruments?

Mr. Fairlie: Or instruments.

The Court: Is there any objection on the part of anybody? As there is no objection they will be offered.

G. ROWLAND MUNROE, resumed.

Cross-examination by Mr. Clark:

Q. I show you Exhibit C-57 and ask you if that is your signature? A. C-57, that is my signature.

Q. And what is the paper? A. It is the report of the Roseville Trust Company to the Department of Banking & Insurance under date of September 4, 1912 apparently.

Q. And can you state what investigation you made of the books and records of the Roseville Trust Company for the purpose of determining the accuracy of the information contained herein before executing or signing such reports. A. My answer would have to be the same as regarding the previous one.

Q. And what is that? A. That I do not now recall.

Q. Would your answer also be the same that if you made any investigation it would have been confined to the general ledger? A. It wouldn't have been any detailed investigation of the books or affairs of the company.

Q. Do you recall ever having examined any book of the trust company, except the minute book and the general ledger? A. Yes, I have in

connection with matters which I had to do with as attorney; I don't remember in connection with these reports having made any such examination.

Q. Now then I show you Exhibit C-58 and ask you what that is, and if that is your signature thereon? A. That is a similar report to the Commissioner of Banking Department, under date of November 26, 1912; that is my signature.

Q. And for the purpose of making up or verifying the accuracy of the information contained in this report did you examine any of the books and records of the Roseville Trust Company? A. Not any further than I have indicated in connection with the other reports.

Q. Is it your recollection that you did examine the general ledger? A. I remember on occasions that I did, but I do not remember in connection with any particular report what I did.

Q. Would you say whether or not these reports were published?

Mr. German: Doesn't it show on the face of them, if your Honor please?

The Court: Well, if the witness knows.

A. I cannot say in connection with any report whether or not it was published; I know on occasions I have seen after such a report had been filed the published statement in the paper, but I do not identify it with any particular report.

Q. This particular report, Exhibit C-186 bears proof of publication thereon, does it not? A. It seems to.

By the Court: Q. You say published; you will know whether it was published by authority of the trust company or by authority of the department, I suppose? A. The rule was, your Honor, to have such reports published.

B the Court: Q. The rule of your company? A. Yes.

By the Court: Q. So that after you had made a report to the State Department you published a snyopsis of that report in the paper? A. Yes.

Q. Was it not a matter of statute? A. Yes, I so understand.

Q. And that is what you meant to convey to his Honor, and not a rule of your company particularly? A. Well, it was the rule of our practice act, I do not remember there was any specific resolution directing the secretary and treasurer to do that thing.

Q. I show you this instrument, Exhibit C-186, and direct your attention to the sub-division of the items making up the cash on hand, and will ask you to read those sub-divisions and amounts? A. U. S. currency National Bank notes $19,212. Gold coin $67.50. Silver coin $2,077.70. Then there is a figure below which is not—oh, nickels and cents $344.23.

Q. And the word "cash items"? A. Check and other cash items $36.54.

Q. Now I show you the general ledger, the only book you remember having looked at for the purposes of this report, and will ask you to tell me if it is not the fact that the cash is shown only in one aggregate sum, without any sub-division whatever, looking under the date of this report, November twenty-sixth, I think it is. A. That seems to be the case.

Q. So that by examining the general ledger alone you could not possibly have verified the information contained in that report concerning the items which any business man is most familiar

with, bills, nickels and cents? A. I did not verify those items as to how many nickels there were and how many cents.

Q. Or how many bills? A. Or how many bills, no.

Q. Is it not a fact that the report was invariably made up and signed as of a date some days later than the date for which it was to be made up? A. That is, the date as of which it was made up was an earlier date, yes.

Q. So that it would have been physically impossible to have obtained the information for that report by actually counting the bills and the coin? A. Yes.

Q. Because you were making your report as of the date two or three days earlier than the time it was presented to you for signature? A. Undoubtedly that is the case.

Q. Now then I show to you the paying teller's proof book, which is an exhibit in this case, C-32, and ask you to turn to page in the paying teller's proof book for that date, November 26, 1912, and give me the amount shown under the heads, various heads of current cash? A. I don't see that I am helping by performing this ministerial labor, your Honor.

Q. I think it is perfectly reasonable to bring this out. A. Bills, $7,057; gold, $17.50; silver, $493.83; nickels and pennies, $74.12; cash itemized $2,918.17.

Q. So that the cash itemized is $2,918 instead of the sum of $36 or so which you included in the report? A. That is what that page of that book says.

RE-DIRECT-EXAMINATION by Mr. Stiefel:

Q. You have been shown certain books here; do you know whether on the date specified you examined either or any of those books? A. I do not, any particular case.

Q. Have you got any recollection at this late date, specific recollection with regard to the matter at all? A. I have none.

Q. Mr. Munroe, during the course of Mr. Clark's examination at one time he started in to ask you about the City Trust Company and then suddenly broke off his question. Now I would like to ask you—

Mr. Hinds: If your Honor please, the question was not finished, and even the part that had already been expressed was withdrawn, so I object to any re-direct-examination at all directed to that question in which the words "City Trust Company" were used.

Q. Well, I will ask you now, do you know anything about the examinations by the insurance department of the City Trust Company while you were a director and officer thereof? A. I remember receiving as a member of the board the reports and hearing the letters read as they were at the Roseville Trust Company.

Q. The City Trust Company received letters criticizing features—

Mr. Hinds: I object.

The Court: I am going to overrule this evidence, it is just as plainly incompetent as anything can be.

Q. Mr. Munroe, during the noon recess I spoke to you about what you had stated to somebody of

the Roseville Trust Company, subordinate body, with respect to what Appleton reported to you regarding Smith's reputation; will you tell us in detail, if you can recall, what you reported to the board of directors or to the executive committee, either or both, with regard to that?

The Court: That has all been gone over two or three times, has it not?

Mr. Hinds: Mr. Clark tried to bring that out and the witness had no recollection, though he did have a very clear recollection of the favorable things that he learned from Smith himself; the unfavorable from Appleton he had no cognizance of now at all.

Mr. Stiefel: In view of counsel's statement, and the questionable nature of the whole situation, I think I should be permitted to ask the witness with regard to that. I want to show that my man Lurich never heard of any conversation that Mr. Appleton had with Munroe, such as was hinted at this morning by Mr. Clark. That is what I want to show.

The Court: Has it been proved that he had?

Mr. Stiefel: I do not know what the record is on that point. Mr. Hinds says that the witness said he had no recollection. I don't know that that is so. Am I to assume that Mr. Hinds's statement in that respect is correct, that Mr. Munroe said he had no recollection?

The Court: Well, ask the question.

Q. (Last question read.)

The Court: That is not the offer. The offer is to show that Mr. Lurich did not have knowledge of a certain fact. Now, if you want that question you may ask it, but I strike out the other question.

Q. Do you know whether Mr. Lurich had any knowledge of any conversation between you and Mr. Appleton, in which Mr. Appleton spoke of Mr. Smith's reputation? A. So far as I know he did not. My recollection as to what Mr. Appleton said about Mr. Smith's repuation as I said this morning, was very vague; I think he made some sort of an insinuation which was not supported by any facts, and it did not seem to me worthy of much consideration for that reason. I remember that he did state the facts, as Mr. Smith had already stated them, as to this transaction, that I remember clearly, but I am positive that he did not state any facts which were supported in any way as to deserve consideration as to Mr. Smith's previous reputation, anything derogatory.

Q. Do you remember whether you ever informed Mr. Lurich outside of a board meeting or at a board meeting of Mr. Smith's connection with the Home Ice & Products Company? A. I do not recall that I did, I do not think I had any occasion to.

Q. Mr. Clark this morning laid great stress upon an overdraft which you were alleged to have made; have you ascertained the amount of that overdraft? A. I have not; my recollection is it was thirty or thirty-five dollars, something like that.

Q. And is that the only overdraft of which you

were guilty, as far as you know? A. As far as I know.

Q. Do you know whether Mr. Smith ever authorized that overdraft, or whether it may have been put through by a bookkeeper?

Mr. Clark: If your Honor please, on the question of knowledge, a perfectly disinterested outside witness was held down very strictly to his actual personal knowledge concerning such a well-known commercial fact in the business world as to whether or not a man whose reputation he knew in its entirety was rich or poor, and I submit that this interested witness, this defendant, this lawyer, should not be allowed to encumber this record with statements of his knowledge with regard to what other defendant's knew.

Mr. Stiefel: If your Honor please, the whole matter was brought up this morning, I suppose not to incriminate Mr. Monroe, but to show that despite the Nones matter the board retained Mr. Smith when he was guilty of participating in a criminal offense, otherwise it can have no possible bearing on this case.

The Court: All that appeared this morning was that Mr. Munroe overdrew and that the bank did not hold the overdraft, that it cashed it.

A. It was not shown that it was done with knowledge.

Mr. Clark: I ask that the witness's answer volunteered be stricken out.

The Court: I overrule the evidence on the ground that it is necessarily hearsay.

Mr. Clark: Will your Honor direct that the witness's volunteered answer be stricken out?

The Court: I have overruled the evidenc and that is enough.

Q. Do you recall, Mr. Munroe, any other feature besides heavy withdrawals which affected the relation of the number of bank accounts and the aggregate of bank deposits? A. You mean in the spring of 1913 and the latter part of 1912?

Q. Yes? A. Well, I remember that that was the time that gave us quite a little concern, because there were heavy drafts, and there were drafts by many of the smaller holders, too, at the time when, as I recall, the money market was tight. I remember personally a loan I had with the Fidelity Trust Company about that time they increased the percentage I was paying on my loan because they said the money market was tight. I remember that some of our builders who had accounts there were having trouble because they said money was hard to obtain, loans were hard to obtain.

Mr. Hinds: I object on the ground first that it is not responsive; second that it is incompetent and hearsay, and also that it is irrelevant.

A. I am speaking of matters that occurred in the board meeting, your Honor, and before the committee.

The Court: I think the evidence is competent. Proceed.

A. And while we were sorry that the aggregate deposits were less than they had been we thought that we had a perfectly reasonable explanation

of that shortage, that diminution in the aggregate, because of the general conditions in the business world and the money market at that time; many of those accounts were very small acounts, little savings accounts opened with a few dollars; we were making a feature of advertising they could open an account with a dollar.

Q. Do you know of your own knowledge whether the commission that was earned on that International Tobacco Company note went on the books prior to the criticism of the Commissioner or not, do you know of your own knowledge?

Mr. Hinds: I object as calling for the contents of the books when the books themselves are the best evidence.

The Court: That is a question that can be determined from the books.

Mr. Stiefel: Is it not proper to ask the question whether he knows or not, and if he says he knows then I can ask him if it is on the books, and then I could have him point it out, otherwise I would have to go through all those books myself personally.

A. I think this transaction was still an open transaction at the time of this correspondence with the banking department about it, I don't think it had been completed.

Q. Do you know whether the bank eventually got the commission?

The Witness has already said that it did.

Q. Do you know when the International Tobacco Company went into bankruptcy? A. After the bank failed.

Q. I notice amongst the endorsers of the notes of the International Tobacco Company a certain

Paul E. Heller, I think it is; do you know who that Heller was or is? A. Well, I remember one man, I don't know whether that was the one or not.

Mr. Hinds: I object if the witness cannot identify the man.

A. I think I cannot identify him sufficiently.

Q. The name of a Mrs. somebody was mentioned this morning in connection with—A. Mrs. Jane A. Curtis.

Q. Yes, in connection with the Postcraft Company. Do you know whether before the taking of Mrs. Curtis' note by the bank she had submitted a statement to the company, and what that statement showed? A. As I remember, Mrs. Curtis, I know she submitted a statement, and as I remember it showed that she was worth seventy thousand dollars in real estate here in the city of Newark. I might also say that she made two reductions on account of the original note.

By Mr. German: Q. Mr. Clark asked you something in reference to remarks or the statement of Mr. Appleton regarding Mr. Smith, concerning this Nones matter. I ask you now whether the fact that Mr. Appleton was an applicant for Mr. Smith's position had anything to do with your action in retaining Mr. Smith and the action of the directors in connection therewith?

Mr. Hinds: Objected to first on the ground that it is not proper re-direct-examination; and second, on the ground that the witness by saying that he had only a vague recollection and was unable to repeat what Mr. Appleton said furnishes no basis for the further inquiry into the subject; and third, that it is totally irrelevant what fac-

tors in Mr. Munroe's mind entered into his decision not to repeat the matter to the directors.

The Court: I strike out the question because it assumes that Mr. Appleton was seeking this position, wthout any proof of it.

By Mr. German: Q. Do you know or was it considered in the board of directors that Mr. Appleton or the examiner who examined these books was an applicant for Mr. Smith's position? A. It was so stated.

Mr. Hinds: I ask that the answer be stricken out.

The Court: If the matter was referred to in the board I will allow it to go in.

By Mr. German: Q. It was so stated in the board, was it? A. It was so stated in the board.

By Mr. German: Q. And was that at the meeting—

The Court: No, no. He says it was stated in the board.

By Mr. German: Q. Before the action taken regarding the retention of Mr. Smith or at that meeting? A. It was discussed in the board before the action was taken.

By Mr. German: Q. Mr. Clark asked you regarding this resolution which was passed giving Mr. Smith the power to borrow twenty-five thousand dollars with pledged collateral, and you stsarted to explain, you said that was all explained; I would like to have you now give your explanation. A. It was explained in the letter replying to the banking department that the matter was thoroughly understood, that the only

fault in the matter was an inadvertent omission from the minutes.

By Mr. German: Q. In what respect? A. That it failed to mention that transaction; it was nothing that reflected on Mr. Smith or reflected on the committee, except as Mr. Smith made the ministerial omission.

By Mr. German: Q. And the matter, I understand you to say, was corrected and was so reported to the Commissioner? A. To the Banking Department.

RE-CROSS-EXAMINATION by Mr. Clark:

Q. Mr. Munroe, you have stated in reply to a question by Mr. Stiefel, if I understood your answer correctly, that you had not reported to the board or the executive committee the substance of Appleton's conversation with you; is that right? A. No, I did not say that.

Q. Well, what is it? A. I said, or meant to say, and I am sure I did say that all that I recall of Mr. Appleton's conversation I reported.

Q. To the board and the executive committee? A. Yes, whenever the matter was under discussion.

Q. Did you also report to the board and executive committee—I ask this again because I understood you gave some answer which conflicted—did you also report to the board of directors and executive committee that you and Mr. Smith were both interested in the Home Ice & Products Company? A. I think that matter was not brought up in the general board, I think it was before the executive committee, we were speaking about the note for five thousand dollars which

was secured by the contract with Mr. Drake for the purchase of ice greatly in excess of that amount; at that time before the executive committee the details were fully discussed, and I do not know that anybody made the categorical statement that Mr. Smith was connected with the company but it was certainly understood in the executive committee; when the matter was reported to the board I do not think those details were gone into at all, I do not think there was any occasion for it; that is my recollection.

Q. I will refresh your recollection by showing you if you refer to that and ask you if you de you your testimony given in this court and found at page 305 of the record, and ask sire to change your answer? A. "Did you ever hear the subject of Mr. Smith's connection with the Home Ice & Products Company discussed by or in the presence of any other director? A. Yes, at the time there was a note for $5,000, secured by contract with Mr. Drake of Newark for ice that was then in the ice house which was under contract to be sold and delivered to Mr. Drake, there was a note for $5,000, purchased by the Trust Company with that collateral, and at that time it was spoken of in the executive committee meeting and board meeting." Well, I will modify that to the extent that I say that I do not know that the details were discussed in the board meeting; my best recollection would be that they were not, that the fact of the making of the note was reported to the board, and that the details were in the executive committee; that would have heen the usual course and that is my recollection.

Q. And on the following page you were asked

if you looked at the minutes with a view to finding that, and you answered, "No, but I heard it read this morning or yesterday." A. That was about the five-thousand-dollar note.

Q. Now you say that Mrs. Curtis made two reductions of this note? A. Well, there were two prior notes, as I remember, of which this was a successor.

Q. Well, then do you mean your answer to stand that the reductions were made by Mrs. Curtis? A. I so understand.

Q. Not by the Postcraft Company? A. Where she got the money I do not now recall, but they were made by Mrs. Curtis.

Q. In making the loan with this good statement from Mrs. Curtis, the trust company relied on her solvency, did it not? A. Yes, in part, largely.

JESSE L. CONGER, re-called:

Direct-examination by Mr. Fairlie:

Q. Of course you are familiar, Mr. Conger, with the assets which the Mutual Bank took over from the Roseville Trust Company? A. Yes, sir.

Q. And you have had to do with the handling of them and realization upon them since they were taken over by the Mutual Bank? A. Yes, sir.

Q. Is it not a fact that in a great many instances the Mutual Bank has obtained from creditors on those obligations securities of one sort and another, such as notes with new endorsers and second mortgages or first mortgages, and collateral of one sort and another?

Mr. Hinds: I object, first, on the ground that the question is leading, this is counsel's own witness, and I do not think the matter is relevant at all, I do not think he should put the answer in the witness's mouth.

Mr. Fairlie: I want to show, your Honor, that complainant as to the realization of these assets is resting upon the mere fact that Mr. Vredenburgh appraised the assets turned over to the Mutual at $531,000, whereas in fact the Mutual Bank of Roseville now has securities of one sort and another of which nothing in said by complainant in this case, and I want to find out whether there are such notes at this time, from this witness.

The Court: If you wanted to show what all the assets realized, while I am by no means persuaded that that would do you any good, I would let you put in the evidence for the purpose of raising the question whether the directors were chargeable on the basis of the price obtained by the commissioner or chargeable on the basis of the money actually received by the vendee.

Mr. Fairlie: I will withdraw the question, your Honor.

Q. Mr. Conger, the Mutual Bank assumed liabilities equal to the purchase price at which these assets were turned over?

Mr. Hinds: I object to that, first, in that it calls for a lay witness's construction of the contract already in evidence; in the sec-

ond place that if it is at all desired to have it in—

Mr. Fairlie: I will withdraw the question.

Q. That being the case the Mutual Bank has been realizing on those assets sums in excess of the liabilities which it assumed, and has been declaring to its present stockholders dividends out of that sum realized on those assets which exceeded the purchase price; is not that correct?

Mr. Hinds: In the first place, your Honor, I object on the ground that the question is leading, and in the second place that it calls for a conclusion.

(After discussion.)

The Court: I shall have to overrule evidence of that sort.

Q. The assets which were turned over to the Mutual Bank were classified, as Mr. Vredenburgh testified, into certain classes; one class was assets valueless; is that correct? A. Yes, that is right.

Q. So that the appraised valuation of $531,000 must have been the assets other than those valueless; that is correct, is it not? A. Yes.

Q. And those assets which were valueless were thrown in, is that correct? A. That is right.

Q. Now on those valueless assets haven't you got securities of one sort and another?

Mr. Hinds: I object.

The Court: I overrule that, that is exactly the same question but in another form.

Q. It is alleged in the bill of complaint that one of the items of loss is the Armstrong loan. Since the Mutual Bank took over the indebted-

ness of Mr. Armstrong as one of the assets, hasn't it had conveyed to it or to a corporation controlled by it by the name of the Enbyor Corporation, a great deal of property, or some real estate?

Mr. Hinds: The same objection.

The Court: I overrule it.

Mr. Clark: I will say now that I am willing to turn back to these defendants all of the assets not liquidated at the face value thereof, or any appraisal that they may get from any three bank presidents in the city.

Mr. Fairlie: We accept your offer.

Mr. Congleton: I would like to call your Honor's attention to that part of paragraph 17 to which they refer, and annexed hereto as Exhibit "G" where they have listed certain claims which they say are losses which have been sustained, and they make the direct allegation: "That no part of said uncharged checks and drafts, so paid as aforesaid, has been repaid, and said trust company received no value or consideration for any of said payments." Now it is with respect to those particular ones which they have set up in schedule G that we want to ask some questions about.

The Court: What does your answer say about that?

Mr. Congleton: I had no knowledge when I filed my answer whether that was so or not, but here is the man that can tell us.

The Court: Well, that puts the matter in

a slightly different position. If the bill charges a certain fact and you do not admit it, and they try to prove it, you are entitled to try to disprove it.

Mr. Hinds: On that precise point this very witness by way of supplementing the proof and deducting slightly from the loss as alleged in the bill has testified last June to the correctness of Exhibit H, or rather payments made on account of the notes as listed in Exhibit H, appearing at 1244, stating comprehensively all of the realizations that were made as referred to in that particular allegation of the bill, and that witnesses though produced here several months later, after their accountants have had three or four months to go over the books in detail, was not cross-examined. If there is any virtue in the substance of this inquiry, certainly it is objestionable in form, and the procedure is not correct.

(After discussion.)

The Court: I will permit the defendant to show that this particular loan has been realized upon, and I will admit the evidence with a view of disproving negligence in that particular.

Q. Has the mutual Bank of Roseville received any collateral security or assets of any sort on account of the William C. Armstrong item mentioned on page 62 of the bill of complaint, the item here being $35,458.47?

Mr. Hinds: Your Honor will note our objection to that on the same grounds.

The Court: Yes. You may answer.

A. I don't know as I can answer it just that way. That Armstrong matter was handled in a rather round-about way, and you cannot say that we received security directly to the Mutual Bank. I can recite some of the history of the Armstrong matter but I cannot give you all the figures exactly.

Q. There is a corporation, Enbyor Corporation? A. Yes.

Q. Which the Mutual Bank of Roseville uses as a holding company? A. Yes.

Q. Is it not a fact that William C. Armstrong has conveyed or caused to be conveyed to the Embyor Corporation various pieces of real estate? A. He has not.

Q. Or to the Mutual Bank of Roseville? A. No, sir.

Q. Has he given any second mortgages? A. No, sir.

Q. Or first mortgages? A. No, sir.

Q. Explain this Armstrong transaction.

Mr. Clark: It was sold at public auction, and that is what is misleading the witness, direct his attention to that.

Q. Will you explain what the Mutual Bank of Roseville has realized, and how it realized it, on this Armstrong matter? A. The history of the Armstrong matter was somewhat this way; I cannot give you exact figures, Mr. MacEvoy, the president of the Mutual Bank, was appointed as trustee for Mr. Armstrong's property; he handled the property under agreement signed by all parties concerned—

By Mr. Hinds: Q. You mean creditors of Mr. Armstrong? A. Creditors of Mr. Armstrong—

for a period so arranged of about forty-five days; Mr. Armstrong in the meantime was to take up his property and pay his indebtedness due to the Roseville Trust Company, which was specified in the bill I think originally, however I am not sure of that; Mr. Armstrong did not take care of his proposition in the time specified, he went along, and they gave him possibly six or eight months, under agreement, to clean up his matter; he did not do so; the trustee then advertised in the usual way and the property was sold at public auction; at that time, or during that time, the trustee had borrowed certain sums of money to carry along the properties from the Mutual Bank in order to keep them in shape, various expenses, etc., and at the time of the sale one of the representatives of the bank bought the property in in his name, for the bank really; that is what it amounted to.

Q. One of the representatives of the bank? A. One of the representatives of the bank bought it in for $12,500 or thereabouts.

Q. And is still holding it for the bank?

Mr. Hinds: Let the witness tell it.

A. The bank then took over, rather the Enbyor Corporation took over the transaction, and after securing the Mutual Bank for loans made to the trustee, etc., that is, the trustee had to reimburse the bank for loans received; I think there was some twenty-three hundred dollars turned back as payment on account of the Armstrong indebtedness; there is some still owing on the Armstrong indebtedness, although the Enbyor Corporation held the property almost in its entirety, we having, I presume, a dozen pieces at the present time, carrying it along, and there is still an

indebtedness from Armstrong matters of possibly twenty-three or twenty-four thousand dollars.

Q. And as against that it is hoped that these pieces of property which you speak of will be sold and the proceeds thereof realized for the benefit of the stockholders of the Mutual Bank?

Mr. Hinds: I object.

The Court: That will not do any harm, "it is hoped."

Mr. Hinds: I object. What the Enbyor Corporation now realizes, whether it be a million dollars or ten billion, can have no effect, because that is only reimbursing the expenses of the trustee.

The Court: I do not think the evidence amounts to very much, as far as I can grasp it, but I will allow it to be put in.

Q. (Question read.)

The Court: I will overrule that question, it is absolutely pointless "it is hoped."

Q. The property is being held now for the Enbyor Company, controlled by the Mutual Bank of Roseville, for the purpose of realizing on it and applying it on account of this Armstrong money? A. Well, I might go a step further, and say that the Enbyor Corporation is carrying that property at the present time at a loss, and after that loss is made up there may possibly be something coming, but at the present time the enormous expense in carrying that property does not help us along very far toward paying dividends.

Q. Whatever is realized, if anything, is to be applied on the Armstrong item? A. I wouldn't say the item at all.

The Court: This is your witness, and it seems to me you have not advanced your case at all by this evidence. What you want to show is lack of negligence. The negligence charged in this case is a loan to a man who is unable and whom the directors should have known would be unable to pay. Now you do not rebut the charge of negligence by showing that this man is unable to pay in accordance with his obligation turned over his property to somebody in order that something might be realized with which to pay a part of the debt.

Mr. Stiefel: I want to object on the ground that there is not the slightest proof thus far in the complainant's case of any negligence on the part of the directors with respect to that.

Adjourned until tomorrow at 10 a. m.

October 4, 1917.

JAMES B. BANISTER, re-called:

Direct-examination by Mr. Stiefel:

Q. Mr. Banister, you showed me this morning certain memoranda which you have found relating to your participation in the examination of the affairs of the Roseville Trust Company; will you produce those memoranda, please? A. (Produced.)

Q. Now, Mr. Banister, I show you two slips of

paper containing memoranda apparently and dated, the first one, May 21, 1913, and the other one bearing no date, but bearing folds which correspond to the folds in the first mentioned paper; can you tell us what that paper is?

Mr. Hinds: If your Honor please, it is already in evidence that this examining committee made a report and filed it with the bank, and it is now in evidence. I do not see any possible relevancy in any further self-serving declarations of this witness tending to vary the official report of their proceedings that they saw fit to turn in to the directors and made months after the examination, that is, made months after the examination on the stand here I mean, original testimony.

The Court: This witness is now calling in his own defense and of course he has the right to state what care he exercised in making his examination; I presume these memoranda are produced with a view of showing what he did. I will let it in.

Mr. Hinds: This witness is not called in his own defense, he is not being sued.

Q. Mr. Banister, will you tell us when that memorandum was made, if you can (showing witness paper)? A. It is dated May 21, 1913.

Q. Can you tell us whether it was made on or about that date? A. That was undoubtedly the time.

Q. Is that in your handwriting? A. My handwriting.

Q. What does that memorandum deal with? A. It deals with the collateral loans of the Roseville Trust Company which I examined at that time.

Mr. Stiefel: I ask that this be marked in evidence.

Mr. Hinds: I object.

The Court: I would like to hear in what view it is offered.

Mr. Stiefel: It is offered as part of the *res gestae* of the examination. It shows that this party made a memorandum with respect to certain loans which he says he examined and made certain observations with regard to them.

The Court: Well, if he made those entries at the time he may testify as to what they are. Evidently the paper is not of itself competent. Are they memoranda made by you at the time?

A. They are.

The Court: You may testify about them if they refresh your recollection.

Q. Tell us about the matters which that memorandum deals with, as your recollection is refreshed by referring to that? A. These loans were recorded serially by number and are referred to in that way on this memoranda; the number is given, loan No. 5, the amount of the loan and the collateral hypothecated, to which I have affixed the market price as of that day through an expert in that business in Well Street.

Q. You consulted an expert in regard to that? A. I say an expert, a man who is in that business with J. P. Morgan & Company.

Mr. Hinds: If your Honor please, I object further on the ground that this discussion is totally outside of the issues, because we have never attributed any negli-

gence to the directors or to the members of the examining committee because of any failure to ascertain the values of collateral loans at the time of this examination; our predication of negligence respecting the examination was totally different, and this is outside of the issues.

The Court: That is a matter that I cannot very well determine now. I think the evidence is admissible with a view to showing the degree of care which this gentleman in the discharge of his duties as a member of the examining committee took with reference to the assets of the bank. I presume that is the view-point.

Mr. Stiefel: That is my whole offer.

Q. Go on with your testimony. A. Each item is given in detail in the same way. Loan No. 8 was for $200, for which was hypothecated two shares of the Mutual Trust Company of Orange, valued at $350 total, $165 a share, $350. The next loan was for another item of $5,000, twelve bonds of the New York Knife Company at $500 each, totalling $6,000. The next item was a loan of $700, for which fifteen shares of Welch Grape Juice Company was collateral, worth $1500. Shall I go on with all of them?

Q. Yes? A. The next was a loan of—

The Court: Is it worth while?

A. They are all of the same nature.

The Court: What you want to show is that at the time he examined these assets he took memoranda in reference to what they were and looked at the collateral, and this is one of the memoranda that he took.

Now counsel objects to its being offered in evidence, and I do not think it is independent evidence; it can be used to refresh his memory.

Q. I show you another memorandum, is that in your handwriting? A. It is.

Q. Can you tell us precisely when that was made? A. I cannot, because I didn't date it.

Q. Can you tell us whether it relates to any of your examinations? A. It relates to the examinations.

Q. Now referring to the first item there, can you tell us what the first item deals with, and what can you say about it, with your recollection refreshed by looking at it? A. It related to the building and loan shares which were hypothecated against some of the loans, and in one or two cases they were made out, the books were made out to man and wife, and I asked that we have them made out to individuals.

Q. You brought that to the attention of the committee? A. I brought that to the attention of the committee.

Q. With regard to the next item? A. The next item was that one of the bonds, Wax Paper Company bonds for June 13th had not been cut, and I called the attention of the committee to that, so that it would be done; it had been overlooked, that is all.

Q. Now the next series of items? A. The next series of items were a number of loans that had been released and the book was not properly ruled off to indicate that at a glance; I had to study them to find out that was the case, and I noted that they should have been ruled off. The next

item was the collateral for one loan which consisted of the Scott Company.

Q. That is the Cod Liver Oil Company? A. Yes; I could find no quotation, it had no market, it was a close corporation.

Q. You called that to the committee's attention? A. Yes.

Q. The next item? A. Loan No. 63, which was $900, for which was hypothecated twelve shares of the Claflin stock worth about eighty.

Q. What did you say to the committee about that? A. I understood that that was hardly sufficient to cover the loan of $900.

Q. The next item? A. The next item was similar character, of $600, five shares Wells Fargo at $112.

Q. Does the next item recall any suggestion you made to the committee? A. The next item is that the building and loan books should be priced or should be written up each year, which was not the case, so as to show their value as a matter of collateral to the bank officers, and I suggested that that be done.

Q. That last item? A. I don't know what that means, it just says Scarlett, seventy-five shares, I don't know what that means.

Q. Now I show you another paper; is that in your handwriting? A. It is.

Q. Can you tell us the date of it? A. I cannot.

Q. Does it relate to your examination? A. It relates to one of the examinations, I won't be sure which one without consulting the books again.

Q. In general tell us what you called to the at-

tention of the committee with respect to the matters there indicated?

Mr. Hinds: Is this another paper? If so, I would like to see it first. I would like to have the papers that have been testified to marked for identification. I object to their going in evidence.

The Court: I do not see how you can use them if you object to them.

Mr. Hinds: I do not object to their going in evidence.

The Court: Then I do not think they ought to go in at all. If you want them in you can have them in, but if you do not want them in then they ought not to be marked.

Mr. Hinds: No, I do not want them in.

Q. Tell us what you called to the attention of the committee with regard to these matters noted on that sheet? A. This relates to one of our examinations, and it was my duty to look over the loans again and also the mortgages; this first items says that on page one the amount of intertest is not noted against one of the loans, the date only was given; that was a clerical error, but that was our business to call it to their attention. The next is loan 62, for $1200, which the memorandum here says the collateral was deficient; then follows a series of building and loan—

Q. Six of them, I believe? A. Six building and loan shares.

Q. You mean loans? A. Yes, loans secured by building and loan shares, and I have noted against them that no value is attached to the book, that is, it is not written up.

Q. I show you four papers appearing to be statements of the American National Bank, each one bearing date June 20, 1913; can you tell us what those papers are, how they came into your possession, and under what circumstances? A. At that time I was vice-president of the American National Bank and was on their board, their loan committee I would call it, board of directors and loan committee; as a member of that committee I knew of certain transactions with individuals, and as a member of the board of directors of the Roseville Trust Company I also knew that these same people were involved in transactions; so that I asked the cashier of the American National Bank to give me the statements or the items against these several accounts which were involved in both banks.

Q. In order that you might as a director—A. I didn't present it to the other bank, I simply used it.

The Court: Let the witness state the purpose.

A. The purpose was to let me tell or know the condition of these accounts in both banks, so that I could advise the directors as to my views in the matter.

CROSS-EXAMINATION by Mr. Hinds:

Q. Did you make any other memoranda respecing your examination? A. Yes, from time to time; I made up with each examination similar memoranda.

Q. I mean respecting the examination with which those were concerned which you just testified to, May, 1913? A. Why, I don't know that

I can specifically say I did, except I can say this, that at that time in relation to the Scarlett matter I was appointed a committee to investigate his affairs and found out how he stood with relation to the bank and how the bank's loans might be paid, and I visited Mr. Scarlett a number of times.

Mr. Hinds: I object to that as not responsive; I asked him whether he made any other memorandum respecting this examination of the bank on May, 1913.

A. I am coming to it, Judge. One of the items in that examination was Scarlett's, and I made several visits, as I said, to Scarlett, and took memoranda of his personal affairs in pencil, a verbal statement of his, which I asked him to give me in writing and which he afterwards did, and sent me an explanatory letter which was contained in this envelope, and this envelope I have noted on the outside "February 28, 1916, in Judge Adam's court I gave Mr. Hinds letter and statement of Scarlett's."

Q. Was all that done as part of your duties as a member of the May, 1913 examining committee? A. Getting that report of Mr. Scarlett was, because that was part of that very transaction.

Q. What were your duties on that committee, as you understood them? A. They varied.

Q. On that particular examination? A. On that particular examination my duty was to look over the collateral loans and see if they were sufficiently covered, and the mortgage papers, as I recall, I haven't any record of the mortgage papers here but that is my recollection, that I looked over the mortgage papers at the same time.

Q. Those were the only two features of the bank's assets and liabilities that you personally were concerned with on that examination? A. I wouldn't say that; I was concerned in all of it, but I did not do the other work, we had to divide the work.

Q. In what way were you concerned in the doing of the other work? A. I had to sign the report and I had to know what the other members of the committee had done the other work.

Q. Did you know that? A. I saw them at work the same time I was.

Q. Did you inform yourself as to what methods were yet, I am asking you whether you informed

Q. Did you infrom yourself as to what methods the other members of the committee employed in performing their several parts of the work? A. What do you mean, in counting the cash?

Q. Any part? A. Counted the cash physically.

Q. I am not asking you what those methods were wet, I am asking you whether you informed yourself at the time as to what methods in each instance they were pursuing in doing their several portions of the work of the examination; yes, or no? A. I cannot answer it either way.

Q. What is your answer? A. My answer is that each one was doing his own duty assigned him by the chairman of the committee; I didn't watch him, I couldn't do my own work and watch him.

Q. Did you know in general what methods the others were employing in doing their portions of the work or did you inquire? A. What do you mean by "methods"?

Q. The means that they employed, the system that they employed to arrive at the result they were seeking. A. They used the customary methods of checking up the several items; one man checked up the cash, another man checked up the depositors' ledgers; another man, or one of the same men, corresponded with the banks, Mr. Sexton corresponded with all the correspondent banks, as the report shows, written and in the minutes.

Q. How did you learn what means they employed; was it by seeing them or was it by discussing the matter with them afterwards? A. I was there with them, and in most cases I saw the letters from the correspondent banks.

Q. Did you discuss with the other members of the committee what means and methods they were employing to arrive at the result? A. I cannot say that I did discuss about their methods.

Q. Let us take up the question of the correspondent banks; will you tell me what steps were taken with respect to checking up the accounts with the correspondent banks so far as you learned it from observation, or from conversations with members of the committee at about that time?

Mr. Stiefel: I object on the ground that this is not cross-examination. If Mr. Hinds wishes to ask the witness these questions and make him his own witness I am perfectly willing, I have no objection. I should say this matter was developed by Mr. Hinds once before on his original examination and I think he should refrain from going over the ground already cover-

ed. If Mr. Hinds wishes to cover the same ground again and make this man his witness again I am perfectly willing, but I do not think it is necessary.

Mr. German: I object to the cross-examination on the ground that it is new matter; the only matters that Mr. Stiefel asked the witness was his recollection, and to refresh his memory from the memorandum produced; his evidence related solely to those matters, and I object to this cross-examination as not being the proper subject of cross-examination.

Mr. Cornish: I only want to say that I think Mr. Hinds' characterization of the witness's testimony when he was here before was unfair; I have no such recollection as that; the evidence is here, and he ought not to characterize it in that broad way; the witness's testimony at that time, as I remember it, was very full and frank and answered every question put to him as best he could.

The Court: I can see if the attention of the witness had been directed to one thing in reference to which it was alleged that he was negligent and therefore responsible, one particular thing, why the cross-examination would naturally be confined to that thing, but the cross-examination, as I understand it, was had with a view to showing that this witness was careful, generally careful in the discharge of his duties. Now it seems to me that that being the aspect of the matter Mr. Hinds has the right to go

beyond the particular items to which the witness has testified and ascertain whether or not he was generally careful.

Q. (Question read.) A. Mr. Sexton, chairman of the committee, usually or always wrote the banks with whom we had accounts, and asked them for their balance as of the day that we took the examination. He first, as I recall, took the figures as shown by our balance, and held that in his possession until he received word from the several banks, to see if they were in agreement. Do you want me to give the whole system?

Q. Yes. A. This was done by him personally, and the letters, I think he enclosed self-addressed envelopes to his home address, so that they would not come to the bank and he would have the record at his home to make the comparison, and where there was any difference it was usually, if not always, offset by items in transit.

Q. Now what further inquiry, if any, did Mr. Sexton or any of you make respecting those items in transit? A. Why they were carefully gone over and the books made to agree by the explanation in connection with those items.

Q. For example, supposing that an item in transit, to use your expression, was a deposit of ten thousand dollars which the Roseville Trust Company's books showed was on its way, we will say, to the Irving National Bank at the time of the examination, did you verify later the fact that there was such a deposit on its way, and that it had arrived, in addition to getting the balance as it was shown on the Irving's books on the day of the examination? A. I should say that items from our bank would be on our books as of that

day, we would not have to consult any items in transit of our own; the items in transit were those that might have been drawn against the correspondent bank, and the items of the fifteenth, for instance, when they got our word on the sixteenth, if the figures would have shown some items in transit, then I would have to include in order to make it balance.

Q. You do not apparently understand my question? A. I guess I don't.

Q. I assume an item in transit to be a deposit going from the Roseville Trust Company to the correspondent bank, and which was in transit at the time the examination was mad e or was said to be in transit, and which I will assume accounted for part of the discrepancy which would always be observed between the correspondent's balance on the colse of a given day and the Roseville Trust Company's balance on the close of that day. Now I say did your committee or Mr. Sexton or anyone that you observed to do it or heard discuss having done it, verify the arrival at the correspondent bank of the reputed deposit then in transit?

Mr. Stiefel: I object; a purely suppositious case is put, and the question is asked with reference to a suppositious case, whether it is a fact, whether this witness knows what Mr. Sexton did with regard to suppositious fact.

The Court: You can only ask with regard to his own knowledge.

Q. Do you know whether or not any of those items in transit that you have referred to were items said to be in transit from the Roseville

Trust Company to the correspondent bank? A. I couldn't tell that definitely.

Q. And so far as you can recollect there were no such items in transit concerned in any of these reconciliations? A. I cannot say that; I can only say that the books were shown to agree or we wouldn't have passed them.

Q. Do you recall ever having known in the instance of any of these examinations of an inquiry having been made of any correspondent bank with a view to learning whether any items said to be on the way there for deposit had arrived? A. These items did not always agree on the face; I cannot answer your question categorically.

Q. I think if the question is read. I asked him if he recalls any instance. A. No, I will answer it no.

Q. Assume then that the items in transit which you have any recollection of were items going the other way, that is to say, items drawn on the correspondent bank which had not been charged or arrived there yet at the close of the day of the examination; is that correct? A. That question is a little misty.

Mr. Stiefel: He asks if the assumption which he makes is correct.

Q. Since you have no recollection that any of those specific items in transit were those which were deposits from the Roseville Trust Company to the correspondent bank, I assume that those you have any recollection of were items drawn on the correspondent bank by the Roseville Trust Company; is that correct? A. I don't think I can answer that question plainly, it is not clear to me.

Q. What sort of items in transit did you have in mind when you used that term? A. Items that are in the mail, where the books did not agree and items in the mail would make them agree.

Q. In the mail going which way? A. Either way; Mr. Sexton, as I said before, did that himself, I didn't do that specifically, I simply went over it with him after he received the letters.

Q. Do you know whether or not the correspondent bank after having given the balance as it existed on their books at the close of the day of your examination was requested to send you or Mr. Sexton or any other member of the board vouchers or statements representing checks drawn on the correspondent bank on or before the close of the date of your examination that day? A. I do not recollect any such transwhich had not been charged on their books on action.

Q. Now then as to the footings of the general ledger; I assume from what you have said that one or another of the members of the committee made an inspection or verification of each of the several items of assets and liabilities on the Trust Company's books; is that correct?

Mr. German: I object to this as not being the proper subject of cross-examination and entirely foreign to Mr. Stiefel's direct-examination.

The Court: Well, I have said that I think Mr. Stiefel's examination threw upon the inquiry as to the care which this witness exercised in the discharge of his duties as a member of the examining committee.

Q. I will withdraw that question; I think it is well understood. Now then, Mr. Banister, at any stage of the examination did your committee add up the several items of assets which you had examined or purported to examine and several items of liabilities and compare the two footings? A. Why the necessary figures were made to find that the books were in agreement.

The Court: That is not exactly the question.

A. Do you mean to say did they—

Q. (Question read.) A. Why the comparisons were made; I didn't do that part of it myself, I cannot tell exactly how it was done.

Q. On the occasion of any examination did you ever foot up the liabilities and foot up the assets? A. I don't think I ever did it personally.

Q. Or either of them?

The Court: Suppose you wanted to declare a dividend, either the regular quarterly dividend or a special dividend, would you not be obliged to find out whether or not there was a surplus from which the dividend could be declared?

A. I would take the word of the officers for that.

Mr. Stiefel: May I say this, these examinations of course did not coincide, or there is no evidence to show that they coincided with the consideration of whether a dividend should be declared.

Q. Now these collateral loans, that was one of the two portions of your particular part of the examination, amounted to around fifty thousand dollars, fifty or fifty-one thousand dollars, didn't they as a rule? A. I do not recall the totals, something like that, I do not recall.

Q. And the mortgage loans, which was the other half of your work, was also relatively insignificant part of the assets, is that right?

Mr. Stiefel: I object to the characterization "insignificant part of the assets."

Q. Relatively. A. It was examining that part of the assets which was given as my duty, I was delegated to examine those things and I do not remember the total items.

Q. Did you at any time have any examination personally of any of the liabilities? A. I went over the notes.

Q. The liabilities of the institution? A. Oh, the liabilities. That means the depositors' ledgers?

Q. Well, any of the liabilities of the institution? A. I once helped with the tabulation of figures for the depositors' accounts, I remember doing that once.

Q. Now you say that you made inquiry of J. P. Morgan Company about collaterals? A. I did not say J. P. Morgan, I said a member of that organization.

Q. A member of that company; what member was it? A. It was a man by the name of Reighly.

Q. Did you ask him about the value of those? A. I gave him a list of them and he gave me the price.

Q. Was Welch Grape Juice one of those securities? A. I am not sure that that was on the list I gave him, but I think my recollection is that he told me that that had no market, was a close corcorporation.

Q. Was it part of your work in connection with

the May examination or any other examination to ascertain values of collateral or values of assets, notes, for example, bills purchased, and report back to the directors as to whether or not the value was there as carried on the Trust Company's books or should be reduced? A. Why we recommended reductions in a good many cases.

Q. Did you after your examination of the Scarlett asset make any recommendation of reduction? A. We did, and you will find that in the minutes of our report.

Q. And to what extent?

Mr. German: Won't the minutes show that?

Q. I will withdraw the question. Now I show you attached to a page of the minute book what purports to be the report of your examining committee dated May 22, 1913, and ask you if that is the report you have just referred to? A. Yes.

Q. And ask if that is also your signature? A. That is my signature.

Q. You will find there what recommendation respecting the reduction of the Scarlett line? A. I find a memorandum here that a note of the Stevens—Rye Company was overdue.

Q. That is what you had in mind when you say you reported a recommendation that the Scarlett line should be reduced? A. That you will find in a previous examination to this.

Q. Then there was no such recommendation in this examination? A. No, there was not; that was the time when the Scarlett matter was, they were trying to liquidate it entirely, and that was the reason that brought out that statement that I got

from him to find out if he was worthy of any credit.

Q. Do you recall on the occasion of any examination which you made finding pages missing from the bills purchased book? A. I do not.

Q. Do you recall having been present at a conference at Mr. Munroes' office respecting the discovery that pages were missing from the bills purchased book? A. I do not.

Q. Or any irregularity at all respecting the matter of bills purchased or the records? A. I do not.

Q. Or any of the assets?

Mr. Stiefel: I am perfectly willing that Mr. Hinds shall examine as his witness this witness to any extent, but then I want to have the right to cross-examine, and I think we are going far afield.

The Court: No, I think this is cross-examination.

Q. Now you have referred to having obtained statements from the American Exchange Bank of the condition of accounts of those who had dealings with both institutions, and I will ask you whether you did that in the instance of Raymond E. Smith? A. You either mis-spoke yourself or else I can't answer it.

Mr. Stiefel: It is American National Bank.

Q. American National Bank? A. No, sir.

Q. He was one who had dealings with both institutions, was he not? A. He had, yes.

Q. He was an endorser? A. I won't say to what extent, but I know he had some dealings.

Q. You said you did not make any such com-

parison? A. I did not, there wasn't any occasion, the occasion did not arise.

Q. Now I show you what purports to be your report as of the previous examination to May, 1913, namely, that of December 14, 1912; that is your signature, is it not? A. Yes, sir.

Q. Will you say whether you find any recommendation there respecting a reduction of the Scarlett line? A. I do not see it in that report.

Q. Now you have said that you did make an examination of Mr. Scarlett's financial condition? A. I did.

Q. In connection with one of those two examinations? A. Yes, sir.

Q. Did you find facts indicating to you that his line should be reduced? A. The matter must have been treated orally instead of in a written report, because—

Q. Well, did you find that the asset was being carried at an excessive valuation on the bank's books when it was being carried at par as it was, did you find that excessive?

Mr. Stiefel: I object, if your Honor please, there is no proof here yet that it is being carried at par or at its face value.

The Court: Let the witness state what his recollection about this matter is.

A. What is the question?

Q. What is your recollection as to what value your committee found that the Scarlett line of notes should be carried, whether at par or at something less than par; I do not ask you for the figures in thousands but ask for your recollection as to whether you found that the value should carried at an excessive valuation on the bank's

books? A. I do not recall any discounting of the items, I think the items were taken at par, if you mean taken at their full value, and he was asked on a number of occasions to have the account reduced.

Q. Now will you refer to the memorandum which you first used in direct-examination to refresh your recollection, I guess it must have been the second one, and turn to the note at the bottom "Scarlett seventy-five per cent," and see if you can now—A. Seventy-five shares that reads, and I don't know what that means, that is just a scratch memorandum and I cannot recall.

Q. What is your recollection as to what that referred to? A. I haven't any, I just said, it was just a memorandum I made at that time probably to bring it up again.

Q. Do you recall whether the Oakland Motor Products Company had banking dealings with both the American and the Roseville? A. Yes.

Q. Did you procure any statement from the American with respect to comparing their dealings and accounts? A. I do not recall a statement about it, I remember the matter was discussed a number of times.

Q. Raymond E. Smith was an endorser of that paper also, was he not? A. Yes.

Q. Have you any recollection what amounts were involved in the Home Ice & Products Company's dealings with either of those banks? A. I haven't a recollection as to the amounts, no, the matter is too old for me to recall the figures.

Q. Do you recall whether the Oakland Motor Sales Company was involved at both institutions with Smith's endorsements? A. I recall it was

at one of the institutions, I do not remember which one or how much, the matter is most too long standing for me to have recollection.

Q. Don't remember which institution? A. Don't remember which or if both I wrote them both.

Q. You knew at the time Mr. Smith was an endorser of the paper in both instances, did you not? A. Well, yes, I knew that he was an endorser, but my recollection is that he hypothecated his shares in the Roseville Bank to the American National; that is not absolutely clear, but something of that sort was involved.

Q. Did you bring that fact to the attention of the other directors of the Roseville Trust Company? A. I do not remember doing it in the directors' meeting, but it was spoken of personally with some of the directors.

Q. Do you remember who you spoke to about those facts? A. I do not.

Q. Did anyone assist you in your work as a member of the examining committee in going over the collateral loans? A. Why I would say no, although I referred some questions to some of the other members when questions arose, I asked some of the other members what to do with it.

Q. You did your own tabulating of the collateral loans? A. Those memoranda I made myself, yes.

Q. As you counted them up did anyone help you in doing so? A. I do not recall it.

EXAMINED by Mr. Cornish:

Q. I show you report of the examining committee for December 7, 1910 and ask you to read that

paragraph in it? A. This report of December, 1910, we observed one note for $10,000 signed by J. B. Scarlett and payable to himself; there is one two thousand dollar note drawn by the Stevens-Rye Company and endorsed by Mr. Scarlett; in this connection we would recommend that Mr. Scarlett either change his personal note to a collateral loan or assign to the bank twelve thousand dollars life insurance, which would amply protect the company in event of the death of Mr. Scarlett; that was probably the reference I had; we hammered at that from time to time.

Q. And that was back in 1910? A. Yes, according to the record.

Q. And what was the course of action of the directors subsequent to that time in regard to the Scarlett account? A. Why we took over that insurance that was referred to and held that until the bank closed its doors, I think, as collateral against that loan.

Q. Were there further efforts to liquidate that account from time to time? A. Efforts were almost unceasing.

EXAMINED by Judge Collins:

Q. Mr. Banister, you have had considerable experience as director of financial institutions, have you not? A. The American National Bank I was vice-president of, and I was director in this Roseville Trust Company.

Q. How long have you been a director of the American National Bank? A. From its incipiency.

Q. When was that? A. About the same time that this bank was opened.

Q. Have you had experience as a member of the examining committees of financial institutions? A. No, sir, no previous experience to that, not before this Roseville Trust Company experience.

Q. Had you been on examining committees of the American? A. No, sir.

By Mr. Stiefel: Q. Do you know whether Smith had loaned any money of the Roseville Trust Company? A. How is that?

Q. Did Smith loan any money of the Roseville Trust Company? A. That was his?

Q. No, did he personally borrow any money? A. Oh, borrow.

Q. Yes, I should say borrow? A. I think he did.

Q. Are you sure about that? A. I am not sure, I can't say, the records will show that.

Q. During the course of your several years' activity as a member of the examining committee your work was not confined to the examination of these collateral loans? A. No, sir.

Q. You were on the very first examining committee, were you, do you remember? A. I don't recall what order.

Q. But very early in the day of the bank? A. A number of times, I cannot recall how many now.

Q. You do not pretend, Mr. Banister, except as your recollection is refreshed by these memoranda, to be able to distinguish one examination from another examination at this late day, do you? A. No, I would not.

Q. Do you know whether these are the only memoranda that you prepared during the course of your many years' experience as a member of

that committee? A. They are not the only ones but the only ones I happened to put in a pigeon hole and found them there.

Q. What was your custom as a member of this committee with regard to making memoranda during the course of your examination? A. My plan was to make all questionable items subject of memoranda and hand it to the chairman of the committee for his further investigation.

Q. Would the other members of the committee make memoranda? A. I judge so, I wouldn't answer for them.

Q. Did they discuss with you after your labors were finished various questions? A. Yes, we discussed various questions.

Q. You do not pretend to be able to tell us at this day just when and what questions you discussed, I presume? A. Surely not.

Q. How many years have you been in business in this city? A. About thirty-five.

Q. You are connected with the Banister Shoe Company? A. I am president of the Banister Shoe Company since my father's death.

Q. Is that a large or small concern? A. That depends on, we think we are a large concern, we manufacture high-grade shoes to the extent of about a million and a half a year.

Q. Do they keep books of account at your company? A. Certainly do.

Q. Do you come in contact with those books of account? A. I have almost daily contact with them.

Q. During the course of the history of the existence of the Roseville Trust Company did you come in contact with the books? A. In the same way.

Q. Can you compare your methods of dealing with your own business and dealing with those of the Roseville Trust Company when you were a director of a member of its examining committee? A. Why, in the question of our own books we trust our bookkeeper to make the figures, and I sign all papers and swear to papers for which he gives me the figures.

Mr. Hinds: If your Honor please, I could not have anticipated that answer from the question, and I certainly ask to have it stricken out as totally irrelevant. I might point out also that counsel is opening up a very wide new field for further cross-examination.

Mr. Stiefel: I want to show through Mr. Banister that he is a business man and that he brought to bear on his examination of the affairs of the Roseville Trust Company his experience and his knowledge and his care which he observes in his business. Now I have no doubt that is the fact, I don't know, it may not be.

Mr. Hinds: On the collateral loans and mortgages?

Mr. Stiefel: No, generally.

The Court: Do you want to pursue the matter any further? It seems to me you are going a little away from the question involved when you go into a detailed examination of Mr. Banister's private business.

By Mr. German: Q. What did you do to satisfy yourself either by statements from Mr. Sexton or otherwise concerning these items in transit

with correspondent banks? A. Why, Mr. Sexton completed the transactions and made it clear that they would balance, the books were in agreement; I didn't do any of the correspondence with the other banks.

Q. You relied upon Mr. Sexton's statements? A. Oh, yes; I saw his answers and even saw the figures where they balanced, and he said they did, and there was no question about it.

Q. You were satisfied? A. I was satisfied with his figures.

By Judge Collins: Q. You participated in a great many examinations of the Roseville Trust Company, did you not? A. Yes, a number.

Q. About how many? A. Well, I think I was on the committee in 1910, perhaps earlier than that, my book shows 1910 that we just read.

Q. And so on down to date? A. And so on down to date.

Q. Wasn't it always the custom in the examinations to divide up the labor? A. It was, sir.

RE-CROSS-EXAMINATION by Mr. Hinds:

Q. You say Mr. Sexton completed the transaction; do you mean that he did anything other than to take the reported items in transit and compare those with the difference between the correspondent's balance and the Roseville Trust Company's balance and see that they arithmetically tied up with one another? A. He satisfied himself that they were correct and that satisfied me.

Q. Well, did that satisfaction so far as you know complete any further inquiry in addition to getting the balance from the correspondent bank or any inspection of the vouchers corresponding

to these alleged items in transit? A. Well, I would rather not answer that because I couldn't be clear enough.

Q. You don't remember he did that in any instance? A. Mr. Sexton can answer that better himself than I could.

Q. You say your directors considered the Scarlett ten thousand dollar note which in 1910 you said you were a little doubtful about being amply protected on, because he turned over some in surance policies?

Mr. Cornish: I object, he didn't say that, simply read from the minutes.

The Court: No, I do not think he said that.

Q. Well, you used the expression "amply protected" in connection with what your board of directors found in 1910?

Mr. Cornish: I object; the minute book shows what expression was used.

Q. Now you referred to some insurance policy as having been deposited as collateral; do you know what the surrender value of this policy was?

Mr. Cornish: I object, on the ground that that is not cross-examination.

The Court: I think it is a perfectly proper question to ask the witness if he knew at the time when the policy was transferred what its surrender value was.

Mr. Cornish: Do you recall?

By the Court: Q. Do you or not? A. I think the minutes there gives the value.

By the Court: Q. It was a ten thousand dollar policy? A. Don't it say there that the cash in value was $5,000? That is my recollection.

Q. You do know, however, as a business man, that the surrender value was greater two years later than it was at that time, do you not? A. I do.

Q. Do you recall having this part of the Commissioner's letter read to you as a director in 1912, the letter being dated October 28, 1912, and being in evidence: "The Examiner reports that it is conceded that director Scarlett's financial condition is very bad; that he is trying to run a hat factory at Metuchen, at the same time is carrying on the business of a civil engineer and land speculator at Newark; that he is having great trouble in getting raw material for his factory at Metuchen; that the real estate market is so depressed that his land schemes are eating themselves up, and that his creditors are holding meetings to see what is best to do. The institution holds a single name demand note of his for $10,000, which has remained at that figure for some time. As reported it is intended to be secured by one hundred and thirty-five shares of the common stock of the Graylock Manor Company, and by certain life insurance policies written on the twenty payment life plan, having a face value of $25,000, and a cash surrender value of $2,425." Do you recall having that portion of the letter read to you? A. Why, that letter I think I heard.

Q. Can you recall that it was stated that it is intended to be secured by certain life insurance policies of the surrender value of $2425; do you recall that? A. I do not recall the figures.

Q. (Continuing): That the Graylock Manor Company has a capital stock of $100,000 of which $60,000 is common stock and $40,000 preferred;

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that the preferred stock seems to have preference both as to assets and dividends, although the Examiner was unable to confirm this, not having seen Mr. Scarlett, but if it is so the common stock would seem to have very little value. If a petition in bankruptcy were filed against Mr. Scarlett, it will probably take years to realize on his real estate investments. On the other hand, if he is not disturbed, he may prefer some creditors to others, with the result that somebody is bound to suffer. The Examiner is quite clear in the opinion that the $10,000 loan will show a loss eventually, and he accordingly allows the same as an asset, to the extent of fifty percent only, equals five thousand dollars. Under the circumstances it would seem wise and prudent for the institution to reduce the loan on its books to $5,000 and carry it as an asset at not more than that figure."

Mr. Cornish: Now, I do not know that any question has been asked in regard to it, but I do not think any question should.

Q. Do you recall having that letter read to you, that part of the letter?

Mr. Cornish: I object to that. This refers to the time two years after the recommendation of the examining committee and obviously has nothing to do with it whatever. The circumstances of Mr. Scarlett undoubtedly changed in those two years, but whether they did or not there is no proof in this case; it does not refer to the question of negligence of the examining committee as of the time of the examination in 1910 certainly, and it seems to me it is not relevant at all.

The Court: This witness continued a member of the examining committee right through as I understand it, and this matter of examining securities of this sort was the special part of the examination that was entrusted to him personally. I think it is perfectly competent to ask him about this.

Q. Do you recall having that portion of the letter read to you in October, 1912? A. I recall the items in that letter, but I would not be able to say that they were just as you read it, because my memory cannot tell me.

Q. Two months after that, to-wit, December 14, 1912, you took part in an examination, did you not? A. Yes, I think so; the records show.

Q. You made a report following that examination, did you not? A. If we made the examination we made the report.

Q. And you have testified, and it appears from your report that you made no recommendation regarding carrying the Scarlett loan at a less valuation than its par value?

Mr. Cornish: I object, the report shows for itself what it is.

The Court: Well, the report shows that he did not; now you can ask him whether outside of that report he did anything.

Q. Other than what is contained in your written report did you or any other member of the examining committee recommend to the directors in December, 1912, two months after the receipt of that letter, that the Scarlett loan should be carried on the books at a depreciated value? A. I do not recall that we did.

Q. And do you recall that you made such recommendation in May, 1913, in addition to anything that is contained on your typewritten report as of that examination? A. I cannot recall that specific item, but I know that the Scarlett matter was probably considered in addition to each report that we made.

By Mr. Cornish: Q. Mr. Banister, do you know whether prior to the examination of the examining committee, following the Commissioner's letter which has just been read, the Commissioner's letter had been answered by the president of the Roseville Trust Company? A. I am quite sure it was, the record ought to show that, I am quite sure it was.

Q. Do you recall whether that letter took up the items referred to in the Commissioner's letter? A. We always did, that was our custom.

Mr. Cornish: That letter is in evidence and speaks for itself, and I do not think it is necessary to go into that, the matter had already been attended to.

By Mr. German: Q. You say in answer to Mr. Hinds' question that the directors took up this question of Scarlett? A. Yes.

Q. With a view to what? A. With a view to reducing the loan or getting sufficient collateral.

By Mr. Hinds: Q. The reply of Mr. Odell was read to you, was it not? A. I think so.

By Mr. Hinds: Q. And it contained the following statement, did it not: "It is our intention to get an up-to-date"—this was in November, 1912—

Mr. Stiefel: I object; this is an exhibit in evidence and speaks for itself.

Mr. Hinds: I have to call it to his attention, because it expresses an intention to do something, and then I will ask him if he did in fact do so.

The Court: I understand the witness to say that no action was taken outside of getting the policy; if I am mistaken about that the witness may correct me; the letter itself is in evidence. Now do you remember whether either you or anybody else in the board or the board itself took any other action with reference to the Scarlett matter than the getting of this policy?

A. Why we did take other action.

By the Court: What was that action? A. We had personal interviews with Mr. Scarlett asking for reductions, and did everything in our power to get—

By the Court: Q. What else, if you did anything but interview Mr. Scarlett you may state it now. A. We insisted on reductions and got some little reductions with each renewal of his notes, and those reductions didn't amount to a whole lot because he was not in a position to handle his affairs, as he was involved in these other matters, he couldn't handle his affairs as he wanted to, he couldn't liquidate our paper because of his being involved in this new enterprise that he started.

By Mr. German: Q. Did you make any further demand or did you make any demand for further collateral or security? A. We made demands every time we saw him.

By Mr. Hinds: Q. Was the ten thousand dol-

lar note ever reduced; you said small reductions were made, was the ten thousand dollar note ever reduced a nickel? A. I cannot recall that fact; there were some little reductions made.

By Mr. Hinds: Q. And following the November twenty-fifth reply of your president to the Commissioner was any additional security ever produced from Mr. Scarlett?

The Court: To your knowledge.

By Mr. Hinds: Q. To your knowledge. A. I can't say, I don't know; I know we asked for it.

By Mr. Hinds: Q. Was the face value of the note ever reduced at all at any time, of that ten thousand dollar note, on the books of the Trust Company, either before or after? A. I cannot answer that.

EDWARD D. DUNN, re-called:

Direct-examination by Judge Collins:

Q. You have testified that you were never on any examining committee of any institution, financial institution, except on the one occasion in April, 1912, in the Roseville Trust Company; were you ever a director of any financial institution except the Roseville Trust Company? A. No, I was not.

Q. You testified that you never knew of the letter written by the Banking Department in 1909; you were not asked with respect to the letter of October 2, 1912, and I ask you now about that. I understand that you were not present at the meeting at which that letter was read, the meeting of the directors; that was during your illness, was it not?

Mr. Hinds: I object to that as calling for something that is already in the minutes.

Q. You were not present at that meeting? A. I appeared at the meeting but I was excused by the president before the meeting was held.

Q. You were not present when the letter was read? A. No, sir, I don't know any of the business of the meeting.

Q. Mr. Odell in a letter in evidence says: "I have submitted your letter to every director on the board with the exception of two, who were both out of town and have been for several weeks. Upon their return, however, I shall be very much pleased to submit your communications to them." Was this letter ever submitted to you? A. No, sir, it was not.

Q. And you never knew anything about it, nor was the reply that has been put in evidence of the president ever submitted to you? A. No, sir, it was not.

Q. That was dated November 25, 1912. A. No, sir, it was never submitted to me.

Q. You knew nothing about those letters? A. Not until I was served with the complaint here.

Q. Did you ever borrow from the Roseville Trust Company any money except the one loan of ten thousand dollars for which you made written application? A. Not while I was a director.

Q. While you were director you mean? A. Except the renewal of that note, which I also applied for in written application.

Q. Now, Mr. Dunn, what was the reputation of Mr. Smith personally and as a financial man? A. He had the reputation of being a very hard working man and very industrious and very honest

and very simple man in all of his tastes and his expenditures, and a very fine banker, and it was quite the opinion of the majority of people, the great majority of people in Roseville that his ability as a banker and his energy and hard work was going to and was already raising a new trust Company, the Roseville Trust Company, well beyond its rival on the same block, and it was his reputation for being energetic and being very pleasant and very conservative, as I always understood it, that was building the bank up.

Q. Did you down to the time of the closing of the trust company have any suspicion of his dishonesty? A. Not any whatever.

Q. Did you have any suspicion or belief that he was financially irresponsible? A. No, sir, I did not; I would not have left such large amounts of money in it if I had.

Q. Did you have any reason to suspect or did you suspect the honesty of Mr. Jennings? A. No, sir, I did not.

Q. Or of any other of the clerks in the bank? A. No, sir, not any.

Q. Or of any of your fellow directors? A. No, sir, not any of them.

Q. Did you or not have perfect confidence in the directors? A. I had perfect confidence in the directors.

Q. Why did you do nothing more than you have testified that you did on the occasion of the examination of April, 1912? A. Because it took so much time to accomplish that, and the reason was that it has been testified to in this trial that that was usually the work of two men to look over and check the bills purchased, and consequently

I did the work of two men, and it took all the time almost that I was there, which was late into the evening, to accomplish that.

Q. You checked them alone by yourself? A. I did, sir.

Q. Were you or not informed that the custom of the examining committees doing the work was to divide up the labor? A. I was so informed.

Q. Did you have confidence in the fellow members of that committee? A. Absolute confidence.

Q. Whatever they would report you would believe to be true? A. Yes.

Q. And when you made your report you expected them to believe that to be true? A. I did, sir.

Q. And therefore you joined in the report which was the work of the different members working separately?

Mr. Hinds: I object to further leading this witness. This witness is obviously an intelligent business man and Judge Collins has testified practically from the beginning and this witness has said yes or no.

Q. Why did you join in a report certifying to facts when you had yourself personally only listed part of those facts?

Mr. Hinds: And the answer you will find contained in the previous question.

A. No, you won't.

Q. (Question read.) A. Because it was the only possible way for a report to be made, for an examination to be conducted; it was not physically possible for each man to do all of the work, if so it would be only necessary to have one man, and there was a committee for the ex-

press purpose of dividing the work, and I joined in it because I had and I have absolute faith in every man that worked with me, as they had with me; I went very carefully over every item and took a great deal of time, and I was watched and checked up by the chairman who came to see and explain the great importance of the examination so that I would be careful, and I had every reason to believe and still do believe that he went to every branch of it the same way, to see that they were carefully checked up in all of their work.

Q. You have testified that at the meetings which you attended of the directors you gave careful attention to what occurred? A. Yes, sir.

Q. Did you listen to the reading of the reports of the executive committee and to the reports of Mr. Smith? A. Yes, sir.

Q. As treasurer of the institution? A. Yes.

Q. Did you ever observe anything in any or either of those reports to awaken suspicion in your mind that they were not truthful or that they disclosed a precarious condition of the trust company? A. Most emphatically no, there never were any such.

Q. Did you believe those reports to be true? A. I did, sir.

Q. Did you have any knowledge or suspicion of the alleged thefts of money by Mr. Smith? A. No, sir, I did not.

Q. Or by Mr. Jennings? A. No, sir.

Q. Did you have any knowledge or suspicion of the alleged overdrafts referred to in the bill of complaint? A. No, sir, I did not.

Q. Had you any knowledge or suspicion of alleged improper payments out of the funds of

the trust company, as stated in the bill of complaint and set forth in the schedule? A. No, sir, I did not.

Q. You have testified that on one occasion Mr. Smith told you of large drafts of depositors threatening to reduce the cash reserve lower than the law required? A. Yes.

Q. And you made deposits? A. I did, sir.

Q. Had you any knowledge, belief or suspicion that at any time the cash was reduced to an amount lower than the law required? A. No, sir, I did not.

Q. Did you have any knowledge of the action of the board of directors in permitting Mr. Smith to make loans up to a certain amount over his own signature, did you have any knowledge of that? A. Only up to the amount of a thousand dollars he was able to buy purchased paper for the bank.

Q. You knew that? A. Yes.

Q. You did know that the directors had authorized him up to the amount of one thousand dollars? A. Yes.

Q. You never knew of his loaning on his own authority alone above a thousand dollars? A. No, sir, I did not.

Q. You participated at the declaring of dividends and received dividends? A. Yes, sir, I did.

Q. Had you any knowledge, belief or suspicion at any time when dividends were declared and you received your dividends that the condition of the company did not warrant the declaration of a dividend? A. No, sir.

Q. Did you ever know or suspect any irregularity whatever in the conduct of the affairs of the bank? A. No, sir, never.

Q. I have asked you a general question, but I will particularly refer to paragraph twenty-seven of the bill in which it is alleged that the report of Mr. Smith did not state the true facts as to the amount of deposits; had you any knowledge of the falsity of that report or suspicion? A. I hadn't any knowledge or suspicion.

By Mr. Stiefel: Q. You used the word "bills purchased" during the course of your examination. I am not sure, but didn't you tell me at one time about an alteration in the practice of the bank with reference to the furnishing of money or the passing of a credit—

Judge Collins: Mr. Smith testified to that, and not this witness. Mr. Smith testified that originally when they bought paper they took some formal document, and that the Banking Commissioner told them that that was not necessary, so that after that they did as other trust companies do, and they do, and as your Honor has said it amounts to a discount although they call it bills purchased; Mr. Smith at the outset was careful to take formal assignment of the bill, but the Commissioner told him that was not necessary.

Mr. Stiefel: You are sure that is on the record.

Judge Collins: Yes, I remember it. This witness would not know that.

CROSS-EXAMINATION by Mr. Hinds:

Q. Did you at any time inquire what means were being employed by examining committees while you were a director in verifying the reputed

amount of the assets and liabilities of the bank, not necessarily when you were on the committee but at any time? A. Would you repeat that question?

Q. (Question read.) A. Examining committees of the Roseville Trust Company?

Q. Yes. A. I do not quite understand what you mean.

Q. (Question read.) A. Yes, I think I did.

Q. From whom did you make those inquiries? A. Why the first time I appeared at the bank to participate in this work it was all very carefully explained to me by the chairman.

Q. And who was he? A. I think it was Mr. Sexton as I recall.

Q. You say when you were on the committee your own work was of such nature that it took all of your time to do that one thing? A. No, I didn't say that.

Q. Well, we will leave that. What would you say as to how much of your attention was occupied on your own particular division of the work? A. Well, the greater part of it, almost all of it.

Q. But you did make inquiries and were informed by the chairman—that was Mr. Sexton, was it not? A. Inquiries as to what?

Q. Inquiries as to what means were being taken by the other members of the committee to verify the various liabilities and assets? A. I accepted his explanation, I did not catechise him on it.

Q. Do you recall what explanation he gave you as to how they would verify the result as a whole, after making verification of the different liabilities and assets? A. Yes, he talked over with me

to see what part of this work I was best qualified to do, to inquire if my knowledge as a bookkeeper or as an accountant or as an expert in notes or matters of the different branches of the work were nearest the work I could do best, because he was anxious to get the ones that were best qualified for separate work to do that part of the work. I told him I didn't know very much about bookkeeping, and that when he mentioned the bills purchased I told him I thought I could qualify as an expert in that.

Q. I guess you did not understand my question. The question was as to whether he told you what means were going to be employed to verify the result of the examination as a whole, to assemble the various pieces of work done by the different members of the committee and see whether the bank was out half a million dollars or it was all there as an aggregate thing? A. Yes, I think he made it very plain.

Q. And what did he say? A. That the result of each man's work would be compared with the records of the bank; if they tallied they were correct, if they did not tally they were not correct.

Q. And compared with the records as found where? A. In the bank's records.

Q. Any particular record? A. No, I guess all the records.

Q. He did not tell you that there would be one particular record of the bank which would purport to summarize the liabilities and summarize the assets, and that the verification would be made with respect to each one as it was found at that place, did he? A. No, he said they would go over all the records.

Q. You did not know, did you, in what book of the bank the assets and liabilities were summarized? A. No, I don't think I did.

Q. Did you thereafter learn in what book the summarization appears? A. No, sir.

Q. Was there any summarization made of the assets and liabilities as the committee found them to exist other than in the books of the bank? A. I think so.

Q. In what form? A. I don't know, but I guess there was a memorandum taken of it to compare with the records of the bank.

Q. You do not recall having seen that memorandum? A. Only so far as it related to the work I did, which was very careful and exhaustive.

Q. You did not foot up the column of the assets or liabilities on that memorandum, did you? A. No, I did not.

Q. You did not take the several items of assets and liabilities as they appeared on that memorandum and compare them with the reported corresponding items as they appeared in any book of the bank, did you? A. Oh, no, that was outside of the province of my work entirely.

Q. Did Mr. Sexton in explaining the work to you tell you how they were going to make ultimate verification of the bank's condition as a whole after each person had reported as to his particular asset or liability? A. I do not recall that part of it except I know he took a great deal of time to explain it to me.

Q. Did you inquire from him as to that? A. No, I did not, not that I recall.

Q. You do not recall at all that any member of the committee made any footing of the assets

or liabilities in your presence, do you? A. I do not, no.

Q. You don't remember when that was done, do you? A. I was apart from all the other members of the committee, I was out of the cages, not near any of the books.

Q. Do you recall when it was done, or that it was done? A. I wasn't near the other members of the committee, I would not know.

Q. Do you recall whether the matter or method of examining the bank's assets and liabilities was ever the subject of a discussion at any meeting of the board of directors? A. It never was.

Q. And can you state of your own recollection that at no meeting at which you were present any director ever inquired as to what means were being employed to verify whether the assets were there or the liabilities fully stated? A. No, sir.

Q. Your recollection is that there was no such inquiry made; is that right? A. There was never any question brought up as to the method used in examining the bank; of course I was only a director for a little over a year and a half.

Q. Did you ever inquire or seek to find out from the minutes what had taken place at meetings of the directors at which you were not present? A. Only so far as they read.

Q. If you missed two meetings you had no knowledge then from the minutes of what occurred at the first of the two; is that right? A. No, sir, it is not customary to do that.

Q. You never made any inquiry as to what did happen at the first of the two where you missed two in succession? A. It would have been impertinent for me to do that; I did not do it.

Q. Or the first two if you missed three in succession? A. No, sir, it would have been impertinent, and I didn't do that.

Q. As to Mr. Smith's reputation, do you recall that at any meeting of the directors or any assemblage of the directors at which you were present the question of his domestic troubles was considered? A. Never, never heard of them.

Q. Or any difficulties he may have had with any women? A. Never heard of it.

Q. This is the first time you ever heard of any suggestion of that kind? A. Oh, no, the paper was full of a lot of things.

Q. When was that? A. After the bank closed; I never heard of them before that.

Q. What knowledge, if any, did you have while you were a director of his owning and running automobiles? A. I knew he had an old automobile, it wasn't much of a car, that is all.

Q. Now you say that you had perfect confidence in your fellow directors? A. Absolutely, yes.

Q. Did you have perfect confidence in Mr. Scarlett? A. I had no reason not to have confidence in him.

Q. Did you have perfect confidence in him? A. I did not suspect him.

Q. Did you have perfect confidence in him? A. Yes, I think I did.

Q. You were in the real estate business that time, were you not? A. I owned a great deal of real estate, yes.

Q. You knew he was a real estate speculator, did you not? A. Yes, I knew he was interested in real estate developments, if that is what you mean.

Q. You knew he was a speculator? A. No. I didn't know he was a speculator. What is a speculator?

Q. Well, what is a speculator according to your understanding? A. According to my understanding he is a man that will go out and take a blind chance of losing a lot of money.

Q. Mr. Scarlett didn't take any chances with the real estate he sold? A. Not to my knowledge at that time, I thought he owned all that property.

Q. Did you regard him as a real estate investor? A. He owned real estate and was investing in it, that is my understanding of it.

Q. From your point of view as far as you knew he was an investor in real estate? A. Exactly; of course I didn't know him well.

Q. Did you ever see any of his financial statements? A. No, sir.

Q. Ever hear his financial statement discussed at any meeting where you were present? A. No, sir, I did not.

Q. Did you ever knew or hear in the directors meeting of any demands being made on Mr. Scarlett for payment of his indebtedness? A. It seems to me I did.

Q. Did you ever make any personal investigation into his assets? A. No, sir; that was in the hands of another committee.

Q. How many real estate men were there on the board of directors besides yourself? A. There were two I think.

Q. Two others besides yourself; is that your recollection? A. I think so, I am not sure of the other man, the only one I am sure of is Mr. Lurich.

Q. How about Mr. Mott? A. Yes, I understood he was in the real estate business.

Q. And beides those two you were the only other one, as far as you knew, that had anything to do with real estate? A. Oh, no, a great many of them, Mr. Fairlie was quite a large real estate owner, had a great deal to do with it I believe.

Q. Was it ever suggested to you that you as a real estate man should inquire into Mr. Scarlett's reputed assets? A. No, sir; I was a new director and very young man.

Q. You never suggested that you should do so? A. I did not; I took orders, I didn't give any.

Q. And the same answer applies to Mr. Armstrong and his reputed real estate assets? A. What about that?

Q. That it was not suggested that you as a real estate man should make any inquiry and you did not suggest it yourself; is that the same answer? A. Yes, I never heard very much about Mr. Armstrong in my career in the bank.

Q. You testified very positively that you attended the meeting following the letter of October 28, 1912? A. No, sir, I did not.

Q. The meeting at which the letter, the Commissioner's letter of October, 1912, was read, which was read a minute ago, you testified very positively that you appeared but were excused from that meeting? A. Yes.

Q. How did you happen to remember that particular incident at this late date? A. Because it was an unusual incident in my experience in the bank; the executive committee meet immediately before the regular directors meeting, and this night I was suffering, I was very ill, I

was ill for three months after that, and the executive committee held a very long session, an hour or hour and a half or two hours, longer than usual, and I was suffering so that by the time the executive committee was over I asked to be excused, stating that if they needed a quorum and it was absolutely necessary that I would suffer through it, but that I was really suffering, and was ordered away by the doctor, and it made a decided impression upon me, and the president said they had a quorum and would be very glad to excuse me.

Q. How is it you are able now to connect up the date of the meeting with the date of this unfortunate occurrence?

Judge Collins: I object to the question; the minutes themselves show, and all he has testified to is that on that occasion that the minutes show the letter was read he was sick and had to go away; he is not connecting it with something that appears in the minutes when he wasn't there, he is simply stating that on that occasion he went away before the meeting convened.

Q. Did you ever have any difficulty in having your pass book balanced or notice any delay in balancing it? A. No, sir, I don't think so.

Q. Did you know while you were director that Mr. Jennings owned and was driving a car? A. No, sir, I did not.

RE-DIRECT-EXAMINATION by Judge Collins:

Q. At the meetings of the directors at which you were present and the report of the examining

committee of the Trust Company was read, whenever it was presented and read, you heard it? A. I never heard any report read, because I was absent when the other reports were made except the ones in which I officiated.

Q. That is why? A. Yes, I never heard any other examining committee's report.

Q. You were absent? A. Yes, I was very ill once and I was getting married the other time.

Q. The first report was April, your own report? A. Yes.

Q. Then there was one in December, 1912, and you were sick? A. Yes; I never heard of that, never heard it read.

Q. And there was one in May, 1913? A. I was on my honeymoon.

Q. Then I address myself to the reports of the State Commissioner; you saw some reports during your directorship of the State Commissioner? A. No, sir, I did not, I was absent, they were made at the same meetings and I was away.

Q. You spoke of seeing in the newspaper the published statement of the affairs developed by the State Banking Department? A. Oh, no, by the officers of the bank.

Q. I wanted to know what it was you referred to, I recall from memory you referred to seeing something published in the newspaper? A. I did, sir.

Q. What was it? A. The matter I referred to was the printed report that the officers, the president I think, had published, showing the assets and liabilities of the trust company.

Q. Now did you see more than one of those? A. Oh, yes, sir.

Q. When you saw those did you read them? A. I did, sir.

Q. And they were I suppose—the custom I think is to be signed by the president and treasurer? A. I think so, yes, sir.

Q. Some officers anyway? A. Sworn to by a Notary I think.

Q. You read them? A. Yes.

Q. Did you believe them to be true? A. I did, sir.

RE-CROSS-EXAMINATION by Mr. Hinds:

Q. What year or years did you see these reports in the paper? A. The reports I refer to were not the reports in the paper, they were little printed forms issued by the Roseville Trust Company.

Q. Reports in the paper? A. No, the paper, little printed pamphlets.

Q. You did not see any reports published in the newspaper? A. It seems to me I did.

Q. When? A. I do not recall.

Q. Did you notice in reading any of these printed reports or reports that appeared in the newspaper an apparent shrinkage of the amount of deposits of the institution? A. Well, I knew of the shrinkage of the deposits; don't just recall whether I learned it, whether that struck me particularly at that time, but I did know that the deposits were not increasing.

Q. Did you know that during the period that deposits were decreasing the number of depositors almost doubled? A. Oh, yes, I made special inquiry as to that.

Q. Did you make any verification of the fact as

reported that deposits were decreasing or did you accept it from those printed reports? A. Oh, no, I talked it over with all the directors, they all talked it over at the meeting, several meetings.

Q. Further than that you made no inquiry to find out whether it was a fact as reported that the deposits were decreasing? A. I talked it over with the directors; there were several that talked it over with me.

Q. Did you suspect that possibly they were not decreasing as reported? A. Oh, no, I knew money was tight and that there was great stringency at that time in the money market.

Q. Did you make any inquiry to verify the reported fact or the report that the deposits were shrinking, or did you accept that as true because it appeared on the printed report? A. Oh, no, it was not the printed report that convinced me; all of the directors and officers of the bank consulted and discussed it, and I did believe it.

Q. You did believe it? A. Yes, absolutely.

Q. Did you look in any book of the bank by way of testing the truth of the statement that the deposits were decreasing? A. No, sir, I did not.

By Judge Collins: Q. You said you made inquiry to account for the fact that deposits decreasing and depositors increased? A. Yes.

By Judge Collins: Q. What was it it you were told? A. All of the directors were greatly concerned about it and so much so that they made a move to go out and try to get new accounts in, because all of the accounts, new accounts, were small, some savings accounts of only one dollar and other little household accounts that a house

wife would have of less than five or ten dollar balance, and that our large depositors were withdrawing their money.

By Mr. German: Q. You would not attempt to say that each individual director was there and discussed it? A. No, sir, it was taken up at the board meetings.

Q. When was it you say the directors discussed generally the decrease of deposits and means to prevent further decrease? A. You mean about the date?

Q. Yes. A. I don't know but I think it was in the spring of 1913.

Judge Collins: In my absence, if your Honor please, Mr. Hinds offered in evidence and read the answers to certain interrogatories out of a large number submitted to Mr. Dunn, and objection was made that he must put them all in and your Honor permitted him to put in only the interrogatories he saw fit; I think that under the practice I now have a right to put in the other interrogatories and I do so.

Mr. Hinds: I think it was done; his Honor said we might read from any we wanted to but we were obliged to put them all in.

Judge Collins: If it is understood they are all in that is all I want.

ELMER K. SEXTON, re-called:

Direct-examination by Mr. Stiefel:

Q. Mr. Sexton, have you got in your possession any papers relating to your work as chairman of an examination committee of the Roseville Company? A. I have a number of papers; I would take away from the examination certain papers, one time a certain number and another time a certain number, promiscuously, and I have looked them over and I found a few perhaps such that could connect our work with the particular examination, in fact they are all connected with it but it couldn't be connected up, many of them couldn't be connected up.

Q. Have you any such papers with you? A. I have some.

Q. Now what is that paper you hold in your hand? A. This is a copy of the general ledger.

Q. Made by you when? A. Made by me on the date of examination.

Q. Can you tell what examination? A. It was September 27, 1910, I presume that is the date of examination; this is the figures of the general ledger as they appeared on the general ledger, and below is the addition of those figures together with the carrying figure of the addition.

Q. Does that show who made the additions, those carrying figures? A. It shows that in this particular case that I made the addition, they are my figures.

Mr. Hinds: If your Honor please, I did not hear quickly enough, but I did not understand that that was as early as September 1910; we made no claim as to hav-

ing been negligent in failing to find any defective condition at that time; for all we know there may have been the most perfect examination; it is not in issue at all, we do not know about that, we do not make any claims about it.

Mr. Stiefel: If your Honor please, I want to question further whether it was his custom to do that on every occasion. I want to show it was actually done once; if we cannot produce other papers I want to explain why they cannot be produced and show what his practice was.

The Court: I see no objection to the evidence as far as it has gone.

Q. Now will you tell us, Mr. Sexton, what items you examined and what balances you ascertained on the date of that examination?

Mr. Hinds: I make the same objection, it is absolutely irrelevant.

The Court: What is the use of inquiring into an examination that is so far back?

Mr. Stiefel: I will connect it up with the others and show that he did precisely the same thing in the others.

The Court: Well, you say that he made this statement; now you can ask him what he did at other times.

Mr. Stiefel: Furthermore I will offer this in evidence, if your Honor please, I offer this now as evidence in the cause of part of the things done during the course of this particular examination of September 27, 1910, and I call to your Honor's attention that the bill of complaint in this

case alleges general carelessness from the very beginning with respect to every feature of the activity of the officers of the bank and every committee of the bank, and here we have an actual document rescued after all these years from a man's papers in his home as evidence for your Honor to inspect and to determine whether it was made at that time and whether this man is telling the truth, and from that to determine whether he probably did that, as I think he will testify, with regard to the others, although he may not have those papers; I think it should be admitted in evidence, it is too important to be kept out.

(After argument.)

The Court: I do not think it is relevant.

Q. Was there any change in your system from 1913 to 1912 or from 1912 to 1911, and go away back to the commencement of the bank, was there or not?

Mr. Hinds: I object, your Honor, to any inquiry as to whether or not the system was changed; it may have been perfect in 1908 but it was bad in 1912, and that is what we are complaining about.

The Court: I will allow the question, I do not think it is of much consequence; what we want to know is what the system was when the alleged carelessness occurred.

Q. Will you answer that? A. The question was was there any change?

Q. Yes. A. There was no change of any ac-

count, nothing except very minor changes; the general plan of the examining committee was the same from the beginning through.

Q. In 1912 and 1913 did you or did you not take off statements from the general ledger similar to that statement which is now before you there?

The Court: No, that is leading. Why do you not ask the witness what he did in 1912 and 1913, the critical period; that is what we want to know.

Q. Answer the question of his Honor, will you please? A. With reference to the whole of the examination or with reference to this particular trial balance?

By the Court: Q. Counsel for the complainant objects to your using that document. No complaint is made of any carelessness in that year. Now what we want to know is what you did in 1912 and 1913; you can tell us what you did first in 1912 and then you can go on from that and tell us what you did in 1913? A. My question was with reference to the whole of the examination or with reference to what we did in connection with trial balances?

The Court: Well, whatever counsel wants in that particular line.

Mr. Stiefel: I am examining this witness in the light of his former examination, and I do not propose to cover the same ground, but he comes here now with a paper which he did not have before, and he has already told us in a general way what the course of his examination is. Now my object is to show that a system which was

pursued in 1910, and of which I may say I have demonstrative evidence in the shape of this paper, is the same system that was pursued in 1912 and 1913. Cannot I show that?

The Court: He can testify to what the system was in in 1912 and 1913, he can describe it in his own way.

Q. Do so, Mr. Sexton? A. The system as it was through all of the examinations I can testify in a general way only, not to any specific examination, the evidence is the same as I gave on the preceding examination.

Mr. Hinds: Now, your Honor, in view of the witness's—

The Court: The witness is an intelligent man and I do not thnk he will go beyond the question; I am limiting the question to 1912 and 1913, and I want the witness to state what the practice was then.

A. In 1912 and 1913, so far as I can possibly recall, the examining committee met at the bank at about three or a quarter after three o'clock; they were assigned to various lines of examination, sometimes to one line, a man would be assigned to one line and sometimes to another; the various members of the examining committee would take the particular line to which he was assigned, examine the material at the bank and the account in which the material was recorded, check it up, add it up, and bring his result to the general ledger; when we had finished all of the items—and we examined every item on the general ledger—when we had finished all the items we met at the general ledger, or so many of us

as had finished, and there checked up the items on the general ledger, and then the general ledger was added; the accounts with correspondent banks, the letters to those corespondent banks were sent out that day; the individual ledgers were, two of the clerks were put upon the individual ledgers with the machine and they run off the individual ledgers for us in the latter part of the time, that is 1912 and 1913, when the ledgers were very large. All the accounts were examined that day with the exception of the accounts of the correspondent banks, and the accounts in the individual ledger, if we could get through with it that day we finished it that day, if we did not or did not finish it to our satisfaction when we returned on the day that we met to check up the bank balances we went over the individual ledgers as well as the bank balances again. I think that as far as I know that comprises the general outline of the examination as conducted in 1912 and 1913.

Q. That paper that you have there you might call a transcript of the general ledger? A. Yes.

Q. Did you make a transcript of the general ledger on your examinations in 1912 and 1913 or not? A. Not necessarily a transcript, some times we did and some times we did not; we would check up the items on the general ledger and add them right on the ledger.

Q. You would do that? A. Yes.

Q. Can you say positively on the occasion of each examination whether or not you either footed up a transcript of the ledger or footed up the items as they appeared on the general ledger? A. I think I would have to say that I did it or I saw it done.

Q. On every occasion? A. On every occasion.

Q. Now you have told us all about communicating with the correspondent banks when you first testified; I do not want that over again; I want to know whether you now have any letter or letters from any of those correspondent banks in your possession? A. I have one letter from the Irving National.

Q. Have you any more letters in your possession than that from any of the correspondent banks? A. Not that I recall.

Q. What has become of them? A. Those letters as a rule were left at the bank.

Q. You are not sure whether they were preserved or not, or are in existence or not? A. No, I don't know.

Q. You don't know? A. No, I don't know.

Q. But you happened to find this one? A. Yes.

Q. Have you any more papers that might be of any importance in this case outside of that transcript of the ledger away back in 1910 and that letter, that could throw any light on the situation? A. Not that I recall; I have gone over the papers and they couldn't positively be checked up; I have a great many which I can check up myself but wouldn't be of value here.

Q. Did you receive the letter from the Irving National Bank? A. Yes.

Q. On or about that date? A. Yes.

Mr. Stiefel: I offer this letter, if your Honor please.

Mr. Hinds: I was going to consent that this go in because I assumed from the examination it had something to do with

the bank's balance in the correspondent institution but since it has not I object to it as being totally irrelevant.

The Court: What does it state?

Mr. Stiefel: It states "As requested by the Roseville Trust Company, etc., we beg to advise that on close of business December 4th said institution was indebted to this bank as follows: $25,000 demand note secured by (then it gives collateral); $15,000 demand note secured by sundry notes, aggregating $78,453.83. Yours truly" The date of it is December 17, 1912.

Mr. Hinds: The date is all right, but it had absolutely nothing to do with the deposit account with that institution, simply tells of certain collateral loans. If we can find some evidence as to what they did to find out what the balance was in the Irving National Bank we shall be glad to get it in evidence.

The Court: It is part of the examination that took place on that day; I do not know how useful it will be but it is part of what was done. I will admit it.

A. The statement showed this particular liability and it seemed to us that we should prove it.

Marked Exhibit D-1.

Q. Was it the custom in 1912 and 1913 to write to the banks who held the bills payable of the Roseville Trust Company? A. In every case.

Q. And you have already testified I believe with regard to your system about writing to the depositary banks? A. Yes.

Q. Were the letters in both class of cases in 1912 and 1913 sent to your own house? A. To my own house.

By Mr. German: Q. So there may be no misunderstanding as to what you did testify. What precautions did you take to check up the items in transit with correspondent banks at the time of your examination?

The Court: Has he not gone all over that?

Mr. Hinds: I do not recall that he has, and if Mr. German does not I will go into it because I do not recall any testimony on that at all; that is what we claim he did not do, that is what the bill charges.

By Mr. German: Q. In addition to your former testimony, if you did testify on that subject? A. I think I testified before, at least this was the custom.

By Mr. German: Q. If you did testify you need not testify again so far as my question is concerned, but in addition to your former testimony, if you have anything to give? A. We sent for our letters and after we received them we went to the books of the bank and reconciled the accounts of the correspondent banks just as we reconciled our own cash books or bank books when we received our checks.

By the Court: Q. You said that before, did you not? A. Yes.

By Mr. German: Q. If you now remember anything more that you did to satisfy yourself of these items in transit than in the testimony which you remember giving before, please give it? A. I did nothing further; I reconciled the ac-

count and then I supposed, I had no reason to think that the account was not correct and I did not go further.

By Mr. Newton: Q. Do you recall the examination of April, 1912, as to the work performed by the various members of the committee on that occasion? A. I do not.

By Mr. Newton: Q. You do not remember what Mr. Dunn did? A. No.

By Mr. Newton: Q. You do not remember whether he inspected any of the books at that time or not? A. No, I do not know, excepting in that general way that everyone so far as I ever knew examined the book that corresponded to the material.

By Mr. Newton: Q. You do not recall what he did at that time? A. No, I do not recall that.

CROSS-EXAMINATION by Mr. Hinds:

Q. Now Mr. Sexton, you say that after getting the balance from the correspondent bank as it existed at the close of the day as of which your examination was made you compared that balance with the balance shown on the Roseville Trust Company's books as on deposit with that correspondent bank, and it is a fact, is it not, that in every such case you found some discrepancy which needed to be reconciled? A. There would always be very small items of discrepancy.

Q. In reconciling that discrepancy did you at any time go beyond the Roseville Trust Company's own records and the report as to the balance which I have just referred to as having been received at your house from the correspondent institution? A. The evidence here is one of the

things that seemed to us to be very important and we did it.

Q. (Question read.)

(Answer read.)

A. That answers it.

By Mr. German: Q. When you point what are you pointing to? A. To this Exhibit D-1.

Q. My point is that the only inquiry you made from the correspondent bank was as to what the balance was or as to what loans, as in that case, there were at the date of the examination, is not that fact; you did not make any subsequent inquiry of the depositary bank to find whether in fact there were items in transit which had not arrived on the date of the examination and which were reported on the books of the Roseville Trust Company to be in transit on that date?

Mr. Stiefel: I object.

A. I have testified.

Mr. Stiefel: I object for this reason, it is admitted in this case that the entire course of inquiry was in the form of correspondence; the correspondence is produceable and readily produceable by the complainant if he wants it.

The Court: I think the evidence is plainly competent.

Q. Then I ask that the witness answer this question yes or no. A. I have answered the question decidedly, I made it very clear, as clear as I could make it.

By the Court: Q. I did not quite catch your answer to this last question. Counsel wants to know whether in addition to finding out the balance on deposit on the day of your examination in

Newark you made any inquiry as to the deposit at a later day, as to the deposit that might have for instance stood to the credit of the Roseville Trust Company on the next day or the day following, when time had elapsed sufficient to enable anything in transit to get from one bank to the other. That is the way I understand the question; what do you say to that? A. I answered only that question of following up the items in transit by a letter to the particular bank; I testified that I did not do that, I testified to that very clearly to Mr. German.

Q. Then when you found on the books of the Roseville Trust Company a reported deposit made on the day of the examination with the Irving National Bank which had not reached there when they closed their books as of the date of your examination you simply accepted that as proof that such deposit had been sent since it reconciled with your figures; is that correct? A. That is correct, we had no cause for doubting its truth.

Q. And so far as you know none of the other members of the committee made any such inquiry either, did they? A. Correct.

Q. And you would have known of it in all probability if they had, as the chairman? A. Yes.

Q. Now let us take up the question of the footings. You say that you did not necessarily, I believe those were your words, take off a transcript from the general ledger at the time of the examination, but that in many instances, and I believe you said that may have been true in 1912 and 1913, the checking was done direct to the gen-

eral ledger page itself, and you said also that when you had finished your work you together went there to the general ledger, and either you in person or someone whom you saw do it footed up the general ledger; now I ask you whether you made any inspection or took any means to be sure that the figures that you added up were in every instance the precise figures that you or one of you had verified from the original material and previously checked? A. That was always done; the figures on the general ledger were never added until the person who had examined brought his figures there and compared them to see whether they were accurate or not.

Q. Now suppose that the man whom we may say was delegated to add up collateral loans got through very quickly, say long before the time came for adding up the general ledger, before the rest had finished theirs, what would be done with the result of that collateral loan man's verification in the mean time, would that be written down on a piece of paper or would he simply go there and check the ledger and depart? A. He would not depart, he would bring his material there, he would probably look at it and see whether it was correct or not, but hold the paper which he had until we were ready to meet around the book.

Q. When you all met around the book and at the time the footing was made did each and every one of you again see that the figure was still there as it was at the time the original verification was made?

Mr. Fairlie: There is no evidence that when they met around the book to check the figures the footing was made at that time; the evidence is that they delayed the footing until they had checked up all the items, which included the items of the correspondent banks, and that was on a subsequent date.

Q. Is that the fact, has counsel correctly stated it? A. It would always be when we had finished; there might have been an addition before.

Q. Was Mr. Fairlie's statement of it correct? A. I don't know, I would have to hear it again.

(Mr. Fairlie's statement read.)

A. It was always made on a subsequent date but at times it would be made on the same date, that is, I mean to say, and the subsequent date, but that wasn't always the practice.

Q. On those occasions when the footing was made on a subsequent date did you employ any means to prevent absolutely against the figure having been changed on the general ledger in the mean time, so that what you were adding up was not what you or some of you had verified previously? A. Why I can answer that only in this way; if we had seen evidence of erasure that savored in any sense of speculation or anything of that kind or any dishonesty whatever we would have reported it very quickly.

Q. Did you on any of the occasions when you made footings find any evidence of erasure in the items of the general ledger which you were to foot? A. I don't know that I can answer that; not that I recall.

Q. Did you ever notice any evidence of erasure in the general ledger at all? A. I do not recall of any.

Q. Did you gentlemen ever look? A. May I say one other thing?

Q. Certainly. A. I am not so sure that if there was an erasure in the general ledger that I would think it was criminal.

Q. If you had seen an erasure in the general ledger would you have ascertained that the erasure had not been made since the member of the committee who had charge of that item had made his verification a few days before? A. Why I think so.

Q. Well, did you do that on any occasion? A. Not that I recall now, we may have done so but I do not recall.

By the Court: Q. I do not know whether I understand the course of procedure. I gather from what has been said that the committee met, and to each member of the committee was assigned a particular duty, that each member of the committee then and there proceeded to discharge that duty and obtain a result, and that after each member had done so there was a general meeting around the table when the various results were checked off in connection with the items on the general ledger, and that the general ledger was then added. That is what I understand you to say was the ordinary course of procedure; is that right or not? A. That is correct, with the exception—

By the Court: Q. Well, then counsel's inquiry assumes that there was a space of time between the time of the checking off of the items and the

time of the addition of the entire column, when Mr. Smith or somebody else came in and changed the figures; now what have you got to say about that? A. Well, that may have—

By the Court: Q. Could that have been done? A. It perhaps could have been done; the general plan was to add that afternoon and then check up again at the next meeting, but I couldn't positively say that that happened every time.

By the Court: Q. If counsel object to my asking this question I shall not press it, but if counsel do not object I would ask Mr. Sexton what his explanation is or his theory is as to the time when these classifications were made on the general ledger. Now I will not press that if any counsel object.

Mr. Hinds: We would like to have his explanation.

By the Court: Q. I would like to have your theory of the way in which it could have been done? A. I must say I don't know.

By the Court: Q. You cannot answer it? A. I cannot answer it.

By Mr. Fairlie: Q. Did you ever hear of anyone who could, did you ever hear anyone suggest an explanation? A. No, I have not.

Q. During this last preceding summer, between now and your previous testimony, you have been up and looked at some of the books of the Roseville Trust Company, have you not? A. One day, yes.

Q. Would you be willing between now and next Tuesday to go there again or to do it here, I think the books are here, and to go through the same process of verification or reconciliation that

you went through on May 21, 1913 respecting the Irving National Bank account, so that you may come here on Tuesday with the result and submit to an examination respecting your method of reconciling that account? A. You haven't the data.

Q. If you will tell us what data you need I can assure you of what we have and what we haven't.

Mr. Stiefel: I should object to that I think.

The Court: The witness is asked whether he would be willing to do a certain thing; he is not obliged to do it. Let us get his answer whether he is willing or not; if he is not willing why that ends it.

A. I could easily tell you what we did.

Q. Well, are you willing to go through it again from the documents and books themselves, if we can provide you with them? A. Why I don't know anything to the contrary, excepting I haven't a whole lot of time to devote to it.

Mr. Cornish: I object; that would not be fair to any of the defendants what Mr. Sexton might do at this time.

The Court: Well, Mr. Sexton is not obliged to do it; he is simply asked the question; if for lack of time or any other reason he does not want to do it he may say so; it will not prejudice him at all if he says so.

Mr. Cornish: I am making this suggestion on behalf of my own client; I think it might prejudice the examining committee to have this done, and it would not be evidence in the case.

By the Court: Q. What do you say, do you want to do it or not? A. I would rather not.

Mr. Hinds: I would like to make that same offer with respect to any of the other defendants who claim to have reconciled that or any other bank account which we have proved was not susceptible of reconciliation.

The Court: They can do it if they want to, and if they do not do it it will not be to their prejudice.

Mr. Hinds: In that connection I might say that we selected the Irving as the best one, because there have been absolutely no changes on the general ledger on that day, and the thing is absolutely clean now and not susceptible of reconciliation.

By Mr. Fairlie: Q. In respect to checking up the accounts of the correspondent banks at the time the committee met again after the reports had been received from the correspondent banks, did you make it known to the members of the respective committees of which you were chairman and each of the members, the plan by which you were checking up those correspondent accounts? A. Yes.

By Mr. Fairlie: Q. Did they offer any criticism or suggestion which you did not follow? A. No.

Recess.

CHARLES C. LURICH, sworn:

Direct-examination by Mr. Stiefel:

Q. Where do you reside? A. At present in East Orange.

Q. Did you ever reside in Roseville? A. Yes, within two blocks of the Roseville Trust Company.

Q. For many years? A. For about seven years.

Q. What is your business? A. Real estate and insurance.

Q. How long have you been in the business? A. About twenty-six years.

Q. How long have you been out for yourself in that business? A. About eighteen years, that period.

Q. Your office is located where? A. Fourth North Ninth Street, opposite Roseville station, within two blocks of the bank.

Q. You mean of the Trust Company? A. Of the Roseville Trust Company.

Q. When the Roseville Trust Company was formed were you well acquainted in Roseville? A. I was.

Q. What was the size of your business at that time, doing considerable business? A. Yes, I had the collection of considerable rents, amounting to close on to ten thousand dollars a month.

Q. How about selling property? A. About selling properties?

Q. Yes. A. Yes, I sold considerable properties and made a great many exchanges, etc.

Q. Were you familiar with the values of properties in Roseville and in Newark, in a general way? A. I was.

Q. Do you remember the formation of the company? A. I do.

Q. How much stock in the company did you hold? A. I think it was seven shares.

Q. Were you made a director at the first organization meeting? A. Yes.

Q. And continued so until the closing of the bank? A. I did.

Q. When did you become a member of a special committee of the bank? A. I only have a faint recollection as to that, I think it is about a year, possibly a little over, prior to the closing of the institution.

Q. What committee was that? A. Executive committee.

Q. That is the only special committee you were on? A. No, I was on the attendance committee to fill in a quorum, and I was also on a committee of appraisals at various times.

Q. Was there a committee of appraisal which continued in office during the year, or were special committees of appraisal appointed as applications for loans were made from time to time? A. It seems to me I served spasmodically at six months periods, if I am not mistaken, that is, committees were appointed for that period and I think I served mostly during the entire period.

Q. During the entire history of the bank? A. Yes.

Q. You are not quite clear as to the method of appointment and the length of tenure, so to speak? A. No, I am not clear as to that.

Q. But the fact is you served during most of the history of the bank on appraisal committees? A. Yes.

Q. Were you a frequent or infrequent attendant of the meetings of the board of directors? A. Very frequent attendant.

Q. Will you characterize that a little more closely, how frequently did you attend, how frequently were you absent? A. I don't think that I missed during the existence of the bank all told over four or five meetings.

Q. While you were a member of the executive committee what was the course of your attendance? A. I think it was very regular, because I considered the importance of that.

Q. Now while you were a member of the executive committee was Mr. Odell a member? A. Yes.

Q. And Mr. Fairlie? A. He was.

Q. Had you known those gentlemen for a long time? A. I did.

Q. Did you know their standing and reputation in the community? A. I did.

Q. You heard Mr. Munroe testify with regard to them I believe in a general way? A. I think so.

Q. Was your knowledge of their standing and reputation approximately the same as Mr. Munroe's, as he testified? A. Well, I can only say that I can add still more to it for the betterment.

Q. All right, go ahead and do so. A. I thought so well of Mr. Odell and his standing and his connection with Claflin & Company for thirty-eight years that I was the means of appointing him as president of the institution.

Q. You do not mean appointing him, you mean suggesting him? A. Of suggesting him.

Q. Had you know Mr. Odell prior to his be-

coming president of the bank for any length of time? A. Oh, yes.

Q. And did you have any reason to form any judgment with regard to his business acumen and ability? A. Why, yes, I had occasion to call at Claflin & Company to see Mr. Odell in connection with other matters and I observed there his standing in that business, and other knowledge that has come to me in my visits there that led me to believe that he was—

Q. He was the one man for the job? A. The proper man to qualify for that position.

Q. How about Mr. Fairlie, what knowledge did you have of Mr. Fairlie? A. My knowledge of Mr. Fairlie consisted of my knowing of his business standing in Roseville and in Newark in general, his connections with other banks, and my dealings with him in a business way for quite a few years.

Q. Did you know anything about his standing in any church in Roseville? A. Oh, yes.

Q. What church? A. I knew of his standing in connection with the Methodist Church in Roseville.

Q. Who is this? A. Mr. Fairlie. I knew of Mr. Odell's standing in connection with the Roseville Avenue Presbyterian Church.

Q. And what was their standing in those two churches? A. Mr. Fairlie was a trustee, and as I recall Mr. Odell was a deacon in the Presbyterian Church and also at the head of the Men's Club there.

Q. In the church? A. In the church, yes.

Q. Were you acquainted with Mr. Munroe? A. I was very well acquainted with him.

Q. What other directors did you have any special or intimate knowledge of when the bank was formed? A. I knew Mr. Banister very well.

Q. Which Mr. Banister? A. Mr. J. B. Banister.

Q. Is he the one connected with the Shoe Company or the other one? A. He is the one that is connected with the James A. Banister Shoe Company.

Q. He lives right there on Roseville Avenue? A. He lived on Roseville Avenue.

Q. And is one of Roseville's most prominent citizens? A. He is.

Q. Had you known Mr. Smith prior to the formation of the company? A. I had not.

Q. Did you have anything to do with the selection of Mr. Smith? A. Only this, that there was a meeting called in a building corner of Roseville Avenue and Seventh Avenue where various applicants appeared for that position, and they got up and spoke, and then there were others who spoke in their favor, and then they decided I think upon two men, to look them up, and a committee was appointed to to look up those two men and whichever one of the two seemed to be the best fitted was to be the one chosen.

Q. You were not on that committee? A. I was not on that committee.

Q. Do you remember that committee making report? A. Yes.

Q. Do you remember in general the character of that report? A. The character of that report I think I recall having heard read from the committee, and that was to to this effect, that the committee had interviewed Judge Thomas A.

Davis of Orange, Judge Sorrs of Orange, ex-surrogate Schoenthal of Orange, Roth & Company, the butchers of Orange, and I think several others if I am not mistaken, and they said "Why, Smith, you couldn't have a better man for that position, he will qualify in every phase of it."

Q. I suppose you recall the determination of the board of directors to employ Mr. Smith? A. That followed.

Q. Do you remember the interval between his employment and the Nones episode, have you got that person in your memory now? A. I think I have.

Q. Approximately what was the interval? A. About three months I think.

Q. Now how did that Nones incident first come to your attention, if you remember? A. It first came to my attention I think by a special meeting having been called at the bank.

Q. A special meeting of what body of directors? A. All the directors.

Q. And what was brought to the attention of that meeting, if you can recall positively? A. As I recall the report it was that Mr. Nones had called at the bank just at the time the bank was to close, late one afternoon, and had induced Mr. Smith to make him a loan, which Mr. Smith did on the impulse. He directly after that, I do not know whether it was the same day or the following day, realized his mistake, that he had exceeded his authority, and then he telephoned to Red Bank to Mr. Appleton's home, Mr. Appleton having been the Examiner for the State Banking Department; Mr. Appleton he was told was at dinner at Montclair.

Q. This is your understanding of what occurred then? A. This is the report as I remember it having come to me; he then went up to Montclair to see Mr. Appleton and stated the case to Mr. Appleton, and then Mr. Appleton told him "Well, you better tell the president of your bank about this," and as I recall the two came down to Mr. Odell's home and stated the facts there. Now as I remember, following that the Banking Department had up to that time not yet made any examination of the accounts, but then they came and made an examination of the records and recommended his dismissal, Mr. Smith's dismissal.

Q. That recommendation is in the form of a letter which is in this case? A. I believe so.

Q. Was it a written recommendation? A. Yes.

Q. And do you remember a meeting of the board being called to consider that letter of recommendation? A. Yes, as I remember there was such a meeting.

Q. Now how many were present at that meeting? A. Oh, I think pretty near all, eighteen or twenty.

Q. Was the matter decided in a few minutes or a long discussion or what? A. Indeed no, I think it was one of the longest meetings we had, and it was gone over in the minutest detail; Mr. Smith made of course his explanation; after having made his explanation and handing in his resignation he made his exit, and then the matter was discussed for hours.

Q. Do you know whether Mr. Fairlie participated in that? A. Yes, everyone present did,

and I remember Mr. Fairlie participating in that; I also remember Mr. William H, I believe that is his initial, William H. Banister participating that, and Mr. William H. Banister always seemed to be a man that had to see things, had to be shown everything clearly, he wouldn't take a thing for granted, and if there was the slightest suspicion of any wrongdoing intentionally why he surely would have so expressed himself, and I think he was a man in a measure that could have swayed a good many men to his way of thinking, and I remember him too, among the others, in his remarks was heartily in favor of the reinstatement of Mr. Smith.

Q. That is Mr. Banister of Banister & Pollard the big concern here on Market Street? A. Yes, hardware dealers I believe.

Q. Did you vote on the retention or rejection of Smith? A. I voted on the retention of Mr. Smith.

Q. In doing so did you or not exercise your best judgment? A. I exercised my best judgment, not in the capacity of an act of mercy but in the capacity of an act that was a proper one, after having everything discussed *pro* and *con;* Mr. Smith in doing what he did, that is the way it impressed me, showed his honesty; if he was a man at that time with crooked intentions I do not think he would have divulged his mistake.

Mr. Hinds: I object to the witness's present analysis of the subject.

Mr. Stiefel: This is not his present analysis, I understand he is telling what influenced him at the time; am I correct?

The Court: The last statement of the

witness is plainly incompetent; the rest of it can stand.

Mr. Stiefel: On the ground that he is now what he thinks now?

The Court: He is giving his present opinion of something that occurred five or six years ago.

Q. Give us your opinion then five or six years ago?

The Court: Oh, no, not his opinion then; anything that was discussed in the board he can state.

Q. Now you signed the letter which Mr. Odell sent to the Commissioner? A. I did.

Q. Do you remember distinctly what was the vote, the first, second and third, if there was more than one vote, or what were the votes on the offer of Mr. Smith to resign? A. Why I do not think that the first ballot was altogether unanimous, but the second was.

Q. Do you remember how many stood out on the first ballot for accepting his resignation? A. I do not.

Q. Was the number over or under ten? A. Oh, it was under ten.

Q. How much? A. I do not remember the exact number, I think there was only two, and that is the reason it was made so unanimous.

Q. Would it be correct to say two or about two? A. I think about two, to be correct, of those present.

Q. And it was nearly a full board? A. Yes; I did not count them, but at the round table there most every chair was taken.

Q. Now from the time of that Nones incident

down to the closing of the bank was it ever brought to your attention in any way by anybody that Mr. Smith was guilty of either irregularities, embezzlements, falsification of the books of the company or any of the other matters or things alleged in the bill of complaint in this cause? A. No.

Q. Did you often or not go to the banking house of the bank outside of your attendance as a director or member of the executive committee? A. Why I do not think that out of a week there was a day, more than two days, but what I wasn't there once or twice a day.

Q. For what purpose? A. Depositing and introducing new depositors.

Q. You had how many accounts there? A. I had I think three of my own at the time.

Q. At the close of the bank? A. Yes.

Q. And at the opening of the bank do you know how many you had, can you recall that? A. I think two.

Q. Did you ever carry large balances there? A. Depends on what you call large, they averaged I presume about eight hundred to a thousand dollars.

Q. Would your balances ever run in excess of that? A. Oh, yes.

Q. When? A. At different times they ran up to eighteen hundred dollars or more, it depends on what funds were in my trust; of course I made disposition of my rents the day I collected them, so there wasn't much chance for a large balance to be there.

Q. Do you recall ever being present when a report of any examining committee would be presented? A. Oh, yes, I do.

Q. Can you give us any specific dates, or simply have a general recollection with regard to it? A. I have a general recollection of the reports of the examining committee, and many questions, I cannot remember the questions that were put to the examining committee for the purpose of safeguarding the interests and throwing every barrier around to have things so as to suit the Banking Department, who would from time to time, especially at the beginning they would write letters that were rather drastic in their tone, and it was to eliminate that and to comply with those things that these questions came up pertaining to the reports of the examining committees.

Q. Did you ever participate in these discussions? A. I did.

Q. Was there any feature of the bank's transactions which came to your attention as a member of the board of directors or executive committee that you were in doubt about or not satisfied with before you acted as such, can you recall any? A. No, I do not.

Q. When I say satisfied, or when you say satisfied do you mean to say that in every instance the condition of the particular loan that may be involved was just as you would like to have it be, or that you were satisfied with the explanation with regard to it in so far as the matter was susceptible of explanation and handling? A. Well, my vote on the issues of course was according to the information that was presented through various sources. My actions at times in voting did not always coincide with my own opinion, in this respect, for instance the Banking Depart-

ment would request us to charge off certain loans and of course I did not think that they should be charged off, but notwithstanding that I voted to charge them off; they criticised the loans as worthless at times and it was proved later that those loans were good and we collected not only fifty cents on the dollar but various times one hundred per cent on the dollar.

Q. In those cases you erred on the side of safety, is that so? A. Exactly.

Q. Just to get to one specific account. Take the Scarlett matter; do you know whether you passed on the Scarlett loan initially, can you recall or not? A. I do not think I can recall.

Q. Was Mr. Scarlett a frequent or infrequent attendant of the meeting of the board of directors in the early stages of the bank? A. In the early stages he was frequent.

Q. What will you say about the middle and later stages? A. That he absented himself.

Q. Did you know Mr. Scarlett well when the bank began business? A. I didn't know Mr. Scarlett very well excepting from a general knowledge of his holdings and handling of the Graylock Manor tract in Belleville.

Q. Is that a large or small tract? A. A very large tract.

Q. And what did you know about that? A. My knowledge at that time was that it was a grand success.

Q. That is to say, your information was? A. A. My information was, yes, that is what I meant to have said.

Mr. Hinds: I object to the last question and the answer. The witness volun-

tarily said it was his knowledge and then counsel puts in his mouth the modification that it was his information.

The Court: I think the character of the men and their business reputation is evidence in this case.

Mr. Hinds: I was not objecting to the relevancy or competency but rather to the leading modification of the question which followed the witness's complete answer.

The Court: Of course Mr. Lurich only had information, and unless he was employed in the office or about the business he did not have knowledge.

Q. Now to get back to the subject, have you got in your mind at the present time, comparatively speaking, a picture of the course of this Scarlett loan from its inception to the end, give it to us, if you have, in a few words?

The Court: As far as you personally know anything about it. If the loan was approved by you in the first instance you may state that; if the loan came up for discussion afterwards you may state that, provided you know.

A. I do not remember the loan in its first instance, and I could only draw a picture perhaps from the time that the man got involved, that is when I seemingly was brought into the matter.

Q. How were you brought into the matter then, tell us about that? A. In this way, to investigate his real estate and its value up at Graylock Manor, and as to whether Mr. Scarlett really owned those things, and so on; I stated all that information that I was able to obtain, and that

is about all I remember, other than Mr. Banister was delegated to see Mr. Scarlett, and he made reports to that effect, that he had to get Mr. Scarlett to reduce his obligation and to furnish further securities because of his having become involved after having been a director of the Roseville Trust for a period.

Q. Do you remember whether this Scarlett loan was a matter of frequent or infrequent discussion by the board of directors? A. It seemed to be a sort of a follow-up thing, at every meeting that came up right along.

Q. Now did you ever hear Mr. Odell address the examining committee of the bank at any time? A. I remember Mr. Odell taking up everything in connection with the bank, not alone the examining committee but every detail, and bringing up these various things; he used to come there to the bank with all sort of memorandum and go over one thing after another in the minutest detail, even pertaining to the loans that were made, with the examining committee, advising ways and means to protect the interest of the institution and to comply with the requests of the Banking Department. I don't know where they could have been found a man to be more careful than he was along that line.

Q. That was your impression, anyhow, that you gained? A. That all happened within my presence so that I couldn't help but observe it.

Q. How long would the meetings of the board last as a rule? A. During the summer time we had morning meetings and the rest of the year of course we had meetings in the evening or late afternoon I should say, and we would be called

together, I think the executive committee, three until four, and then the full board meeting followed it, and that would be invariably up to six o'clock.

Q. While you were a member of the executive committee what was the course of procedure? A. The first thing was that the minutes of the previous meeting were read.

Mr. Hinds: Simply to save the record from being overwhelmed, this is all contained in the minutes and been over a great many times, and it is technically objectionable also on the same theory that your Honor has already ruled, as seeking to supplement or vary the minutes without first exhausting—

The Court: You cannot have a more accurate statement of the course of proceedings than is to be found in the minutes of the examining committee, that states it exactly. You can supplement that if you please by anything else, if it is not recorded.

Q. How long did those meetings take as a rule, executive committee meetings? A. About an hour.

Q. Do you ever remember speaking to Mr. Smith about an interest in a garage? A. I do not remember Mr. Smith speaking about it, but a rumor came to me about Mr. Smith having purchased a garage.

Q. A rumor came to you? A. Yes.

Q. And what garage was it? A. It was a garage on Central Avenue between Ninth Street and South Tenth Street.

Q. Was that the Oakland Motor Sales Company? A. No.

Q. That was another garage? A. It was another garage.

Q. Do you remember the name of that? A. I think it was Central Avenue, something like that, something pertaining to the avenue.

Q. Let us call it that anyhow. A. Central Garage.

Q. When you heard this rumor what did you do? A. As soon as I heard that rumor I went right over to the bank and interviewed Mr. Smith personally; I said, "Mr. Smith, I hear you purchased a garage on Central Avenue, one dog cannot serve two masters," I said "is that true" he said "That is very true, the way you remark, but I am not the man owning that garage," he said "It is true also I made that investment but it is for my father," and he said "Discharge it from your memory," I said "I don't think that the board of directors would stand for you acting as secretary of this bank and running another business on the outside;" he said "Discharge that from your mind, that I bought for my father, he had some moneys to invest" and he told me the price he bought the property at, it was ridiculously low, and he said as soon as he could dispose of it he would in behalf of his father, and he wouldn't lose one minute's time from the Roseville Trust Company in connection with that, and he had a man named Briggs who had been with the former owner of the garage and he was going to run it until such time as he could dispose of it, and it wasn't very long after that a broker in Roseville sold the garage property to another

man by the name of Lees, whom I know, and I verified the figures that he paid for it at that time, and of course there was a handsome profit made in that transaction.

Q. You knew that Smith's father— A. I knew all that, and I knew of Smith's father having been connected with a bank in Orange, and also where he resided in Berkeley Heights Park, and I knew of his properties there, which was listed with me for sale, and was free and clear.

Q. Did you ever at any time learn of Smith having any alleged or real connection with any other business? A. No.

Q. Ever, at any time, if it is a fact that at any time anybody made any statement to any directors or any meeting of the board that Mr. Smith was connected with this Oakland concern or the Home Ice & Products Company or the Intercity Company that has been mentioned here, or any other company, were you present? A. I do not remember having heard anything about his connection with anything else other than just what I have answered.

Q. Now did you ever have occasion to talk to Mr. Smith about Mr. Jennings conduct? A. Yes.

Q. Tell us about that? A. Next door to me there was a stationery store, next door to where my office is located, and it is conducted by a Hebrew, and he had his account with the Roseville Trust Company, and he complained to me one day about Mr. Jennings, who was the receiving teller I believe, I think that is what you designate the man taking in the money, and that he had been rude to him at the window; so I took that matter up on behalf of my neighbor with Mr.

Smith first, I spoke to Mr. Smith about this complaint and told Mr. Smith that if that was so why he was not the proper man in that window to handle customers, and Mr. Smith said, "Well" he said "perhaps they might have had a little altercation, I will look into it and see what there is to it, and I will censure Mr. Jennings for it." Well, that passed by; subsequently I heard another complaint of Mr. Katz, another Hebrew, conducting a dyeing and cleaning establishment on Orange Street, who spoke of taking his account away because of Mr. Jennings, he said "He doesn't appear to like the Hebrews as customers," and when I heard that I said nothing more to Mr. Smith but brought it up to the board of directors, and then there was action taken and Mr. Smith explained about my previous complaint, and then they arranged to take Mr. Jennings from that window and put him on some other job in the bank to which perhaps he was better fitted, on the books, and since that time Mr. Thompson, I think, was put at the window and everything seemed to run along nicely then, because I made inquiries along that line after that.

Q. Did you ever hear from any other sources of any complaint with respect to Mr. Jenning's conduct of his duties? A. No.

Q. How about the attendance of Mr. Fairlie and Mr. Odell at the banking house, did you have opportunity of observing that? A. Mr. Odell was present most of the time with but very few exceptions and then Mr. Fairlie presided as vice-president, I think on one occasion Mr. Foster as second vice-president; that is as near as I can recall.

Q. But outside of the directors meetings, mornings, evenings or during the day, what about the attendance of them or either of them at the bank? A. I would meet him there very frequently; Monday evenings the bank was open from seven to eight and I would meet him there then, I would see Mr. Odell coming from the bank or going to the bank mornings and evenings, and he worked at home too, in the nature of getting out certain literature, to help along the interests of the bank; he did that, as I understood, at his own volition and at his own expense, because I never saw any items in connection with that that came in as a bill from him.

Q. Outside of your lawfully required attendance at the directors meetings and the executive committee meetings did you exert yourself in behalf of the benefit of the bank to any extent, and, if so, in what respect? A. I rented a great many houses in our section, and I got my stenographer and bookkeeper to notate the people that paid their rents in checks, notate also where they banked, and then I had lists made up, and then I would take those lists over to Mr. Smith and give them to him and say "Now here, these people are banking in these various other banks, and they are living at these addresses, now will you establish some system and try to get their accounts, offer them our Monday evening facilities when they can come and do their banking in their local home town and at their convenience," and he did so, and I was commented upon as having brought a great number of accounts to the bank in that manner.

Q. Did you ever actually appraise any proper-

ties for the bank, as a member of the appraisal committee or committees? A. I called personally on Mr. Mott with my own machine and on Mr. Fairlie and Mr. Krug; of course he worked I think in New York at that time, I would meet him at the Roseville station, and call for the others, and we would go around and look at these various properties where there were applications made for loans; I did that of course in the interest of the bank at my own expense; I took the rest of the committee around to see the properties and we discussed matters, and their values, and so on. Mr. Mott, too, has had large experience in building houses in East Orange, and of course he had a very good conception of the cost of buildings; my knowledge came in as to the values of land, having sold properties in those localities and knowing of the frequent sales and the amounts that they brought; Mr. Krug also was an architect qualified pretty good for his line.

Q. Did you ever express your opinion of whether a proposed loan should be granted or not, having reference to your notion of the value of the property to be mortgaged to secure such loan? A. Why loans were rejected that were applied for unless there were other collateral offered to make the loan safe.

Q. What attitude did you take with respect to any of those? A. Why always the attitude that seemed the safe one to pursue. Now in the Armstrong case, I only know of one loan having been made to Armstrong during my connection with the bank, and that was on land in East Orange. I of my own knowledge knew the land having sold at $45 per foot; as land was an unproductive

proposition and he owned considerable there I think I recall suggesting to the committee that we loan only one-third of its value because it wasn't anything bringing in money, it was something that cost money to hold, and to play safe we better only loan one-third, and that loan was made and I do not think that loan exceeded fifteen thousand dollars, and that was the only loan I think was ever made to the knowledge of myself while I was on that board of directors, but I am charged I notice for other loans, and, in my own defense, I cannot see why I should be charged for other loans having been made without the board's knowledge.

Q. Do you know whether your recommendation with respect to the restriction of the amount of the loan in that case to one-third of the value was adopted? A. Yes.

Mr. Hinds: Now we heard Mr. Lurich in his own defense, and I think any further inquiry here as to matters contained in the minutes should be preceded by exhausting first the written record. We are now coming to specific loans, and the minutes undoubtedly will show what was done, if anything was done, as to action on these loans.

The Court: I am not so sure that the minutes will show what the value of the real estate was.

Mr. Hinds: I did not object to that part of it.

Q. (Question read.)

Mr. Hinds: Whether or not a recommendation was made and whether it was adopted was a matter for the minutes. I do

not object to his stating the facts as to what he found to be true as to the value, but when it comes to recommendations and adoptions then that is concerning the minutes.

The Court: I do not think there will be any harm in stating that.

A. The loan was made on the strength of that recommendation, in accordance with that recommendation.

Q. Mr. Lurich, do you remember ever discussing with your fellow directors the question of pursuing the policy that the Fidelity Trust Company does loaning money on real estate and then selling the mortgages; do you ever remember such a thing? A. Yes.

Q. Now tell us about that? A. I have friends that are connected with the Fidelity Trust Company and when matters came up in our board meeting and they were not altogether clear why I would seek information from other sources, and through these sources, and I consulted my friends of the Fidelity Trust Company about one matter perticularly that I recall was in connection with loans; I noticed that the Fidelity Trust Company made loans on bond and mortgage on real estate, and sold these loans to the Prudential, and I thought that was a good method to pursue for the Roseville Trust Company, so that when our customers came and applied for loans that we would have the money to grant the loans on the real estate by having sold the previous loans made to other customers, and other items along that line I investigated, and made reports accordingly to our board in the interest of the bank.

Charles C. Lurich—Direct

Q. Did the investigating committee ever call upon you and ask for information about bonds and mortgages, abstract of titles, surveys, insurance, etc.? A. When the bank was first organized, and I think it was the first time the examining committee of the board were making an examination of the accounts, someone was delegated to look over the bonds and mortgages, and evidently they did not just understand those things, and somebody suggested that they call upon me, and I received a telephone message and was told the committee was there and would I come over and look over those items and enlighten them in any manner, way or shape that I could, and I said I would, and I did, and I spent many an afternoon over at the bank doing that when these committees were together, until the time Mr. Dunn was put on the examining committee, and the collateral was all laid out on the table and there were different envelopes, and I would take them out and show this particular director who was examining those, now it is necessary to see that this abstract is there, see that the survey is there, see that the insurance is in force, and give him all that information, and tell him how he could find it, and see that our counsel had also subscribed his name to the abstract to prove, you know, that he had looked over everything and see that everything was intact and couldn't be criticized by the Banking Department, and these things as time went on—in the beginning of course the Banking Department criticized these things, latterly we heard no further criticism, which showed improvement in our method of trying to run things in an intelligent way, not a negligent way.

Q. Now your participation in this work involving the real estate transactions of the company or real estate loans was in the early days of the bank? A. Yes.

Q. Did you ever know or have brought to your attention in any way that you can recall, Mr. Lurich, that Mr. Smith was making loans in excess of one thousand dollars without the authority of the board? A. No.

Q. Or that he was permitting big overdrafts to be made without putting them on the books? A. No, nothing, nothing like that.

Q. Now Mr. Lurich, you remember, I presume, signing one or more reports, I do not know how many there are, of the executive officers of the bank to the Banking Department. Will counsel for the complainant please let me have the ones that my client signed that are in evidence.

(Produced.)

Q. I will put all three of these exhibits before you at once; look at the signatures, will you, and see whether they are all yours? A. I will put on my glasses to see whether they are really mine or falsified. Yes.

Q. Now can you distinguish one of these occasions on which you signed from any of the others? A. No.

Q. Can you tell us how you came to sign these three, what was said to you, by whom, and what was done by you? A. Invariably I was telephoned for and told that the report was ready to be submitted to the Banking Department, and would I come over and witness Mr. Odell's and Mr. Smith's signatures, as it required three signatures, three witnesses to sign, and so of

course I would rush right over to the bank and see Mr. Odell sign them, and at times Mr. Mott was there and he signed, and at times Mr. Fairlie was there, according to the names here. I now see there were a number of others signed, and that was all that was to it; I was called in there to witness a man performing a certain act, and that is as I understood it.

Q. Is that what you were asked to do?

Mr. Hinds: I ask that the last part "as I understand it" be stricken out for this reason, we are not charging this witness for what he intended to do or what was in his mind when he signed "Correct, attest" to these Banking Department's reports; the element of intent or what was in his mind may conceivably be material, although not very material, on the issue of negligence, but as a matter of law as to what the result may be if his signing those papers, it does not involve, as I understand the issues that are presented by our bill, what was in his mind.

The Court: I do not see any reason why the witness cannot go as far as he has gone.

Q. Did you ever examine any of the statements that are set forth in these reports? A. No; I never even noticed that word "Correct, attest"; and if I had, as a scholar of our public schools in Newark, I would—

Q. Never mind about that. Were you ever asked to do anything except sign as a witness, by anybody, as far as you can recall? A. That is all I was called upon to do, to come over and witness and sign as a witness.

Q. Did you ever know that Mr. Smith had a box No. 55 or any other box there? A. No.

Q. Did you send in your account book to be balanced? A. Regularly.

Q. Did you ever find anything wrong with it? A. No, sir, I did not, it always balanced to the penny; I am very careful of my bank account.

Q. Did you ever make application to Smith for a loan on your own behalf? A. I did.

Q. What would Smith tell you? A. "Now," he says, "You will have to make an application in writing, as a director the law requires that," and I did so, and then he said he couldn't tell me of course what the action of the board would be until he took it up with them and subsequently I would be advised whether or not the loan was granted.

Q. You have already testified to some extent with regard to letters received from the Department, can you tell us whether in the latter part of the bank's history or the trust company's history these letters came in from the department after examinations were made? A. Toward the latter part? I do not just recall towards the latter part; I know this, that after we got running right those criticisms seemed to cease, as though the Banking Department were thoroughly satisfied with the way things were going, they would compliment us, so to speak, on matters, "We approve of your action" in certain things at different times; I recall that in some of the correspondance.

Q. Now, Mr. Lurich, was it brought to your attention in any way that the Commissioner of Banking and Insurance did make examinations of your bank? A. Oh, yes, I have seen him there myself.

Q. You have seen them in any other way? A. I have seen him in the bank, and I called there and was told that these are the banking examiners; I would go there to see Mr. Smith and Mr. Smith would be busy with the bank examiners in the directors' room.

Q. Did you ever see any bills rendered by the department for such examinations?

Mr. Hinds: I object to that, and I believe the objection has already been sustained.

The Court: I do not see any point in proving that the Trust Company paid for these examinations.

Q. Do you know of any occasion on which remonstrance was made against the size of the bill submitted by the department? A. I know this, that we thought the bills were certainly excessive for a few men, and my recollection seems to be that one bill, whether it was the last one or not, was one hundred and eighty-seven dollars and some odd cents; now that is as far as my recollection goes, and that, for a few men to audit accounts, seemed to be excessive.

Mr. Stiefel: There is something in the minutes about it; may I call you Honor's attention to a part of the minutes at this point.

The Court: I do not see what it has to do with the case.

Q. Do you know what your knowledge was as to the frequency of the examinations by the Examiners of the Banking Department? A. Every six months, and it was arranged with our own committee from our board of directors to go at a per-

iod between those six months, unknown to those in charge, just the same as the Banking Department.

Q. That leads me to ask you the question: What was your understanding as to the knowledge of Smith and the other employees of the bank as to the visits of the examining committees prior to their actual appearance on the scene? A. Why the visits of the examining committee were to be a complete surprise to those in charge, they were so told and within my hearing.

Q. By whom? A. By Mr. Odell and the counsel for our institution, those things were gone over in a most careful manner as to what you should do and how you should do it.

Q. What was your understanding as to what the actual practice of that committee was in that respect? A. Oh, it was carried out in detail just according to instructions; the reports both from the Banking Department and from our own committees seemed to subsequently substantiate that because there were no further criticisms from the Banking Department along that line.

Mr. Stiefel: Mr. Clark, you and I have agreed to stipulate all the facts provable by documents with regard to the proof of claim of my client, the assignments to the new bank, the publication by the Commissioner of notice to creditors to file claims, and the unquestionable fact that those claims were no disputed, those claims of my client.

Mr. Clark: I assume that they were filed in time, within the period of publication, within the period that the publication re-

quired, I will concede that, I do not know it as a fact, subject to correction later.

Mr. Newton: Will you concede the same as to Mr. Dunn?

Mr. Clark: I think Mr. Stiefel is the only one of the counsel who has pleaded this as a defense.

Mr. Hinds: Of course it is understood that conceding it to be a fact we do not concede that it is provable, that it is relevant to the issues or material, simply for convenience we will concede it to be a fact if he can get it in as evidence, which we will of course object to.

Mr. Stiefel: Mr. Clark himself says I pleaded it, but you mean whether it is a good defense or not.

Mr. Hinds: Whether it is relevant.

Q. Mr. Lurich, do you remember whether or not after you filed your proofs of claims, and I will show you the copies of them, after you filed your proofs of claim, calling your attention to this, that they are verified respectively on December 19, 1913, December 1, 1913 and December 19, 1913, whether you received a dividend or any payment on account of those claims?

Mr. Hinds: If your Honor please, I object on the ground that it is utterly irrelevant what the Banking Department may have done or not done with respect to this depositor's claim upon his deposit.

Mr. Stiefel: I want to put in the proof that I spoke of that Mr. Clark is willing to stipulate; then that he received payment; then that he got no notice until just be-

fore this suit was commenced that any claim would be made against him.

The Court: I will allow you, following up the proof that you put in, to show that he received a payment on his claim as proved.

Mr. Clark: And that will be over our objection.

The Court: Oh, yes, it will be subject to the same objection that you made to the other.

Q. Did you receive your payment? A. Oh, yes, yes.

Q. And that was in part money—

The Court: No, that does not make any difference.

Q. All right. I have not got the letter of the Commissioner addressed to Mr. Lurich, but I have the similar one addressed to Mr. Krug; will you let me use that?

Mr. Hinds: We will concede it to be a fact, with the same objection as to its relevancy.

Q. Did you ever have knowledge that in point of fact, conceding for the moment it is a fact, the legal reserve ever got below the required percentage? A. No.

Q. Did you ever pass upon the declaration of dividends? A. I think so.

Q. What was the basis of your action in that respect? A. As I remember, first they charged off certain loans.

Q. No, but I mean what was it, a paper or some oral statement or what? A. Why there was a statement that the president, as I recall, read to

us just about the conditions and also from the reports of the examining committee, and that they had done, charging off so much for this and so much for that by the Bank Examiners of the State, and there was sufficient left, and then the suggestions were made at various times to declare a dividend.

Q. Was there any fact brought to your attention by anybody to indicate to you that the declaration of dividends was unlawful in view of the fact that the bank had not earned any money since declaring the prior dividend? A. No, on the contrary, on matters of that kind our president and counsel and the examining committee seemed to be very careful to do things in the proper manner, and according to all our information of course we did not do anything other than what seemed to be proper as the reports were presented to us.

Q. Did Mr. Munroe ever pass upon the question of whether a dividend should be declared or not, as counsel for the bank? A. As counsel for the bank I believe he did, because he was there at times and talked on the subject.

Q. And was a member of the executive committee? A. Yes.

Q. Which first passed on the question? A. Yes.

Q. Is there any other matter to which you want me to call your attention, Mr. Lurich? A. Well, I don't know of anything that would have any great bearing on it, other than I know that always the president of the institution never seemed to be very particular about dividends being paid, and I think his aim was to build up a lar-

ger surplus than what we really had built up, as I recall; I remember some discussions along that line, and I don't think we declared any dividend until we had over one hundred thousand capital and surplus.

Q. No, in general, is there any matter I have omitted in examining which you can think of to which I should direct you attention? A. I don't think of anything now.

CROSS-EXAMINATION by Mr. Clark:

Q. Mr. Lurich, you have refreshed your recollection considerably upon the affairs of the bank since the bank closed, have you not? A. No, I don't know as I have refreshed my memory, I have stated the facts as I remember them; I didn't go over anything, I didn't have time to.

Q. You had of course numerous conferences with your counsel in regard to your defense? A. Numerous conferences? No, I hadn't numerous conferences with him because he didn't have time, he had other matters to attend to; I don't think I have seen my counsel in three weeks prior to yesterday.

Q. And then you had very little time to confer with him? A. Yes.

Q. You put in some answers to interrogatories earlier in the year; you were obliged to confer with him then fully? A. I received those interrogatories, and at my leisure at home, when I could get my thoughts together, quietly in my room, why I answered them to the best of my knowledge at that time.

Q. You have been present through most of the trial? A. This trial here?

Q. Yes. A. Yes.

Q. Now Mr. Lurich, you stated quite clearly your recollection of what transpired in the special meeting of the board of directors called to accept or act upon Mr. Smith's resignation, and you have stated that Mr. Smith said, or rather it was stated in the meeting that Mr. Smith called up Mr. Appleton of the Banking Department and reported that he had made a loan to Mr. Nones without entering it on the books immediately after he had made the loan; is that the way you wanted to be understood? A. I wanted to be understood as I answered the question, and that was how it first came to my knowledge, and I think my answer is that I do not recall whether it was just at that meeting or between the meetings or just how but I stated just what came to my knowledge.

Q. How soon did Mr. Smith, as it was reported to you, according to your recollection, how soon did Mr. Smith notify Mr. Appleton of the Nones irregularity, after the irregularity had been completed? A. My answer I will repeat, which I made fifteen or twenty minutes ago, that I did not recall whether it was that same afternoon or the following day, I did not recall, but at any rate it was very soon thereafter.

Q. So that, assuming that the Nones transaction was made today, Smith making the loans and not entering it in the records of the Trust Company, either tonight or tomorrow morning Mr. Smith notified the Banking Department Examiner? A. That is as it came to me.

Q. That is your recollection of it? A. Yes.

Q. You are quite clear on that, you are not hazy in your recollection on that subject? A. I am telling you how I remember, what I remember, whether you can term it hazy or not I don't know.

Q. It makes some difference whether or not your recollection be the fact, or whether as stated by the Commissioner in his letter of May 14, 1909, a different state of facts was called to your attention in the board meeting. I will drop that, asking you to state whether you made any further investigation at the time you acted in this special board meeting to determine the truth or falsity of Mr. Smith's version of what happened? A. Further investigations were that inquiries were made from the various directors who had that detail in charge.

Q. You had personally nothing directly to do with it? A. I do not recall that I did, I do not remember all those details, every detail that happened at that time.

Q. Did you ask Mr. Appleton anything about it? A. Mr. Appleton, no.

Q. You answered, Mr. Lurich, that you never heard of the occurrence until the action of this special meeting to act upon Smith's resignation; is that the fact? A. I would not connect those two, the letter and the time this happened, I wouldn't say that they happened just at the same time or that they did not, I do not remember.

Q. You stated that you never heard of the Nones matter in any way until in the special board meeting the subject came up, is that right, did you state that, or do you mean that? A. I meant to state what I started before, how it came to me, and what I remember now as to connect that between times, one period and another, I can't do it because I don't remember.

Q. So that you are unable to recall whether you heard of the Nones matter before the special meeting took it up? A. I cannot recall.

Q. You stated that your business included the handling of considerable money? A. Yes.

Q. Does it include the employment of at least one bookkeeper? A. Yes.

Q. And the striking of balances with your landlords? A. Yes.

Q. And the balancing of your book of account with your depositary bank at occasional intervals? A. The balancing of each individual account.

Q. No, the balancing of your depositary bank account, books of your business, which includes that? A. Yes.

Q. Have you attended to that personally? A. No.

Q. You never have? A. No, sir.

Q. Are you familiar with how it is done? A. I am to a certain extent; I am not an expert bookkeeper myself.

Q. No. Are you familiar with the way the ordinary clerk, or your self, balances his deposit pass book after he gets it back from the bank? A. Yes, I am familiar with the way he does it.

Q. Did you at any time look in any of the books of account of the Roseville Trust Company? A. I had no occasion to.

Q. No; you never did? A. No, I didn't look into the books. You mean go behind the cage and look at the books of the teller and the bookkeeper of the bank?

Q. Did you ever look in any book of account of the Roseville Trust Company? A. No; I have seen them in the directors' room.

Q. Did you look at them there? A. No, I had no occasion to; I wasn't on that committee.

Q. So that unless you were on the committee which had to do with the specific phase of the Trust Company's work you did nothing in connection with that work? A. Unless—if I weren't on a committee to do another party's work you mean?

Q. (Question read.)

Mr. Stiefel: I think that question is unfair in its nature.

The Court: I think it is intelligible, the witness can answer it.

A. Why I certainly acted upon their reports in the meetings and listened to what they found and what they did not find and what was right and what was wrong, and acted in the best manner possible.

Q. Now, Mr. Lurich, I want to be very careful not to put any answer into your mouth or to attempt to crowd any answer. Did you ever vote against any action taken by any committee as reported to the board? A. I cannot remember, but I think the minutes would show that.

Q. You have no recollection of any? A. I think I did vote against some things and for others, surely.

Q. Then there were times when in spite of the fact that a committee reported in a certain manner, you after listening to their report voted against it? A. I do not remember the details.

Q. Do you remember that there was such an incident? A. I think there might have been.

Q. Now then, with regard to the reports of the examining committee; those were only semi-annual, is not that right? A. The reports of the examining committee were between the reports of the banking committee.

Q. (Question read.) A. Well, the examining committee would examine, then they would bring in their report, and then we would have the meetings on those reports to improve matters, and then subsequent meetings there was further action on that report as to whether those things had or had not been looked after and what plans had been devised; other books were opened for certain purposes, of keeping records and keeping records straight; why, there seemed to be work all the time, and then at subsequent investigation by our directors' examining committee they would come in with reports that this had been done and that had been done, and it was finally substantiated by us not hearing from the Banking Department on those very subjects

Q. You say subsequent books of account were opened? A. Yes, some little books to keep track, for instance, of insurance, expiration dates of insurance and things like that, be sure that everything would go right; I recognized the banking authorities as our superiors and we had to do their bidding, and I was always in favor of eliminating any chance, even though they wrote us such letters that would make—well, I don't know how to describe it, how they would make you feel, but notwithstanding that I would always try and help matters along so as to send them a proper answer that we would look after those things, and we did.

Q. Do you or do you not know that but two examinations were made by examining committees in each year? A. Between the intervals of the Banking Department, I do know that, yes.

Q. Irrespective of any examination of the Banking Department do you or don't you know that the examining committee took only two specific dates in each year at which time they examined the condition of the trust company? A. I don't know what dates they did, but their method according to their instructions from our president, from our counsel, was that they were taken at their convenience and without the knowledge of the force in the bank.

Q. Then so far as you personally are concerned you do not know how many dates they examined on, do you? A. Well, from their reports I do know that they examined every six months, yes.

Q. Every six months? A. Yes.

Q. Now Mr. Lurich, will you please tell us what information you acquired concerning the methods employed by the examining committee to determine the true condition of the trust company? A. I cannot go into details of that other than has been stated so many times at our meetings, how they did the work according to the way it had been outlined for them to do it.

Q. You are not able to answer the question any further than that? A. Well, I thought I covered the ground.

Q. Would you like to have it repeated?

(Question read.)

A. The information that I acquired is what I acquired at the meetings, how they did the thing.

Q. And how was that? A. I cannot state in detail.

Q. Can you state anything about it? A. Why, yes.

Q. What? A. That they counted the cash,

they went over the collaterals, and they did everything that was necessary in connection with their examination.

Q. Anything else in detail other than counting the cash and going over the collateral? A. Yes, and making comparisons with other banks, correspondent banks.

Q. In what way? A. By communications, by writing these banks and finding out the balances; I also had knowledge of their having met, I met them down here in this building myself, we had, I believe a lock box down here, the Roseville Trust Company did, where they kept their securities, right here in this building, and I think Mr. Fairlie was one of the committee and had the key and there was only one or two that had access at the company to that box.

Q. Mr. Lurich, if you had understood upon the occasion of that special meeting that Mr. Smith had been guilty of two separate irregularities in the Nones account and that he had not disclosed it to anybody until the examination by the Examining Department, which was at least a month later, would you have voted for his retention?

Mr. Stiefel: I object.

The Court: I think that is not an inquiry as to a fact.

Q. Coming now to the Scarlett indebtedness; had you known Mr. Scarlett before he became a director of the trust company? A. Only in a general way.

Q. You had known him? A. Yes.

Q. Had you known anything about his financial responsibilities? A. No, nothing.

Q. Did you in connection with the rest of the

board make any investigation of the standing of any other directors to see whether you would serve with them on the board? A. Oh, I knew most of the other directors with the exception of Mr. Scarlett and Mr. Woodward and Mr. Ingersoll and I made inquiries about those.

Q. And those inquiries satisfied you? A. They were very favorable.

Q. Are you familiar with the fact that the loan to Scarlett was made hurriedly because a loan in an Orange bank of his was being called? A. I do not remember the details of that at all.

Q. You don't know anything about it? A. I do not remember the details of that, no.

Q. Do you know that the loan was made hurriedly? A. No, I do not remember the details of it at all, whether it was made hurriedly or leisurely.

Q. Did you make any investigation of his properties before the loan was made? A. Oh, his properties? No, I knew of his properties and saw the transferring properties at Graylock Manor for a period of years.

Q. As a real estate man is it your practice or is it not to read the list of recorded mortgages in the daily press? A. I follow them up pretty closely.

Q. Most all real estate men do? A. I don't know what the others do, but I follow them up pretty closely.

Q. You have stated that there was but one mortgage that you knew of with which Armstrong was identified in connection with the trust company?

Mr. Stiefel: One loan I believe he said.

Q. One loan? A. Yes.

Q. Represented by a mortgage? A. Represented by a mortgage on land on North Eighteenth Street.

Q. What was the amount of that? A. I think it was $15,000.

Q. Did you ever know that a satisfaction, or rather an assignment of mortgage securing a mortgage of $8500, in which Armstrong and the Roseville Trust Company figured, was executed by Mr. Foster as vice-president and recorded in this county? A. No, I do not remember anything about that.

Q. It was never called to your attention? A. Might have been, I do not remember anything about it.

Q. If it had been called to your attention would you have investigated it?

Mr. Stiefel: I object.

A. I would do whatever I thought was right and proper in any premises.

Q. Now Mr. Lurich, you stated that Mr. Jennings ceased to be the teller and was put on some other work on the books? A. Yes.

Q. Does the fact that Jennings remained as paying teller down to the time he left the employ of the trust company in June, 1913, does that refresh your recollection at all? A. No; I never saw him in the cage waiting on customers thereafter.

Q. You are quite positive about that? A. Quite positive that I never saw him thereafter in the cage waiting on customers.

Q. Did you ever see Mr. Smith working on any of the books of account of the trust company during the last year and a half? A. I saw Mr. Smith

at his desk; I have seen him in the various cages; I have seen him at the safe; I have seen him in the directors' room all by himself.

Q. Did you ever see him in the directors' room working on books? A. Saw him in the directors' room with the bank examiner.

Q. No, working on books, without any bank examiners present? A. No.

Q. Never did? A. No. I happened to stroll in there one time when they were there, the bank examiner, and I wanted to see him on a matter of business, and that is how that happened.

Q. Do you recall any occasion when complaint was made to the board of directors against Mr. Smith, growing out of some altercation with a tenant or occupant of the building in which he lived? A. I remember reading about something I think, having been thrown out of an automobile.

Q. No. Do you recall the board of directors having listened to and considered a complaint against Mr. Smith, the board of directors? A. Oh, yes, yes, I do.

Q. You do? A. Yes.

Q. What was that about? A. Why there was complaint that he was intoxicated, and it developed that the party must have taken Smith for somebody else, and Mr. Fairlie and Mr. Munroe were delegated I think a committee, or were telephoned to and they went immediately to investigate it when this thing occurred, and then at our subsequent meeting why this woman appeared to make a complaint, and both Mr. Fairlie and Mr. Munroe, who were both church men, stated that they had received a telephone message of some fracas, the details I cannot recall, but this is as

far as I can remember, and that they immediately went and saw Mr. Smith within ten or fifteen minutes after receiving this telephone message and found there was no truth to it.

Q. They learned that from Mr. Smith? A. They went to the house and they met Mr. Smith in his automobile I believe on Orange Street, and Mr. Munroe, I believe would be the best man to tell about that because he might remember the details, I do not.

Q. Who else would, besides Mr. Munroe? A. Well, Mr. Fairlie, but he is dead.

Q. Would Mr. Odell know about it? A. I don't know whether he was present at that time or not.

Q. If it had been true it would have prompted action by the Board?

The Court: Oh, no.

Q. What was the discussion in the board meeting, Mr. Lurich, with regard to this matter, there being nothing on the minutes that I can find relating to it? A. I do not remember the discussion; I do know that if any matter like that came to my attention I would give the party a chance to have a hearing, both sides, I would want to dig into it, and if I couldn't do it myself I would want somebody else that I had confidence in to do so, and Mr. Fairlie, a church man, and Mr. Munroe, an anti-saloon man, I thought were two good men fitted to pass on the man's state, as to state of intoxication or not.

Q. One more question on that. When was it, do you recall? A. In—well, I don't know.

Mr. German: Is there anything in the bill concerning this matter at all? If there is not I object to it; what is the use of going on with that?

Mr. Clark: This witness has testified, your Honor, on direct-examination that he never heard of anything after the Nones experience which reflected on Mr. Smith's or the conduct of the bank. I want to cross-examine him on his story.

Q. Now, Mr. Lurich, did you know that Mr. Munroe and Mr. Smith were together identified with the Home Ice & Products Company? A. No.

Q. That was never brought to your attention? A. No.

Q. Mr. Munroe has stated that it was reported to the executive committee and the board? A. Might have been, it might have just happened one of those meetings I was not present, I don't remember anything about Home Ice & Products Company, I read about it once in the criminal cases but it was all a surprise to me.

Q. You have testified that your recollection is that the Banking Department made examination every six months? A. Yes.

Q. Do you want to stand by that? A. That is my recollection, that they made it every six months.

Q. The information given to your counsel showed that the last previous examination preceding the one of October, 1912, was in the latter part of 1911; does that refresh your recollection at all? A. Well, I can only refresh my recollection that that is the way we devised it, so that our committee should go between those periods when the Banking Department made their examination, and as a bank we made our reports the same as all other banks, they were published in the news-

papers and also little printed cards to give to the customers of the bank, and the stockholders and so on, and that was once a year I think those statements came out for the customers.

Q. You personally don't know of any examination by the Banking Department within six months prior to October, 1912? A. I can't just recall the date or time.

Q. I understand you to say that you relied upon the State Department's examination and upon the examination of your examining committee? A. Relied upon it?

Q. Yes.

Mr. Stiefel: I don't believe the witness did make such a statement.

A. I did not.

Q. Did you rely upon the report of the Banking Department and on the report of your examining committee? A. Did I? Why most assuredly.

Q. Tell me just how fully you relied on them? A. How fully? Because the State Banking Department I looked upon as the right and proper parties to conserve the poor people's interests in our banks in this State; they have expert accountants, or supposed to have expert accountants to go and examine those accounts; they are very well paid for that, so that they can hire the best of talent for that. Why shouldn't I rely upon their statements. And furthermore, they in their methods or criticism seemed to show that they qualified as experts to tell us as novice bank directors how to do things, where we were not doing right and how to improve upon these methods, and all that sort of thing. Why should I not rely upon those statements?

Q. Have you finished? A. And likewise with our own directors. There were men present in our own community that I think inspired the confidence of everybody; I myself had my own reputation in that little local place of Roseville at stake, to see that I would not commit any over act whereby anyone could point a finger at me, so that I could continue making my living there. All those things I had in mind, and which led me to believe that I could rely on such men who stood high in financial and church circles, as Mr. Odell, as Mr. Fairlie and Banister, and so on down along the line. Why should I not rely on them?

Q. Was your confidence in your examining committee shaken at all by their omission from their report of the examination of December 14, 1912 of any recommendation that the Scarlett loan be reduced? A. You are calling my attention to a specific date on the Scarlett loan. As I said before, I cannot refresh my memory on any specific date; I know it has transpired—

Q. Excuse me; I think I have indulged the witness quite enough.

(Question read.)

A. I recall of no omission on their part of any particular thing.

Q. Did you have quite as much confidence in your examining committee thereafter? A. Well, I recall of no omission; why should my confidence in them be shattered?

Q. Do you recall whether there was any recommendation in the report of the examining committee of December 14, 1912, calling for the reduction in the value at which any asset was carried upon

the books of the trust company? A. All that I can recall in connection with the Scarlett matter I think I have heretofore state, that Mr. Banister was delegated to see Mr. Scarlett.

Q. No, listen to the question? A. I am coming to that and I think it answers the point of the question.

Q. All right, go ahead. A. And that subsequently we would hear reports from Mr. Banister whether he had seen him or whether he had not seen him, and if he had what he had accomplished, and what the prospects were, and so on.

Q. Do you recall any report of any examining committee within the last year and a half of the trust company or the last two years of the trust company which called for the reduction of any asset from its face value or the value at which it was carried on the books at the time? A. I cannot remember any such.

Q. You were familiar, were you not, with the fact that all checks on the depositary banks drawn on behalf of the Roseville Trust Company required only the signature of Raymond E. Smith? A. I would have been familiar with that perhaps if I was delegated to look after that particular thing, but inasmuch as I was not, why, of course I cannot remember any detail in connection with with it.

Q. Do I understand you do not remember whether or not that was the situation? A. The president must have signed all checks and countersigned by—

Q. No. A. You are speaking of the bank's funds now?

Q. Yes. A. Why, that was to be signed by the president and counter-signed by the secretary.

Q. That is your best recollection of the practice that was followed in the Roseville Trust Company?

Mr. Stiefel: I do not know whether the word "practice" is correct there.

The Court: I think the question is proper.

Q. (Question read.) A. I can't say that I followed up the practice; I know what the practice was to be and that there were men that were to do that, such as our president, and the only one authorized to do it.

Q. Do you know or not that nearly, if not all, checks drawn by the Roseville Trust Company on its depositary banks were signed only by Raymond E. Smith, as treasurer? A. I cannot say that I do.

Q. Did you ever make any inquiry concerning the checks, or the right of Raymond E. Smith, as treasurer, to sign checks for funds in the depositary banks alone? A. I did not find it necessary to make those inquiries because these matters would always come up in our meetings.

Q. But you did not make any inquiry; that is the question? A. What should prompt me to make an inquiry? I wasn't running the whole institution and couldn't.

Q. The answer then is yes, you did not make any inquiry? A. I made no special examination of any of the books, I never looked at them.

Q. I suppose that is an answer. Now I will ask you did you know what the practice in the trust company was with regard to borrowing money for the trust company from other institutions upon the signature of Raymond E. Smith

alone? A. What the custom was of borrowing money upon his signature alone?

Q. Yes, as treasurer? A. I think, as I try to refresh my memory—I am under oath here and I don't know whether it is accurate or not to—is it all right to go ahead and tell anything as far as you can remember—I can't swear that it was accurate, and I am supposed to tell the truth.

Q. We want your best recollection. A. I believe Mr. Smith was, to the best of my recollection, I believe Mr. Smith was authorized to borrow some money, and there are resolutions to show even that, according to our minutes, what he has to do, authorized to do and was not to do. Why should my memory be taxed with answering that question?

Q. Did you know of any machinery or system in operation in the Trust Company, other than the examination by the Department, and the six months apart examinations by the committee, to check up Mr. Smith's operations in connection with those bank accounts in depositary banks? A. May I asked to be excused for the balance of the day; I was sick most of the night and this is quite an ordeal for me to be subjected to.

Adjourned until Wednesday, October 10, 1917, at Chancery Chambers, Newark, N. J.

CHARLES C. LURICH, re-called:

Cross-examination by Mr. Clark:

Q. Mr. Lurich, at the time of the action by the executive committee, by the board of directors, on the question of declaring dividends, what investigation was made for the purpose of determining whether there were surplus and undivided profits available? A. The investigation to my recollection was that there could be no dividends declared unless there was a sufficient surplus.

Q. No. What investigation was made, if any? A. Reports of the standing of the bank.

Q. Prepared by whom? A. By the examining committee.

Q. Let us understand this now. The examining committee presented reports to the executive committee at the time it was intended to act on a dividend? A. That is my recollection.

Q. Have you ever seen during the past two years of the bank's existence any detailed list of assets and liabilities prepared by the examining committee? A. Yes, and they were spread on the minutes, to my recollection, reports by the examining committee of their examinations.

Q. Listen to the question, please.

(Question read.)

A. Well, what I have seen, as I recall—

Q. Yes or no. A. —purported to be that.

Q. Have you seen during the past two years of the bank's existence any reference by the examining committee whether or not there was any surplus or undivided profits, and, if so, how much?

A. I cannot remember how much, but I know this—

Q. In reference—

Mr. German: Let him finish.

The Court: The witness says that the reports he has sent are spread upon the minutes. Now if you want to ask him whether he has seen anything else you may do that, but it is not worth while to ask him about what the reports contain, he cannot remember at this time.

Mr. Clark: I am not trying to, if your Honor please, but he has made a statement here that the executive committee acted in connection with advice or reports from the examining committee. There is absolutely not the slightest foundation in this case for that statement, and I want to search his recollection.

The Court: Ask him whether the statements that he refers to are those that are on the minutes or whether he refers to other statements.

Q. Answer the question of the Court, please.

A. In connection with that I would say that I refer practically to both, the statements that are on the minutes and also the statements made at board meeting, when we went over our assets there and surplus, as to whether or not it was feasible to pay a dividend; I also recall that the first things we considered was the charging off some doubtful loans, and after charging off those doubtful loans if there was then sufficient surplus to pay a dividend why it was declared and was voted.

Q. Do you still say that in acting upon the question of dividends you relied or had before you reports from the examining committee giving assets and liabilities? A. I still say what I have said, I don't know how I can make it any clearer.

Q. That can be answered yes or no. A. I cannot answer it in the negative or affirmative because I cannot grasp it.

Q. Were the reports which you speak of the examining committee submitted in connection with the dividends declared in writing? A. The reports of the examining committees were, as I recall, in writing submitted by the chairman.

Q. And there was nothing from the examining committee in connection with dividends on which the executive committee acted or relied other than is contained in their written reports in the minute book?

Mr. German: He said otherwise.

The Court: I understood when the reports were presented there was a discussion and questions were asked, and those questions related to matters connected with the assets.

Mr. German: And liabilities, if your Honor please.

Q. Now you say that at the time that you passed on the question of dividends some report was had and discussion had by members of the examining committee before the board; is that right? A. Yes.

Q. And who acted for the examining committee in that connection, Mr. Sexton? A. At the time of declaring dividends—

The Court: No, just answer the question. The trouble is you try to make a long explanation and that involves another series of questions. If you will just answer the question and stop we would get on a great deal faster.

A. Mr. Sexton as chairman of the examining committee always submitted the reports.

Q. Now then, was it not the practice, Mr. Lurich for the executive committee to first vote for the passage of a dividend, declaration of a dividend? A. It was.

Q. And was there present at any such meeting of the executive committee any member of the examining committee? A. I must correct myself on that statement. I do not know as there was a vote in the executive committee as to dividends, I think there was a report made by the executive committee to the full board, and then at the full board that vote was taken whether or not to declare a dividend.

Q. At the executive committee meeting was there any infromation presented at the time on the question of dividends from the examining committee? A. Well, whether there was at that particular time I do not know; we had the reports every six months from the examining committee and we had reports at each meeting by the secretary and treasurer of the assets and deposits and the liabilities.

Q. So that you did have at the executive committee meetings at which you acted on the question of dividends statements from the treasurer? A. Yes.

Q. Was any investigation made on behalf of the executive committee to determine the truth

or falsity of those statements presented by the treasurer at those executive committee meetings before asting on the question of dividends? A. The executive committee had of course the reports from the treasurer, they had the reports of the examining committee.

By the Court: Q. The question is this, the treasurer made a report, you say? A. Yes.

By the Court: Q. Now what counsel wants to know is whether you made any investigation with reference to the accuracy of his statements? A. The president—

By the Court: Q. No. Did you or did you not? A. Yes.

By the Court: Q. Now state what is was? A. As I recall, Mr. Odell, the president, was the one who made those investigations and went over them very carefully in the executive committee with the executive committee.

Q. He went over it right in the meeting? A. And prior to the meeting.

Q. How do you know about what he did prior to the meeting? A. From his reports.

Q. Mr. Odell reported in the executive committee meeting that he had verified all of the information given on those statements of the treasurer, is that what you understand? A. I won't say that he verified, I say he made his reports as to how things were, made a statement of the facts.

Q. Did he say that he had gone over the figures prior to the meeting? A. He said that he had gone over the items, and we are in this state now, and we are growing, and he also stated that he would like to see a surplus of one hundred thou-

sand dollars before declaring any dividends at all, but of course the other members of the full board they preferred to have dividends paid before the surplus reached that amount and voted that way.

Q. Other than that no investigation to your knowledge was made?

Mr. German: He didn't say that.

By the Court: Q. Well, was any investigation made? A. I do not recall whether there was or not.

Q. Mr. Smith has testified in this cause that during the past two years of the bank's existence checks of William C. Armstrong were being presented, cashed and not charged, almost daily; did you have any knowledge concerning that practice? A. Absolutely no knowledge pertaining to that.

Q. Did you ever make any investigation concerning the practices of the treasurer in honoring checks and not charging them? A. I never knew that there was any cause for that.

Q. Did you ever hear that the Trust Company was short of funds? A. I knew that the funds were decreasing and that the deposits were increasing, and that matter had to be very definitely explained to me, and it was at our executive meetings.

Q. By deposits increasing, do you mean aggregate of amount or in number of deposits? A. In number of deposits.

Q. It is true that the aggregate of the amount of deposits was decreasing? A. Yes.

Q. Now it has appeared in the evidence that the paying teller had in his cage almost daily during the past two years large batches of paper

constituting cash items representing checks cashed and not charged. Did you ever make any examination of the paying teller's cage? A. I did not; I don't know what he had in his cage.

Q. Do you know of any other committee or officer examining the paying teller's cage, other than at the semi-annual examination by the examining committee? A. I have seen Mr. Odell in the various cages at different times when I have been over to the bank, just what he was doing I don't know.

Q. You testified on your direct-examination that you were asked to come over to the bank and, as you put it, witness the signatures on the report of condition to the Department of the Trust Company, which has been offered in evidence here; who asked you? A. Why, Mr. Smith.

Q. What did he say? A. He said, "We got the bank statement ready and it requires three witnesses, can you come over and see Mr. Odell sign, Mr. Odell and I have to swear to it and it requires three witnesses to our signatures."

Q. And when you came over what happened? A. I saw Mr. Prosser there, a Notary from across the street, and Mr. Smith signed and Mr. Odell signed, and they took their affidavit, and then of course Mr. Foster sometimes, Mr. Mott sometimes, Mr. Fairlie sometimes, and myself and some other would sign, seeing him sign, being sworn to, of course that was Mr. Odell's signature.

Q. Now then, did Mr. Odell tell you you were merely acting as a witness to his signature? A. I don't remember Mr. Odell saying anything specifically about that.

Q. Was it customary for the three persons who signed as attesting signers—

The Court: Well, what he did.

Q. Well, at the time you signed your name to these reports were the other two directors present who also signed with you? A. I believe they were.

Q. In all cases? A. In all cases, as far as I remember.

Q. You signed these reports of condition at more or less frequent intervals for several years, did you not? A. Yes.

Q. In all that period you had never looked at a book for the purpose of verifying any of the information contained in those reports? A. I looked at the word "attest."

Q. No, just answer the question.

The Court: Prior to signing your name as a witness did you ever make any examination of the assets?

A. Oh, not at all.

Q. And was it on each occasion brought to your attention by Mr. Smith that you were needed over there for that purpose? A. For a witness, yes, to witness that statement.

Q. Never by anyone else? A. No, I don't say never by anyone else, it might have been in the office, someone in the office, at times I happened to be out and when I came in the office my force would say, "You are wanted over at the bank," and they would say—

The Court: Never mind about that.

Q. There was a question asked you at the end of the examination last week which I believe you did not answer, it was the last question asked

you and you asked to be excused for the day; it is necessary to go back two or three questions to get the primary question: "Did you ever make any inquiry concerning the checks, or the right of Raymond E. Smith, as treasurer, to sign checks for funds in the depositary banks alone? A. I did not find it necessary to make those inquiries because these matters would always come up in our meetings. Q. But you did not make any inquiry; that is the question? A. What should prompt me to make an inquiry? I wasn't running the whole institution and couldn't. Q. The answer then is yes, you did not make any inquiry? A. I made no special examination of any of the books, I never looked at them"—no, I am on the wrong page, this is the question: "Did you know of any machinery or system in operation in the trust company, other than the examination by the Department, and the sixth months apart examinations by the committee, to check up Mr. Smith's operations in connection with those bank accounts in depositary banks?" A. The only other system was of the Banking Department.

Q. Other than that and the examining committee what, if any, system was there?

The Court: He says there was none except the Banking Department.

Q. Do you make that answer? A. That is my answer.

By Mr. German: Q. I understood you to say that the examining committee recommended the payment of dividends before the board?

The Court: He has gone all over that.

Mr. German: I wanted to be sure the witness testified that the executive committee recommended all so far as he knows.

A. Yes.

ELLIOTT HARDON, sworn:

Direct-examination by Mr. Stiefel:

Q. Mr. Hardon, what is your business? A. I am treasurer of a trust company in Jersey City.

Q. Will you give us its name? A. The Mercantile Trust Company of Jersey City.

Q. How long have you been employed in that capacity? A. Since the first of the year.

Q. Prior to that what was your employment? A. I was with the Newark Trust Company of Newark, New Jersey.

Q. And I believe you were connected with the Department of Banking in this State at one time? A. Yes.

Q. For how many years? A. Fourteen years and nine months.

Q. When did that connection cease? A. On the thirty-first day of December, 1914.

Q. Now will you briefly tell us what the character of your employment was by the Banking Department during those fifteen years, we will say?

The Court: Oh, no, you need not do that.

Q. You were a bank examiner?

The Court: If the witness examined this particular bank why you can inquire into that.

Mr. Stiefel: I want to show he was an expert examiner.

The Court: There is no doubt about that, is there?

Q. Did you examine the Roseville Trust Company on or about October 14, 1912, Mr. Hardon? A. If the records say I did.

Q. I show you a paper apparently bearing your signature, or rather a form of report; is that your signature? A. Yes, sir.

Q. Looking at that can you tell us—

The Court: Give the date of that, the one he has just referred to.

Q. Dated October 26, 1912.

Mr. Clark: If you give the date as of which the examination was made it will be more intelligible to all.

Q. And which at the head bears this title: "Examiner's report of the condition of Roseville Trust Company, located at Newark, in the County of Essex, at the close of business, October 14, 1912." Did you make an examination at the close of business of the Roseville Trust Company on that date? A. I did.

Q. Did you embrace your examination in this report? A. I did.

Q. And this report consists of these two papers or documents? A. Yes.

Mr. Stiefel: I will ask that they be marked in evidence.

The Court: Well, they are files of the State Department and cannot be marked, they will have to be identified.

Mr. Stiefel: I offer them in evidence.

Mr. Clark: We want to renew our objection to the introduction in evidence of those reports and any testimony from this examiner bearing upon his examination of the Trust Company upon the ground that it is irrelevant and immaterial.

The Court: I think that Vice-Chancellor Pitney allowed the reports to go in.

Mr. Clark: That is true, if your Honor please.

The Court: Well, I will follow his ruling.

Mr. Clark: But we want to have our objection noted.

The Court: Yes, certainly.

Mr. Stiefel: I would like to have the prior one also.

Mr. Clark: Well, I have not opened the folder covering the prior examinations, but I want to object to the introduction of any earlier ones on another ground, and that is that the last previous examination was made as of the date prior to the date of the earliest falsification of the general ledger which we set out in our prepared statement. It is true that prior to that there were discrepancies between the pass books and the ledger, but so far as the general conduct of the books is concerned the first entry irregular in character plainly apparent on the books is as of a date just subsequent to this examination, immediately prior to the one now offered, so that it seems to me, if your Honor please, that the whole purpose of the defendants' contention can be suitably and completely raised upon this report, and that it is simply going to unnecessarily drag us into foreign fields to go into the report as of December 13, 1911 when our prepared statement shows the first irregular entry as of December 15, 1911.

The Court: What is the object of offering it?

Mr. Stiefel: Mr. Cloran's testimony is that the first false extension in the ledger was on December 6, 1911, and this report is made as of the close of business on December 13, 1911, just a few days prior.

Now we are by no means bound by Mr. Cloran's diagnosis; the proximity of those two dates necessarily calls up the question of what was true on December 13th.

The Court: I do not think it does at all. If a man makes a false entry on December 16th how can any examiner who examines the books on December 14th know anything about it?

Mr. Stiefel: Then I offer it for this general purpose: to show the fact that there was an examination made just prior to the beginning of these falsifications by a highly competent man, that that was followed by the examinations of our own committee, and was at least supplemented by one further examination by this highly competent man, and that the action of my clients, and I presume the clients of the other attorneys in his case, was to a certain extent predicated upon these examinations, none of which furnished my clients with a disclosure or an inkling of the improprieties alleged. You cannot cut off this case at one point and say we will confine our inquiry to that. Furthermore, I point out to your Honor that Mr. Cloran himself cannot identify positively the date of the first impropriety because in one case he places it in January and in anoth-

er in December, and when we get to the argument of the case it may appear that the defalcation commenced prior to this examination.

Mr. Clark: We will admit the fact to be that an examination was made by the Department as under date of December 13, 1911. We simply do not want this additional amount of truck to go into the case because it won't add anything to it.

Mr. Stiefel: All right, if you make that admission that will end it.

Mr. German: I wish to have this put on the record, your Honor—

The Court: Well, you do not agree with Mr. Stiefel?

Mr. German: I do, but I want to supplement his remarks.

The Court: It is not worth while unless you disagree with Mr. Stiefel.

Mr. German: But I would like to have complainant's counsel state whether there is any claim of negligence on the part of any of these directors and particularly Doctor Keim, prior to December 11, 1911.

Mr. Clark: Oh, yes, our negligence goes right back to the start. I am saying that there is no false entry shown on the books so that the purpose of introducing the evidence concerning what this examiner would or would not have found is not of any value to us.

Mr. German: Then I say, in view of that fact, that anything whether it is by way of examiners report or otherwise

which goes to show negligence on the part of any of these directors or non-negligence is competent.

The Court: Mr. Clark has made a statement which satisfies Mr. Stiefel. I do not see why it should be necessary to encumber this case with proof of the non-existence of false entries when it is admitted that there were no false entries.

Mr. German: All right, then that satisfies me. For what time, if your Honor please.

The Court: Prior to December 17th.

Mr. German: And will it be also agreed by Mr. Clark that the examiners report will show no irregularities in the bank.

The Court: I take it that it is for the complainants to show false entries; if they do not show them why I will assume that they do not exist.

Q. Mr. Hardon, your compensation as a professional accountant and an examiner, acting under the authority of the Banking Department, was paid by whom, the Banking Department or the banks which you examined? A. I received the check from the Commissioner.

Q. But it was a per diem, am I correct in that? A. Yes.

Q. You did not render your bills direct to the institution that you examined? A. No, sir.

Q. You were acting all during the course of your examinations under the direction of the Department? A. Yes, sir.

Not cross-examined.

Mr. Stiefel: Does your Honor think it necessary to call the man who assisted Mr. Hardon in making that examination?

The Court: You may put him on the stand for cross-examination if you please, you can call him as a witness and say that you have subpoenaed him for cross-examination.

Mr. Stiefel: I will do that.

WALTER GROSSCUP, called:

The Court: Now, Mr. Grosscup, as I understand, is offered for cross-examination because he participated in the making of the report which has just been offered in evidence.

Mr. Clark: I have no cross-examination.

DOCTOR WILLIAM F. KEIM, sworn:

Direct-examination by Mr. German:

Q. Doctor, you were one of the directors of the Roseville Trust Company from the time of its organization down to the time its doors were closed? A. I was.

Q. What is your profession? A. Physician.

Q. How long have you been such, practicing in Roseville? A. Seventeen years.

Q. Where do you reside? A. Twenty-fifth Roseville Avenue.

Q. What institutions were you connected with, either civic or business bodies, at the time you were director of the Roseville Trust Company? A. I was connected with the Eleventh Ward Building & Loan Association.

Q. In what capacity? A. Director.

Q. What is the size of that institution, large or small? A. It has become a very large institution.

Q. What other bodies? A. Nothing except hospitals.

Q. Well, you are connected with what hospital? A. Connected with St. Michael's Hospital.

Q. What else? A. The Hospital for Women & Children, at the present time the Presbyterian Hospital and the German Hospital.

Q. Any other bodies? A. Not to my knowledge, no, except clubs and lodges of course.

Q. You are a member of the Roseville Athletic Club? A. Yes.

Q. Roseville Presbyterian Church? A. Yes.

Q. Were you on any of the committees of the bank? A. I was not.

Q. Before you became identified with the Trust Company did you know the proposed directors? A. I knew some of them.

Q. Who did you know? A. I knew Mr. Fairlie, not so well personally as by reputation, and knew him when I saw him.

Q. What do you know about Mr. Fairlie's business reputation and standing in the community? A. Very excellent, I knew he was connected with a large concern here in Newark, from which I bought coal for a good many years.

Q. And what else? A. And I knew Mr. Banist-

er, Mr. William Banister, who is head of a large hardware concern here in Newark; Mr. B. Banister who was also an officer in the Banister Shoe business, a large shoe manufacturing establishment, shoe manufacturing establishment, and Mr. McCord quite well.

Q. What do you know about him? A. I believe he was manager of a Philadelphia Life Insurance Company here in Newark; also knew Mr. Lurich, who was at that time and is yet a real estate operator in Roseville, doing a large business; I knew also Mr. Foster who was connected with J. B. Foster, his brother, in the drug business at that time.

Q. Did you know Mr. Odell? A. Yes, I knew Mr. Odell, he was a member of our church, and I knew him to be connected with Claflin & Company as their financier or finance manager.

Q. Do you know Mr. Sexton? A. Yes.

Q. What do you know of Mr. Sexton? A. I knew he was connected with the Superintendent's office in the City Schools.

Q. Did the fact that you knew these gentlemen, and of their business experience, have anything to do with your becoming a director of this institution? A. Yes.

Q. In what way? A. Well, if I was to become a director of an institution I would want to know with whom I was to associate, and naturally those being men of prominence and men of ability I had no hesitancy in allowing myself to become associated with them.

Q. What did you know of Mr. Smith before he became identified with the Trust Company? A. Only what was given to me by, or told me by Mr. Munroe.

Q. What was that? A. Mr. Munroe said that in casting around for a man for secretary and treasurer he had been recommended to have Mr. Smith, and he had investigated Mr. Smith, inasmuch as he had gone to the banks or to the bank in East Orange where Mr. Smith was employed, and talked with the officers there, at least one or two of them, Judge Davis, I remember him speaking of him particularly, that he had spoken to him, and that the report that they gave was that Mr. Smith was a very excellent man, couldn't get a better, and altogether gave him a very splendid recommendation.

Q. What do you know about the employment of Mr. Smith by your company? A. Well, after the organization of the bank Mr. Smith was of course a director, and the bank having been organized I presume it was talked among the directors, as it was talked to me, that Mr. Smith was a suitable man for the position and it was decided—

Mr. Clark: I ask your Honor, if you will, to instruct the witness that he is not to testify to what he presumes was talked about among other directors; the witness is naturally unfamiliar with testifying, and if we start him right now we will save a lot of time.

Q. Only tell what you know. A. Mr. Smith was employed by the directors after the organization of the bank.

Q. Were there other applicants or applicant for the place? A. Not to my knowledge at that time.

Q. Weren't there any other applicants for the

place besides Mr. Smith? A. There had been previously, to Mr. Munroe, but at the time of the employment I do not recall any.

Q. What did you understand your duties were as director of this institution? A. To attend meetings of the board of directors, and to exercise with that board general supervision over the work of the bank and various business that came up and was brought before the board; also to in every way foster the welfare of the bank inside and out as I could.

Q. What did you do to carry out those duties, so far as you now recall? A. I attended the meetings of the board of directors as often as possible, and at the meetings of course when questions of importance or questions came up with regard to the business of the bank I asked questions with regard to that business and voted for or against as I saw fit in regard to various acts; I always endeavored to understand the business which was being transacted.

Q. What did you do, if anything, regarding the statements or reports that were submitted either by the officers or the different committees? A. The statements submitted by officers or the committees were always carefully gone into and questioned, and questions asked until they were thoroughly understood; in this particular I took part when I desired to be enlightened on any particular phase of the work.

Q. What do you know about the allegation that Mr. Smith worked on the books very often and very frequently in the bank? A. In the very early history of the bank I understand that Mr. Smith did do some work on the books, later

we employed a bookkeeper for that purpose, and after that I understood that the bookkeeper attended to the bookkeeping.

Q. What precautions were put upon Smith and the other employes of the bank to see that they carried out their duties?

The Court: You mean what checks.

Q. Yes; I mean the word precautions too. A. Smith was bonded, if that is what you mean.

Q. How much was he bonded for? A. He was bonded for twenty thousand dollars.

Q. How about Jennings? A. Mr. Jennings was bonded also.

Q. In what sum? A. Ten thousand dollars.

Q. And Thompson? A. Thompson, five.

Q. Mindnich? A. Five also.

Q. How about the janitor? A. The janitor was also bonded, five thousand dollars.

Q. Do you know any of the employes or officials who handled money who was not bonded? A. I do not.

Q. Now outside of the bonding of the employes what precautions or what checks do you know were put upon these employes? A. We had our president who was constantly present in the bank performing his duties, I do not mean constantly, but every day practically, and the vice-president, and even the second vice-president was there frequently, he had free access to the bank, and it was their duty as I understood by the by-laws—

Mr. Clark: If your Honor please, I ask again that the witness be confined to his own knowledge.

The Court: Yes, the witness will speak of his own knowledge.

Mr. Clark: He does not know and cannot know that Mr. Odell was there constantly.

By the Court: Q. If you saw Mr. Odell there you may state. A. I frequently saw Mr. Odell there.

Q. You say you saw Mr. Odell there; did you ever see Mr. Foster or Mr. Fairlie? A. I did; the latter part of the period of the bank Mr. Foster was there I think about a half a day each day.

Q. Mr. Fairlie was the first vice-president? A. Yes.

Q. And who was second vice-president? A. Mr. Foster.

Q. Did you see Mr. Foster there frequently too? A. Yes, I saw Mr. Foster frequently in the bank.

Q. Now what other precautions or what other checks were put upon him by the visit of these officials, as you stated, and the bond? A. We had an executive committee which exercised supervision over the acts of the employees and over the general conduct of the bank and had their meetings once a week or oftener and at which matters of that sort was taken care of.

Q. What other committees, if any, did you have? A. We also had an examining committee appointed by the president I believe, which examined all the books semi-annually and oftener if they chose, but they worked with the examiners semi-annually. The examining committee made their reports to the board of directors, and after making their examinations those reports were gone into very carefully by the directors and

questions asked at all times with regard to the examinations.

Q. Were there any other committees or examinations that you know of? A. There was an appraisel committee to take care of appraising property.

Q. Was there any other examination by any other bodies or committees or persons, that you knew of? A. Yes, the State made their examinations twice a year about and those matters of course were always reported to the board.

Q. Did you personally know or did you ever hear, anything brought to your attention to create a suspicion in your mind that Smith or any other employe of the company was not performing his duties? A. No.

Q. When did you first know or hear that irregular entries had been made in the books by Smith or other employes of the bank? A. After the closing of the bank.

Q. Was there any irregularity on any of the reports or statements or on any book brought to your attention made by any employe, either made or submitted by any officer or employe of the company before the closing of the bank? A. There was an irregularity with regard to Smith at one time.

Q. I am talking about reports. All right, we will come to that later. There was an irregularity of Smith? A. Yes, there was one irregularity, htere was an irregularity reported by the Banking Department.

Q. Now outside of that do you remember any other irregularity reported by any official either by statement, reports or otherwise, by any employe or officer of the company? A. I do not.

Q. What do you know about this irregularity that you have mentioned of Smith's? A. Well, the Nones affairs.

Q. Just tell us what you know about that? A. In the first place I wish to state that I did not hear or see the letter written by the Commissioner at that time.

Q. Were you present at the meeting at which the letter was read? A. I was not, that is when it purports to be read, I wasn't there, but I did get from Mr. Odell a statement.

By the Court: Q. You better state why you were not there? A. I was not there on account of a professional engagement which called me away, I endeavored to get there but got there after the meeting had closed.

Q. Now just state what you knew of the irregularity in the Commissioner's letter, if anything? A. Mr. Odell told me that Nones had come to Smith, or rather in the first place that the department had made a complaint of Smith's irregularity, and in asking what that was he said that Nones had come to Mr. Smith some time early in the spring—this conversation that I had with Mr. Odell was just after the meeting, that was in June—some time early in the spring, I think it was February, Nones came to the bank or to Smith and asked Smith for some money, wanted the loan of, I believe in the bill of complaint it is thirteen thousand and something.

Q. Thirteen thousand he asked for? A. No, thirteen hundred dollars, I didn't remember the exact amount, but Smith gave him this money and made no record of it in the bank; Nones was in a hurry about the money, as the story went,

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and there wasn't time to have the examining committee pass on it, and Smith out of the goodness of his heart to satisfy Nones and to help him out of his trouble gave him the money.

Q. You mean examining committee or executive committee? A. Executive Committee. Then Nones did not pay this money back, as he promised; in a very short time he came back to Smith, a week or so later, and asked for more money, which Smith advanced him, which was a thousand dollars. This occurred in February some time. Then in March, I think it was the twelfth, the State Examiner appeared to examine the books and did examine them. After the examination that night Smith called up the examiner and made a confession of the affair to the examiner, and he also called up Mr. Munroe or saw Mr. Munroe and made a complete confession to him as to what had happened and how it had happened.

Q. You are now telling us what Mr. Odell told you about this affair? A. I am. He also saw Mr. Odell very shortly afterwards, probably the same day, and made a confession to him, I believe he saw Mr. Odell with Mr. Munroe; the matter was gone over very carefully, and Mr. Smith claimed that he did this purely out of his friendship to Nones. Mr. Odell said further that they had a conference with the Bank Examiner at his house and went over the matter very carefully, and Nones was sent for or called up and had settled the affair and taken his account out of the bank. This occurred in March. The bank examiner's report went in to the department some time in May, and on May twelfth or four-

teenth the Commissioner wrote a letter regarding the report to Mr. Odell, in which he brought the matter up and requested Mr. Odell to bring the matter before the board. In compliance with that, at the same time or just following this Mr. Odell appointed a committee which, as I remember, consisted of Mr. Fairlie and Mr. Foster and himself, and they made an appointment with the Commissioner of Banking and talked the matter over at a conference with him.

Q. They had a conference with him where? A. I think it was at the Commissioner's office, I am not sure just where that was, but they went to some appointed place. Following this the meeting was called. I asked Mr. Odell at the time whether the committee which had investigated this matter was fully satisfied that Smith was acting in, was honorable about the matter, was acting in good faith, and he said they were. The other portion of the letter which appears I did not read or hear.

Q. Did Mr. Odell tell you what had taken place at the meeting, or any other member of the board?

The Court: That is a matter of no consequence.

Q. Now you are sure you stated all that Mr. Odell told you was in the letter about this Smith Nones affair? A. Yes, I am very sure of that.

Q. You signed with the other directors the letter to the Commissioner in which the directors refused to accept the resignation of Smith in accordance with the suggestion of the Banking Commissioner; what have you to say about that? A. This letter was presented to me two or three days later at the bank by Mr. Smith, and stating

that Mr. Odell expected us to sign the letter, all the directors to sign it; most of the directors had signed it at that time and believing that it was merely a statement as to what the directors had done at this meeting I signed it without any further thought. I read the letter.

Q. Did you ever know down to the time of the closing of the bank that the Commissioner of Banking had criticised the directors, particularly by his letter of June 18, 1910, in retaining Smith? A. No.

Q. When did you first know of this letter, the letter is dated July 16, 1909, in which among other things he says: "I will now say, however, that I emphatically disapprove of the decision of the board in the matter," referring to the Smith matter; when did you first see, hear or know about this letter? A. I think it was in the bill of complaint, when I read the bill of complaint was the first knowledge I had of it.

Q. What do you know, if anything, about the falling off in deposits and the increasing of the depositors? A. That matter was discussed in the board about I think in 1912, and the president and Mr. Smith were asked to explain how this act occurred, and it was explained in this manner, that owing to the stringency of the money market at that time some of our larger depositors had withdrawn large sums of money, and that there was the usual increase of small depositors, the bank was growing and there was a growth of small accounts, but the large accounts had been reduced; this matter was fully discussed by the board at the time, and it was a matter of common knowledge that money was

tight, and we took that as a plausible excuse, plausible reason.

Q. What do you know about the allegation in the bill that your institution failed to keep at least fifteen per cent of funds on hand to meet the immediate demands of the bank, when did you first learn that? A. I didn't know that such a condition existed during the running of the bank, it was never reported by the officials and I didn't know that it existed.

Q. What do you know about the declaration of dividends, if anything? A. When it was decided to declare dividends the matter had been taken up by the executive committee and passed on by the executive committee as I understand it, that there were sufficient funds for a declaration of dividends, I mean sufficient earnings, and the matter was then brought before the board and freely discussed as to whether dividends should be declared or not; the report given by the executive committee and by the officers indicated that the money was there to declare them if they so desired, and it was decided by the board to declare a dividend.

Q. Did you ever know anything about this box 55 alleged to have been kept by Smith? A. Never heard of it until after the failure of the bank.

Q. What do you know about the directors making loans to various persons when the funds were too low to warrant those loans? A. I didn't know that that was done.

Q. What did you know about the institution making loans to persons alleged to be financially irresponsible to the extent of one hundred and

seventy-nine thousand four hundred and nineteen dollars or thereabouts, as alleged in the bill? A. I do not believe that the directors made those loans.

Mr. Clark: If your Honor please, I object to the statement as to what he does not believe.

The Court: The question is what the witness himself knows about those loans. Do you know anything about them?

A. I know nothing about the major portion of them; I have reference to the loans made by Smith unknown to the directors; of course there were some loans made by the board and which were not good or turned out to be not good afterwards, but not to our knowledge at the time they were made, we thought they were good.

Q. Have you read this bill of complaint? A. I have.

Q. What do you know about the allegation therein that the bank had no man of experience except Smith and that they left the entire management to him, what do you say about that? A. I deny that.

Q. Well, in what way? A. We had able men in our board, we had our officers, Mr. Odell, who was an experienced financial man, had been in finances all his life and handled the finances of a very large concern; we had on our executive committee Mr. Fairlie, who was the head of a large business concern here in Newark and a successful business concern, and he was also I believe a director in another bank; we had Mr. James Banister, who was on the executive committee, and he also was the head of a large con-

cern; Mr. William Banister, head of a large hardware concern, and familiar with large business.

Mr. Clark: I object to the witness continuing this recital as to what Mr. William J. Banister was familiar with, and Mr. Odell was familiar with.

The Court: I do not think it helps us very much.

Q. No, you need not go into that in detail.

The Court: It seems to me that as far as the personnel of this bank was concerned it was extremely good.

Q. How about the other employes, what was your understanding as to their experience? A. Mr. Smith—

Q. Outside of Mr. Smith, take the other employes? A. They were banking men.

The Court: As far as the witness observed; he knew nothing about them I suppose; he can state what he observed with respect to their performance of their duties.

Q. Did you visit the bank frequently? A. I did.

Q. In what capacity? A. I was there almost every few days, every other day usually.

Q. And for what purpose? A. Usually on business, and some times I dropped in to see Smith and talked with Smith or other employes, but as a usual thing I was taken there by business of my own.

Q. Did you have an account in the bank? A. Oh, yes, several of them.

Q. Any other members of your family? A. Yes.

Q. How much stock did you own, either personally or with other members of your family? A. Twelve shares.

Q. While you were in the bank did you observe the manner in which the employes were performing their duties? A. I did.

Q. What did you observe? A. I always noticed that the men employed seemed to be attending to business and strictly to business.

Q. Did you ever hear any complaints by any of the depositors or anyone having business with the bank as to any irregularities by the employes? A. I never did.

Q. Or otherwise? A. No.

Q. What do you know, if anything, about Smith being connected with other business other than the banking, particularly the Intercity Land & Securities Company and this Home, Ice & Products Company or the garage, or any other companies named in the bill of which allegation is made? A. I had no knowledge of Mr. Smith's outside dealings.

Q. What do you say in addition to what you have already said about the allegation that none of the directors or officers devoted any time to the affairs of the bank except periodic and infrequent visits?

Mr. Clark: I think that this is quite an objectionable form of leading question, to recite to him a paragraph from the bill and ask him what he has to say about it. I object to the form of the question and the fact that it has already been covered.

Admitted.

Q. (Question read.) A. I would deny that; Mr. Odell was at the bank practically every day, I saw him there very frequently myself; I also saw Mr. Fairlie and Mr. Foster and Mr. Munroe there frequently in the bank; I was there myself, and I saw other directors there.

Q. What do you know about the Intercity Land & Security Company, of which it is alleged Smith was a director, overdrawing its account to the extent of six hundred and eighty-seven dollars and fifty-eight cents?

The Court: He says he never knew about it.

Q. Ths is overdrawing their account.

The Court: I supposed your question was broad enough to cover everything, but if you do not think it was.

A. I didn't know their account was overdrawn.

Q. Or other depositors that were overdrawing their accounts to the extent of $10,867.70 or thereabouts?

The Court: That question is of no value whatever. You can ask the witness whether it was brought to his attention that some of the customers were overdrawing their accounts.

A. It was never brought to my attention.

Q. What do you know about this loan to John B. Scarlett?

The Court: Do you know anything about the Scarlett matter? A. Yes.

A. Yes.

By the Court: Q. You may tell us about that? A. The first loan, I think $10,000, I do not remember exactly how that was made but I do remem-

ber that after time had passed on we did not regard it as a very good loan and we made all efforts, it was almost a—

By the Court: Q. What you yourself did in connection with it, that is all that the question calls for, what you yourself did in connection with the Scarlett matter, did you do anything, either in the way of action in the board meetings or in any other way? A. In the board meetings I endeavored to find out what the securities were that Mr. Scarlett had to guarantee his loan, and what his financial statement, or what his financial state was, and also acted on motions urging the officers to collect on that loan and reduce the loan; this was done repeatedly.

Q. What did you understand was done?

The Court: No, not what he understood.

Q. Well, do you know what was done in the board meetings or otherwise with the letters acting upon the suggestion or recommendations or criticisms contained in the various letters of the Commissioner of Banking and Insurance, other than this first letter regarding Smith?

The Court: I do not think that that is a proper question. The witness has stated that he never heard of but one of those letters. Now you may ask him whether there was any letter other than the one he has testified to written by the Commissioner of Banking which was brought to his attention.

A. There were other letters that were read in the board meeting, that I heard read.

Q. What part did you take, if anything, in act-

ing upon the suggestions or criticisms? A. Endeavored to find out the cause for the criticism, the basis, and in all cases I, with the rest of the board, endeavored to correct as soon as possible the condition to which the banking department called attention, and at all times tried to comply with the banking department's request. Of course in the case of some loans which the Banking Department thought were not as good as the directors seemed to think there may have been at times a tendency to differ with the Banking Department, but even with that the effort was always made, if the loan was directed to be reduced or to be called the effort on the part of the directors in which I took part was made to comply with the request, and in most cases it was done; other criticisms that were made were always either corrected, reported corrected by the president and the executive officrs previous to th reading of the letter, or were at that time directed to be carried out.

Q. What did you do, or the other directors to your knowledge, to supervise or circumspect the work of the examining committee? A. When the examining committee's reports were reported to the board the chairman on one particular occasion that I remember was asked to explain his method of examining, was frequently asked about different phases of the examination but on this particular occasion he was asked to explain the method he pursued.

Q. And who was the chairman then? A. Mr. Sexton.

Q. Now tell us. A. Mr. Sexton went on to detail the method of dividing up the work and

submitting it to different members of the committee, each to do certain portions, and they afterwards brought their results together and compared them, after making a final summary of it compared them with the statement of the general ledger.

Q. What else was said, if anything? A. Well, he went into the matter of examining or verifying accounts with out of town banks.

Q. What did he tell you about that? A. And he said that he himself personally had conducted the corespondence for that verification, and also stated that he had had his correspondence sent to the house; he also stated that in their examination they had endeavored to get to the bank without the knowledge of any the clerks.

Q. Without the knowledge of any of what? A. Without the knowledge of any of the clerks or the officers in the bank.

Q. Did you accept without investigation as true the statements in the reports laid before the directors by the committeemen or officers; if not, what investigation did you or the other directors to your knowledge make? A. No, we did not accept them as absolutely true without question; frequently reports of this sort were always discussed in detail and criticisms offered, and further investigations by the committee requested when the board deemed it necessary, and matters of that kind were always well discussed. If that is what you have reference to.

CROSS-EXAMINATION by Mr. Clark:

Q. Other than discussion concerning any matter that arose and voting on it, what did you do

if anything? A. That is a very general question, I don't know hardly how to answer it.

Q. You do not understand it? A. I understand what you said but I say it is a very general question.

Mr. German: If you cannot answer the question in that form all you have to do is to say so and you have a right, with his Honor's permission, to have it more specific, and I do so ask.

The Court: I think the question is rather sweeping.

Q. I will withdraw the question. You testified that there were instances in which you differed from the report in some respect, and that in those cases the matter was discussed, and so on. Now in any of those instances that you testified to did you ever do anything beyond discussing and voting?

Mr. German: I object, it is predicated on something that is not in the testimony.

The Court: He testified he was president at the board meetings, that when the examining board reported a discussion ensued, and that he took part in those discussions and asked such questions as seemed to be necessary. Now I understand counsel to ask him whether he ever did anything more than that, whether he could have done anything more than that.

Q. Will you answer the question, please? A. I don't know whether I understand the question now just as it stands.

Q. (Question read.)

Mr. German: I object to that, that is not so, I do not think there is any such testimony given by this witness; what he did say was that the directors differed in many instances from the suggestions and criticisms of the Commissioner in his letters regarding certain loans, and if counsel is asking regarding that why that is a different question.

The Court: If you can answer the question answer it, and if you cannot why say so.

A. The question is so general and so sweeping that I would say in some particular cases I did endeavor to find out, but I was not appointed as any committeeman to investigate any particular thing of that sort.

Q. In any instance where you did try to find out do you recall any steps that you took? A. I inquired from other members of the directors and other members of the board with regard to certain things.

Q. Is that all? A. Yes.

Q. Did you ever look at any book or record of the company, the trust company? A. I did not.

Q. Did not? A. No.

Q. They were spread out, some of the books were spread out on the table?

The Court: Well, he says he never looked at them.

Mr. Clark: I want to show the opportunity, if your Honor please, they were spread out on the table in the directors room.

The Court: I overrule that, it has been

shown over and over again where the books were.

Mr. Clark: Each witness is a separate defendant and is separately represented and is asked separate questions, and when it comes to the argument your Honor's attention will be directed to what each defendant has said and what he has failed to say.

The Court: I overrule the question.

Q. Mr. Keim, you said in your direct-examination that you understood that later on a bookkeeper was appointed and thereafter Mr. Smith did no work on the books; will you say that you never saw Mr. Smith working on the general ledger during the last two years of the bank? A. Not to my knowledge.

Q. Did you ever see him working on any books? A. Not to my knowledge.

Q. You also said that the State Banking Department made examinations twice a year, about? A. Well, that was my understanding of it, yes.

Q. Is your recollection on that quite as clear as on the other matters you testified to? A. I would say that that was my understanding that the banking department made an examination about twice a year, the exact dates I do not remember.

Q. You have said that you went to the bank nearly every other day? A. Yes.

Q. What hour usually? A. I usually dropped in, well, I can't say what hour because my hours were very irregular, sometimes very early in the morning, and in fact it was almost any hour in which there was banking business.

Q. And you almost always saw Mr. Odell there? A. I didn't say that, I said I frequently saw Mr. Odell there.

Q. Now your recollection in connection with the Nones matter has been very clear, you have recalled February and March and amounts? A. I will say with regard to that that those matters I rememeber were very definitely stated, but the exact dates and all of that I have refreshed my memory on.

By Mr. German: Q. You refreshed your memory how? A. Regarding the dates as to when this occurred, in February and March, I remember very distinctly.

By Mr. German: Q. You refreshed your memory from what? A. From the bill of complaint, as regards the time that this occurred, and I distinctly remember Mr. Odell saying at the time that this occurred away back in March or in February.

Q. Do you recall whether you ever heard of the Nones transaction until after this special meeting of the board which has been testified to here? A. No, I never heard of it before that.

Q. You received a notice of that special meeting? A. I did, yes.

Q. And it was marked in such way to indicate it was urgent and important? A. The notice stated so.

Q. Have you heard it testified here that the meeting lasted four hours? A. I didn't hear such testimony.

Q. Did you make any effort after you finished your professional engagement to get there? A. I did.

Q. And it was over? A. The meeting had just closed.

Q. Did you talk with the men there concerning the instance of the meeting? A. Yes, I spoke to some of the directors and I spoke to Mr. Odell.

Q. They were still at the Trust Company? A. Yes.

Q. Was the letter there from the Commissioner? A. I don't know about that.

Q. Did you ever read the letter do I understand? A. No.

Q. You never asked to see it? A. No, I didn't ask to see it.

Q. Now then you were asked by Mr. Smith to sign a letter to the Commissioner setting forth that his resignation had not been accepted by the board, you testified, is that right? A. Yes.

Q. Didn't you regard it as unusual that you should be required to sign a letter along with all of the rest of the directors to the Commissioner? A. Well, it was not the custom, but the matter was presented to me and all the directors had signed it; I read the letter over, saw what it contained, and signed it.

Q. And you notice that the letter referred to the letter from the Commissioner of Banking and Insurance? A. I presume it did refer to that.

Q. What inquiry did you make concerning the attitude of the Banking Department toward the board of directors resolution in reinstating Mr. Smith? A. I do not recall that I ever inquired of Mr. Odell.

Q. And you never heard? A. I never heard, no. I will explain that in this way, that I was away on my vacation just following this meet-

ing when the correspondence took place, and the following meeting I wasn't, I don't think that I was, in fact I know I wasn't present in the July meeting.

Q. And upon your return in the fall you did not hear anything more about it? A. No.

Q. Now Mr. Keim, what changes were made by the board of directors to your knowledge in the system under which the trust company was organized, following the reinstatement of Smith, so as to prevent a repetition of this Nones occurrence? A. I do not recall any changes.

Q. Did you ever know how Mr. Jennings came to leave the employ of the Trust Company? A. Never until after the bank closed I heard some rumors, but no knowledge.

Q. Never any discussion in any meeting at which you were present? A. I do not recall any discussion of Mr. Jennings particularly; I do recall now that Mr. Jennings was discussed at some meeting, but I think the matter that was discussed was his conduct towards depositors, a little short, or somethng of that kind was discussed with regard to Mr. Jennings.
of that kind was discussed with regard to Mr. Jennings.

By Mr. Stiefel: Q. You said "a little short"? A. Yes, his conduct and his custom and manner.

By the Court: Q. You mean curt? A. Yes.

Q. And nothing else, nothing more serious? A. No.

Q. You are not able to approximately place the time of that? A. No.

Q. Was it shortly before he left or toward the earlier part? A. I think it was in the latter part of his time there but I wouldn't say about that.

Q. Do you recall Mr. Jennings' salary was $1,-500 a year at the end? A. I do not recall now what his salary was.

Q. You have stated that Mr. Sexton explained to the board at which you were present at one or more times just what the examining committee did in performing their work? A. At one time.

Q. Did he state to you whether or not the examining committee made any effort to verify remittances in transit to out-of-town banks? A. I understood that he did.

Q. Will you say that he said that? A. It has been a long time since this discussion occurred, but I remember very well that he discussed the question of verifying these, or of verifying our accounts with out-of-town banks, and of making allowances and verifications of items in transit.

Q. But what have you to say as to whether or not he told you that he communicated with the out-of-town banks to learn whether remittances in transit were received by them? A. I do not recall that.

Q. Do you recall the examining committee ever reporting during the last two years of the bank's existence upon the reduction in value of any asset on the books of the bank? A. I think there was such recommendation made but I wouldn't say what.

Q. Did you ever ask the examining committee whether they or any member of it, whether they conceded all of the assets which they had not reported any reduction for to be of full value? A. I think that matter was discussed in the board.

Q. Was discussed in the board? A. I think so, yes.

Q. Did you ever ask any member of the examining committee? A. I cannot say that I personally asked.

Q. Did you ever hear such a question asked and answer given? A. I am not sure that I did.

Q. Did you know that checks drawn on the Roseville Trust Company's account in all of the depositary banks were signed by Raymond E. Smith alone as a rule? A. I didn't know that that was the custom.

Q. You were familiar with the by-laws? A. Yes.

Q. You had read them? A. I had, yes.

Q. Had you ever read the statute relating to trust companies? A. I did at one time.

Q. Then you knew that the examining committee had certain specific functions? A. Yes, I knew that.

Q. You knew, Mr. Keim, that there were out-of-town bank accounts also, did you not? A. Oh, yes.

Q. And that it was necessary for remittances to these banks to go by mail? A. Yes.

Q. Did you know or did you ever find out what the reason was for the Trust Company borrowing large sums of money from other banks? A. The reason as reported by the officers was that we were low in cash, had loaned up to our limit and it was necessary to have more cash on hand.

Q. And did you at those times look to see whether or not the balances in bank as reported on the books of the Roseville Trust Company or upon any statement purporting to represent the books of the Roseville Trust Company showed that there was plenty of cash? A. I did not examine the accounts.

Q. Were you aware that such loans could be made upon the signature of Raymond E. Smith as treasurer alone? A. To a certain amount.

Q. I mean loans made by depositary banks to the order of the Roseville Trust Company?

Mr. German: Do you understand the question? A. I don't know whether I get you exactly.

Q. I will withdraw the question. Were you familiar with the fact that Mr. Raymond E. Smith, as treasurer of the Trust Company, was authorized to borrow without the signature of any other officer from the depositary banks for the account of the Roseville Trust Company? A. I was not.

Q. Or that he was authorized to in connection with any such loan pledge collateral or investments of the bank? A. To a certain extent, but I did not suppose that, I did not believe or know that he had unlimited authority in that matter.

Q. Now you were not a member of any committee, were you? A. No.

Q. Did you ever sign any report of condition to the Banking Department that you recall? A. I do not recall having signed any.

Q. You were in and out of the bank very frequently and you were never asked to?

Mr. German: That is not cross-examination.

A. I don't recall having been asked.

Mr. German: I did not ask him anything about these reports.

The Court: The witness says he does not recall, and that is enough.

Q. Mr. Keim, did you ever make any inquiry concerning the assets and liabilities of the bank at or prior to the making of any dividend? A. Only in the meeting of the directors.

Q. By listening to what was said there? A. Listening to what was said there and asking, listening to the reports given by the officers and the treasurer of the bank.

Q. I understand you to say that you relied very much in connection with the propriety of the dividends on the action of the executive committee, is that right? A. Yes, the officers and the executive committee, well, I mean in this way, the propriety of the dividend I should say was controlled or the granting of the dividend was controlled by the board and the matter was discussed by the board and decided, but the executive committee had always taken the matter up previously and reported to the board that they recommended a dividend, that the condition of the bank would warrant it.

Q. Now you say that the board always endeavored to comply with the wishes of the Banking Department in connection with matters contained in its letters; do you recall that the Banking Department insisted upon a reduction of the loan to Scarlett, $10,000 loan to Scarlett? A. I think I do recall that.

Q. Do you recall whether that loan was reduced? A. I don't think it was ever reduced, not very much at least.

Q. Do you recall whether the board ever ordered that proceedings be taken for the collection of the money? A. The board endeavored to get Scarlett to pay, and also to cover the loan if he

wouldn't pay, or when he didn't pay to cover the loan with sufficient collateral or sufficient—yes, collateral, that it would be safe; went even to the extent of appointing Mr. Banister, I think, a committee of one to investigate the collateral, and the matter was of frequent discussion; no prosecution was ever performed to try to collect because it was believed that it would be safer or more likely to collect by endeavoring to get the man to pay voluntarily and to have it properly covered.

Q. Do you know of any action taken by the board of directors at any time during the five years of its existence ordering that suit be begun to collect any note? A. I do not recall.

Q. Did you know, Mr. Keim, that from time to time, particularly during the past two years, there was a considerable amount of paper past due? A. No, I did not.

Q. Was it ever called to your attention by the Banking Department that you can recall or by an examining committee? A. Past due paper was spoken of I think in the board meeting in some cases, and it was brought to the attention of the board or by the letters probably from the Department.

Q. Do you recall that the Banking Department began asking for the reduction of the Scarlett claim very early, one of the earlier years? A. Well, it must have been, I can't say when the Banking Department asked, but I know that the—

Q. When did you start trying to collect it? A. We were several years trying to take care of, get him to take care of his note.

Q. Was there any particular discussion in the board meetings that you can recall in relation to the discounts or the purchasing of bills of the International Tobacco Company or any paper in which H. W. Foster was interested? A. I believe that matter was discussed in the board, that is, you have reference to the discount?

Q. Yes. You do not recall what was said I presume? A. No, I cannot recall specificially at all.

Q. Do you recall the Banking Department calling the attention of the board to the fact that they had discovered by accident, as they put it, that the Trust Company had rediscounted twenty-five thousand dollars worth of notes of the International Tobacco Company without making any entry on their books?

Mr. Cornish: I object on the ground that it has been shown heretofore that there is no loss arising out of that item.

Admitted.

Q. (Question read.) A. I do not recall that.

Q. If any such matter was brought to your attention—

The Court: Oh, no.

Mr. Clark: I wanted to save time, because I could read to him the letter from the Department, and of course I will have to.

The Court: You can ask him whether he heard that letter read or read it himself. Perhaps you can answer generally whether you yourself read these letters that were written by the Department?

A. I did not read them myself.

By the Court: Q. Well, did you hear them read in committee or in meetings? A. There were some of the letters that were read in the directors meetings at which I was present that I heard.

Q. I show you letter dated October 28, 1912, and particularly the part which appears on page 111 of the complaint, and ask you if that refreshes your recollection?

The Court: Ask him whether he heard that read.

A. I will say this with regard to that letter, that I did not hear the letter read, but I was present later in the meeting when some of the items, in fact I suppose most of the items were taken up and discussed, but whether that particular phase that you speak of in the letter was discussed I do not recall.

Q. You are now familiar with the letter so that you can recall? A. Other portions of the letter I remember that we discussed, but the letter as a whole, I recall very distinctly that the letter had been read before I came into the meeting, and when we came to take up this letter it was decided by the board to take up the items separately, and the various items were taken up in that manner; I remained through the discussion or until it was finished.

Q. Was anything taken up during your presence in the meeting about the International Tobacco Company matter? A. I wouldn't say that it was in this particular meeting, there were matters discussed with regard to the International Tobacco Company, I think it was this meeting.

Q. Was it brought to your attention then that

the Banking Department had characterized the manner in which this transaction had been handled as an evasion? A. No, it wasn't brought to my attention.

Q. Were the facts themselves brought to your attention? A. The facts with regard to the endorsements or the validity of the paper were brought out, that is as the board and officers understood it. In other words, the endorsers of these various notes were spoken of and discussed as to their capability of meeting the note in case they had to.

Q. Was it discussed in the board meeting while you were present that the Trust Company had endorsed certain notes of the International Tobacco Company, and had then lodged them with the Irving National Bank and received the proceeds of them and had not entered them on its books? A. I have no recollection of that whatever.

Q. But you do recall this matter was discussed while you were in the meeting? A. I recall that the matter of the quality of the notes, so to speak, was discussed, as to whether it was a safe loan or a safe condition.

Q. And that the Trust Company was an endorser on them? A. I do not recall that, that portion of it.

Q. So that your recollection only goes in this matter—and you have had opportunity to refresh it from examination of these letters? A. I have read that.

Q. But it does not refresh your recollection at all? A. It does not refresh my recollection on that point.

Q. You testified early in your direct-examination that you performed all your duties to the best of your understanding, or something to that effect; were there lots of matters that you did not understand? A. Were there lots?

Q. Yes, were there any matters in connection with the affairs of the Trust Company that you did not understand? A. Oh, yes.

Mr. German: Pertaining to his duties do you mean?

Q. Were there any matters brought before you as a director which you did not understand?

The Court: I do not understand that question. What do you mean, that he did not understand their legal character or did not understand their details or what?

Mr. Clark: I am trying to interpret the witness's own testimony.

The Court: His answer is that he performed his duties to the best of his understanding. Now if you want to refer to any particular thing that he did not do as he ought to have done why that is a ligitimate subject of cross-examination.

Q. Did you understand Mr. Keim that, as has been testified to in this cause, certain checks were being honored and not charged, held in the paying teller's cash, almost daily for the past two years? A. No, I didn't know that.

Q. When the matter came up of the submission of the examining committee's report did you understand fully the scope which that report was intended to take under the statute and by-laws? A. The examining committee's report?

Q. Yes. A. I understand that it was a report

on the condition of the bank, and to cover all essential things to determine the bank's solvency.

Q. Now you say that you never heard, subsequent to the Nones transaction, of anything raising any suspicion with regard to Smith's conduct. Do you recall some matter being presented before the board of directors at a later period than that reflecting upon the conduct of Mr. Smith? A. I do not.

Q. Did you hear the testimony given by Mr. Munroe with reference to a subsequent matter brought up of Mr. Mr. Lurich's? A. No, I didn't hear it.

Q. You have had an opportunity to examine the minutes that are contained in the minute book? A. You mean since?

Q. Since the trial or since the closing of the bank? A. I think I did see the minute book one day, yes.

Q. Is there anything that you desire to add to the record shown by the minutes concerning your performance of your duties other than your testimony already given? A. No.

RE-DIRECT-EXAMINATION by Mr. German:

Q. Why didn't you ask to see this letter to Mr. Odell from the Commissioner regarding the resignation of Smith? A. I didn't know that the letter was to be shown, as reported in the bill of complaint, to all the directors, I supposed it was a report directly to Mr. Odell, and furthermore I had confidence in Mr. Odell that he had given me the substance of the letter.

Q. You stated that shortly after this meeting or shortly after you signed this letter retaining Smith that you went away; why did you go away, what was the condition of your health? A. I went away on a vacation, rather extended vacation, I was considerably run down and advised to go away.

Q. Mr. Sexton you say explained that he had investigated these items in transit with the correspondent banks. Now I want to ask you—

Mr. Clark: If your Honor please, there is no such testimony, and I think the simpler way to get at it would be to ask him what he did say on the subject.

Q. What did Mr. Sexton say in regard to verifying the items in transit with out of town banks? A. Mr. Sexton said that he had written to out of town banks and received the communications from them with regard to the accounts and making allowances for items in transit which he would have to verify later that the accounts were O. K.

Q. Now did he ever tell you or tell the board, or did it ever come to your knowledge that he had verified those accounts later so that you were satisfied that the accounts as examined by the committee were correct?

Mr. Hinds: I object unless it is made clear whether by the word "verify" he means by further inquiry from the cirrespondent bank or by investigation of the Roseville Trust Company's own books; entirely different meanings could be given to that word.

Mr. German: My question is whether this director was satisfied with the explanation made by Mr. Sexton, the chairman of this committee, of his investigation of out of town banks, because that is all this director is called upon to do, to be satisfied from a reasonable inpection that this committee was performing his duties.

The Court: Mr. Sexton explained the method he pursued. I presume that the witness was satisfied with that explanation. I do not quite understand what further you wish to draw out of this witness.

Mr. German: I want to know if he made any further explanation.

The Court: Well, did he say anything more.

Q. Yes. A. You mean at any time, any other time?

Q. Yes, so that you were satisfied that his explanation was correct.

The Court: No, did he say anything more. Never mind about the conclusions.

A. Mr. Sexton said from his investigation of the other banks that he was satisfied the accounts were correct.

By Mr. Stiefel: Q. What part did Mr. Munroe take in the activities of the bank, the counsel of the bank, or rather of the directors meetings?

Mr. Clark: Haven't we been all over this?

Mr. Stiefel: I want to show that Mr. Munroe advised with regard to the declaration of dividends and with regard to the reports of the examining committees, that

they had the advice of counsel on those two features; I think it is a fact, I do not know.

A. Mr. Munroe was frequently asked for his legal opinion, I would say that, but to the definite question as to whether he gave his legal opinion as to whether we should declare dividends or not I couldn't say, but when there was any point of law come up he was always asked.

By Mr. Stiefel: Q. Do you know whether the attention of the board at any time that you were present was ever called to the fact that Smith had connection with other businesses? A. No.

Q. Either by Mr. Odell or Mr. Fairlie or Mr. Munroe or anybody else? A. It was not.

By Mr. Fairlie: Q. You testified, Doctor Keim, that Mr. Sexton told you in outlining the methods of the examining committee that there were certain items in transit which he had to verify later; now do you recall clearly Mr. Sexton having made that particular statement to you? A. He made the statement, Mr. Sexton made the statement before the board, this explanation was made to the board and at the board meeting.

By Mr. Fairlie: Q. Did you have such understanding of the accounts with the correspondent banks as that at that time you knew of your own knowledge that there were items in transit to be verified? A. Yes, I knew there were items in transit, I knew that Mr. Sexton reported certain items in transit.

By Mr. Fairlie: Q. Would your recollection be refreshed any if you were told that no other witness in this cause has testified to those items being checked up?

The Court: No, that will not do.

Mr. German: I move that be stricken from the record.

The Court: Oh, yes, I will strike that from the record; each witness must testify from his own recollection.

By Mr. Fairlie: Q. At what time will you fix the date, as nearly as you can, when Mr. Sexton told you, made that particular statement to you? A. I cannot; it was in one of the meetings of the board when Mr. Sexton explained his method of examination.

By Mr. Fairlie: Q. And you are positive that Mr. Sexton said anything more than that he wrote to the correspondent banks and had their replies sent to his home? A. Yes, I am very positive about that.

By Mr. Fairlie: Q. And what else did he say? A. He said that there were certain items in transit which he would verify.

By Mr. Fairlie: Q. Did he say how he was going to verify them from the books of the company? A. I do not recall that he said just how he would verify them, but as my recollection serves me that that would have to be verified by finding whether those items reached their destination. This matter was not at the time a matter that I was supposed to testify on four or five years later, and I cannot say definitely the words he said.

By Mr. Fairlie: Q. Was this explanation of Mr. Sexton made at a time when the committee's report was submitted to the board? A. I think it was.

By Mr. Fairlie: Q. And Mr. Sexton said when

the report was submitted that he still had further verification to make, even though the report was then and there submitted? A. Well, I don't know that he had further verification to make at that time.

By Mr. Fairlie: Q. Did he say so? A. I do not recall him saying anything like that, but he first corresponded with the banks and got their reports with regard to it, and there were certain items in transit which he had to make allowance for and verify later.

By Mr. Fairlie: Q. But he did not say how he would verify them? A. Not to my knowledge.

By Mr. Fairlie: Q. Did you make any suggestions or criticisms of the committee's method of examination as outlined to you by Mr. Sexton? A. I don't know that I did.

By Mr. Clark: Q. Just one or two questions on that same line to see if we cannot clear this up; you testified on re-direct-examination by your own counsel "And making allowances for items in transit which he would have to verify later." Now then, you know, Mr. Keim, that at the time the report was submitted the examination had been completed a long while previous? A. Well, I think that you misunderstood me, it may be a fault of my language; not which he would have to verify at a later time from the time the report was made, but he verified later than at the time that the report of correspondence was given from the bank.

Q. So that that is the way you understand it? A. Yes.

Q. Now one question which was omitted on the regular cross. Did you ever hear from any mem-

ber of any examining committee that they had found that Mr. Smith had been making loans which were not known to the executive committee of the board? A. No, I never heard that.

Q. Did you ever hear of Mr. Sexton mentioning anything of that character? A. No, I never did.

WILLIAM T. BENJAMIN, re-called:

Direct-examination by Mr. Cornish:

Mr. Cornish: It is stipulated between the solicitor for the complainant and the solicitor for this witness that this witness was a depositor in the Roseville Trust Company at the time it suspended business on August 13, 1913; that his deposit amounted to $200; that he filed a claim therefor as a creditor with the complainant; that his claim was duly assigned to the Mutual Bank of Roseville and stock issued to him for said claim in accordance with the plan of organization of the said bank, and that the said claim was one of those settled between the said bank and the Commissioner of Banking and Insurance on the sale of the assets of the Roseville Trust Company. This stipulation is subject to any correction that the records themselves may show to be necessary, and the complainant does not concede that the said fact is relevant or material to this cause or within the issues.

Mr. Fairlie: And, your Honor, the same

facts are stipulated as between this counterclaimant and the third parties defendant whom I represent, and also the further fact that Mr. Banjamin has shared pro rata accordingly in the payments which were made by the settling directors.

Mr. Hinds: As to the complainant we simply concede that is a fact to save counsel from proving it, but we object to its admission in evidence as irrelevant, and that it is not within the issues or material.

Q. When were you elected director of the Roseville Trust Company? A. At the stockholders meeting at the organization of the bank.

Q. What was the first meeting that you attended? A. The first meeting after that organization, the first meeting of the directors.

Q. Had the officers of the company been elected prior to that time? A. Yes, they had.

Q. When were they elected? A. At the organization of the bank.

Q. Where did you reside when you were elected a director of the company? A. At 37 Fabyan Place, just south of Clinton Avenue, in the southern part of the city.

Q. What city? A. Newark.

Q. How long did you continue to reside there? A. I think all during the history of the bank except possibly the last year I moved from there to Cypress Street, which is in the same neighborhood.

Q. Where were you employed at the time you were elected a director, you were first elected a director? A. At the Banister factory on Washington Street near the canal.

Q. What was the nature of the business? A. Shoe manufacturing.

Q. And what was the position that you occupied in that company? A. I was foreman of the stitching room in that factory.

Q. How long had you been in their employ? A. That time about twenty years.

Q. Are you still in their employ? A. I am.

Q. And all the time this same position? A. Yes.

Q. What were your hours of employment during the time you were a director? A. Why, at that time the hours were from seven until six, ten hours a day.

Q. And how about Saturdays? A. Saturdays, we worked until 5 o'clock at that time.

Q. What, if anything, in the nature of employment took you to the neighborhood of the Roseville Trust Company during the day? A. Nothing during the day except a meeting of the directors of the bank.

Q. Did that ever occur in the day time? A. Yes, in the afternoon, late in the afternoon usually.

Q. Now, Mr. Benjamin, the minutes show that you were present at nine directors' meetings in 1909, eight in 1910, ten in 1911, eight in 1912 and six in 1913; what have you to say with regard to the meetings from which you were absent? A. Why, only that I always attended the meetings unless I was out of the city or was sick.

Q. Were you present at the meeting of the board of directors at which the letter was read from the Commissioner of Banking and Insurance in regard to the Nones transaction?

Mr. Hinds: I object, unless he wants to vary the minutes; the minutes show who were there.

The Court: Well, that is a preliminary question, I do not see any objection to it.

Q. (Question read.) A. I was, yes.

Q. Was Mr. Smith present at that meeting? A. No, he was not, not the latter part of the meeting, he possibly was there in the beginning, I don't remember now whether he was or not.

Q. Was he present at the time the letter was read? A. No, he was not.

Q. Now what do you recall in regard to the presentation of that matter to the board? A. The letter was taken up by Mr. Odell at the time and read by him, and after the reading there was a general discussion by the different members of the board, and I remember distinctly the remarks made by Mr.—or I remember the character of the remarks made by Mr. Fairlie and Mr. Foster and Mr. Munroe and several other men of influence in the bank and in the neighborhood in regard to the matter, what they thought about it, and the matter was taken up for action later, afterwards.

Q. Do you recall how long a discussion there was in the board with regard to their action on this matter? A. I know it was a long meeting, I cannot tell at the present time just how long it took to settle the matter.

Q. Do you recall whether anything was said or not in regard to an investigation having been made of Mr. Smith's past history, his character and habits? A. Why, yes, Mr. Munroe took that up and reported very thoroughly in regard to what he had found with reference to Mr. Smith,

said that he had had the very highest recommendation from prominent men where Mr. Smith had been employed in Orange and Judge Davis and others in Orange who had known him all their lives and had recommended him very highly for the position and thought well of him, knew his father and knew his uncle who were both banking men there in Orange.

Q. Do you recall how many votes were taken by the board on this matter? A. No, I do not at this time remember how many votes were taken, I do not remember but one.

Q. What had you heard in regard to this matter before the meeting? A. Nothing at all.

Q. What positions have you held other than in your business? A. I have been connected with various organizations.

Q. What are they? A. For a number of years I was connected with the Junior Order Council in the neighborhood, they met in the bank, and I was treasurer of it at the time, and I have been connected with the Junior Order Building and Loan association for a number of years.

Q. Now as treasurer of the Junior Order Council what were the nature of your duties? A. Look after the funds, receive the funds and disburse them on order of the Council.

Q. Did you keep the books? A. No, the bookkeeping was attended to by the financial secretary of the Council.

Q. What was your connection with the Junior Order Building and Loan Association? A. I have been a director there for quite a number of years and vice-president there now.

Q. Have you had anything to do with the book-

keeping of that organization? A. No, nothing at all.

Q. How many of the examinations of the examining committee did you take part in? A. All of them I think, and I was called in at one examination during the year I wasn't on the committee, to help them out.

Q. In connection with these examinations what have you to say with regard to how fully your reports set forth the things that you found, the reports to the board I mean? A. We went into the matter very carefully, as carefully as we could, and investigated in all details and made a full report, the committee got together and discussed the various details before they had done so, and after the report was made, which was drawn up by Mr. Sexton there, the balance of the committee signed it.

Q. What have you to say with regard to your method of examination of the dates subsequent to December, 1911, and the date prior to that? A. Why the methods of our examinations were certainly no different, if anything, they were more exhaustive because we were more familiar with the work after that time than we were before.

Q. Did you ever receive any pay for your services as director or as a member of the examining committee? A. I did not.

Q. What knowledge did you have of the irregularities of Mr. Smith that have been testified to in this cause, other than the Nones affair? A. None at all.

CROSS-EXAMINATION by Mr. Hinds:

Q. Mr. Benjamin, other than what is shown in the minutes, and you may look at them if you choose, and I call you attention to the fact that they do not appear to show any authorization by the directors of the paper discounted by Mr. Foster in June, 1913, I say other than what is shown in the minutes, do you recall whether the directors discussed or authorized the discount by Mr. Foster of any paper of the Alcohol Utensil Company or any other paper bearing his endorsement? A. I do not remember any such action at this time.

Q. Was it the practice of the Trust Company at and about that time, so far as you know, to describe on the minutes such discussion or authorization where it did occur? A. Why it was the custom of the company to describe on the minutes the details of what transpired.

Q. And that was particularly so, was it not, respecting authorization to discount notes of directors or bearing endorsement of directors? A. I presume so, yes.

Q. You have spoken of Mr. Munroe's report as to the character of Mr. Smith prior to employing him. In his report did he say that he had heard unfavorable rumors respecting Mr. Smith's previous banking conduct in Orange or in connection with the Second National Bank of Orange? A. He did not.

Q. You are quite sure that he said nothing at all indicating that there had been any unfavorable rumors? A. Not that I remember.

Q. Did you hear such from any other source? A. I did not.

Q. Did you in the course of any of the committee examinations which you took part in find any notes, bills or other paper held as assets of the Trust Company which had not been reported to the board of directors or the executive committee? A. Why, not that I know of, no.

Q. Did the committee in any of the examinations that you took part in, so far as you recall, make any comparison with the records or with the minutes for the purpose of seeing that each item of paper held as an asset had been authorized by the board of directors? A. Why I think not.

Q. That is the best of your recollection? A. The best of my recollection.

Q. Now Mr. McCord was a member of the examining committee in 1912, was he not? A. He was a member of the committee one year, I don't remember what year it was.

Q. Tell us what his part of the work was as assigned to him? A. I do not recollect now what he did at that time.

Q. Is there any record of the Trust Company that you can suggest by which you might refresh your recollection and tell us what he did; would the reports of the committee, for example, remind you or refresh your recollection as to what he did? A. I think possibly he counted the cash but I am not positive about it, I do not remember.

Q. It is a fact, is it not, that he acted on only one examination; is that your recollection? A. I think that is the case.

Q. Just look at the report of December 14, 1912, examination which purports to bear Mr. McCord's signature, and I ask you if the reading of

that refreshes your recollection as to what he did, what his part of the examination was? A. I think from reading this that at that time he did count the cash at that time.

Q. Now did he do anything else? A. He was with the committee and worked with them at the time, I do not remember now just what he did.

Q. Do you recall what use he made in connection with the committee's work of his having counted the cash, what he did after counting it? A. He reported to the chairman the facts that he had found.

Q. Did he compare the result of his count with any record? A. Yes.

Q. What? A. With the ledger.

Q. The general ledger? A. Yes.

Q. Did the other members of the committee compare the results of their various counts with the general ledger, appropriate general ledger items? A. Yes, that was their work, and that is what they did.

Q. Did the committee foot the general ledger?

Q. Did you or did the committee in your presence have the general ledger on the occasion of the December, 1912, examination? A. I should say yes, they did, but I do not recollect of that particular date, it was their custom to do so.

Q. Well, on any occasion when they did so did any time elapse between the checking to the general ledger of the various items by the various members of the committee and the footing of the general ledger? A. No.

Q. Did you hear the testimony of Mr. Sexton on that point a few days ago? A. I think I was in the room.

Q. And you are quite positive, are you, that at no time, no examination, was there any time which elapsed between the checking and the adding, you are quite sure of that, are you? A. Why, only the time that was necessary to go from one place to another to take care of that work.

Q. Now then, the checking was done by several different persons, was it not? A. For the different items, for the different work?

Q. Yes? A. Yes.

Q. Did they all finish their work at precisely the same time? A. They did not.

Q. Will you explain further, if you can, any means that were adopted, if any, to insure that the item which each individual member had checked was the item which figured in the total of the ledger which was footed? A. Well, I can't explain that because that part of the work was not assigned to me, they took care of that end of it.

Q. By "they" whom do you mean? A. The different members of the committee.

Q. Is it a fact that they all gathered around the book at the time the checking was done by each of them to the several items on the general ledger, or did they do their checking at different times each separately? A. I think they did it at different times as they got through their work.

Q. Then was there a further check made by each of them all simultaneously and at the time of the footing? A. No, I don't think so.

Q. Then do you wish to correct your previous answer that no time elapsed between the checking of any item and the footing of the ledger? A. No, I wouldn't correct that; I think that when

each man got through his work there he checked up his work in the ledger.

By the Court: Q. Then when they all got through they assembled around the book and made the additions; is that your recollection? A. Yes.

Q. And you were one of those who assembled, were you, in each case? A. I was there, yes.

Q. Did you then see that the item which you had previously checked from your work was still there, the same figure was being footed? A. Yes.

Q. And did each of the others in your presence make the same comparison to see that they were footing the same figure which they previously checked? A. I cannot answer for what the others did.

Q. Did you inquire to see whether each was having footed the figure previously checked? A. No. I did not.

Q. During the last summer, since your previous appearance on the stand have you refreshed your recollection from any records or any conversation with respest to what you did and what occurred in the various committee examinations A. No.

Q. You have discussed the matter with your counsel, have you not? A. Yes.

Q. And you discussed that very matter of the details of your work on the examining committees, have you not? A. We talked it over, yes.

Q. Your memory is more supported by detail facts now than it was when you testified as my witness, is it not? A. Possibly.

Q. Now then, will you tell us, you just said that the committee discussed various details, was the detail as to the method of making the reconcilia-

tion of the correspondent bank accounts one of the details that was discussed? A. No.

Q. It was not, you say? A. It was not.

Q. Then you did not hear Mr. Sexton explain how he had conducted his examination of the accounts with the correspondent banks, did you? A. No, I never heard him explain how he did it; the matter was left in his hands and he took care of it.

Q. You never heard him explain it to any other member of the committee either, did you? A. Not in my presence.

Q. Did you ever inquire what methods Mr. Sexton employed to check up the accounts with the correspondent banks? A. I did not.

Q. You knew that Mr. Smith could alone draw checks or drafts on any of the correspondent banks without any countersignature, did you not? A. I didn't have that knowledge, no.

Q. You did not have it at the time? A. No.

Q. Did you make any inquiry at the time to see how many signatures and whose signatures were required to check out the Roseville Trust Company funds in other banks? A. No, I did not.

Q. Now when your examining committee made its report to the directors, did it present a statement showing the trial balance of the Roseville Trust Company, or is the report only that which I have shown you as of December 14th, at form? A. That was the manner of report.

Q. And these reports were not in any instance accompanied by a trial balance statement? A. No.

Q. Attested by the committee, or any statement of assets and liabilities bearing the committee's

endorsement and approval; is that a fact; there were none? A. That is a fact, there were none.

Q. Now did your committee in your presence discuss at any time the propriety or wisdom of carrying any asset of the Trust Company at a less figure than that shown on the books? A. Yes, frequently.

Q. Now give us an instance of that? A. The case of the American Tobacco Company, they recommended that that loan be reduced.

Q. Do you mean the International Tobacco Company? A. The International Tobacco Company and also the Scarlett matter.

Q. So that you will be sure to understand my question, by reduced I mean carrying it at a less value on the books than the face or other value that it already carried on the books? A. No, I don't think the committee ever made a recommendation to that effect.

Q. You do not recall that the committee ever discussed the wisdom, if it was wisdom, of carrying an asset at a less value on the books than it was already set down at? A. No.

Q. I will refresh your recollection in the particular instance of Scarlett. Do you recall whether your committee at any time discussed or recommended the carrying of Scarlett's notes on the books at less than their face value? A. I don't think the committee ever made a recommendation of that kind.

Q. That is the best of your recollection? A. Yes.

Q. And it is also your recollection that the committee did not even discuss the question of carrying his notes on the books at less than their

face value? A. Might have discussed that question, but I do not recollect it at the present time.

Q. You have no recollection at all of having discussed it, is that right? A. Not at the present time.

Q. Now you were present, were you not, at the meeting at which Mr. Smith's transaction in the Nones account was discussed?

The Court: Was not that gone into fully?

Mr. Hinds: I would have the same to say respecting that as I said respecting the examining committee. During the summer this witness has undoubtedly refreshed his recollection, he admits his recollection is better now.

The Court: You have an account of that over and over again, and none of the witnesses differ in their account of it; there is no question at all about what happened then.

Mr. Cornish: I wish to amend my answer to conform to the proof in respect to the releases given to the directors that I have brought in as defendants to the counterclaim, other than Mr. Kilgus, I set up his release, but it has now been proved that the other directors have releases of the same sort. I merely want to amend my answer to set that up.

Mr. Hinds: As to that we have no objection, though of course, we do not concede the relevancy; this is merely an extension of the defense already in referring to the other directors' releases; we have no objection to the amendment.

Mr. Cornish: The other amendment is simply to incorporate the facts stipulated at the beginning of Mr. Benjamin's testimony this morning.

Mr. Hinds: There we do object even to the amendment. In the first place, when we conceded them to be facts we objected to their being admitted, therefore it cannot yet be said that this is an amendment to accord with facts admitted in evidence because we objected to their being admitted in evidence. Furthermore, even if that phase of it did not exist, we certainly object to the amendment of an answer for the purpose of alleging that the defendant is advised that the complainant is by reason of these matters, the matter of the payment of his picayune claim, precluded from now asserting that he is entitled to the counterclaim against this defendant alleged in the bill of complaint. We regard that as so absurdly insufficient as a defense that we must assume that it would instantaneously be stricken out by the Court the very moment it was admitted as an amendment.

The Court: I do not want to pass upon any of these questions now; it is desirable that everything in the nature of admission which can be put upon the record should go in to be finally determined; if I allow this amendment no harm will be done.

Mr. Hinds: I wanted to be sure that it was shown to be over my objection at the time.

The Court: Yes.

Mr. German: I would like to ask this privilege, that if the proofs show in order to make the record complete as to the defendant Keim, that it is necessary to amend his answer, that we be allowed to do so.

The Court: You must do it now, so that everybody will know just where they stand. If you want to amend this is the time to do it, I will not allow you to amend bye and bye.

Mr. German: I am not just at this time prepared to state it.

The Court: There will be no difficulty in your putting on the record now, if you want to, whatever amended pleading you desire; this is the time to do it.

Mr. German: I did not plead these releases, but I now desire to amend.

The Court: Well, you may do that.

Mr. Delaney: In behalf of the defendant Bataille I seek the same leave to plead the same defense relative to the releases.

Recess.

CLINTON F. McCORD, sworn:

Direct-examination by Mr. Ernest Lum:

Q. Mr. McCord, you were a director of the Roseville Trust Company? A. I was.

Q. When did you become such? A. Why I think at the time the Trust Company organized.

Q. And do you remember when that was? A. It seems to me the latter part of 1908.

Q. You were a stockholder of course at that time? A. I was.

Q. Did you continue to be a stockholder down to the close of the company's business? A. I did not; I sold my stock in February of 1913.

Q. Did you at that time sell all of your stock? A. I did.

Q. To whom did you sell your stock? A. To Mr. Raymond E. Smith.

Q. After that time did you have any connection with the affairs of the Roseville Trust Company? A. None whatever.

CROSS-EXAMINATION by Mr. Clark:

Q. Mr. McCord, you had served on the examining committee in December, 1912, had you not? A. I believe I did.

Q. And that examining committee made a report which you signed? A. I don't remember whether I signed a report or not.

Q. I show you this report of the examining committee as of examination made December 14, 1912, and ask you if that is your signature on the second page? A. That is, yes.

Q. Does that refresh your recollection? A. You refer to the signature?

Q. To the fact that you served on that examining committee? A. Yes.

Q. Did you serve on any other examining committee at any other time at the Roseville Trust Company? A. Well, I did not serve on any other committee, but I served at other times.

Q. Oh, you did serve at other times? A. Yes.

Q. But this was the last occasion? A. This was, the December 1912 examination was the last that I was present at.

Q. Now do you recall what part of the work you did upon that occasion? A. I do not.

Q. One of the witnesses has testified that you probably counted the cash; does that refresh your recollection at all? A. No, it does not; I cannot recall at this time just what I did on that occasion.

Q. Do you recall what anyone did? A. No, except what a general examination would consist of, I don't have any recollection now as to what the individuals did.

Q. What did the examination consist of, according to your recollection? A. Why, ordinarily counting the cash, going over the notes purchased, and it seems to me that Mr. Sexton, the chairman, checked up the ledgers, and it seems to me that securities were examined and bonds were examined, that is the bonds of the officers and employees, and bonds and mortgages owned by the Trust Company; it seems to me at times the committee commented on loans; outside of that I do not recall anything that was done.

Q. What did they do in connection with the examination of the bills purchased? A. Do you mean at this—

Q. Last examination. A. I do not recall, it seems to me, though, that the examination was probably the same as previous examinations, comparing the notes purchased with the list which was attached to the notes, checking them up.

Q. Oh, there was a list attached to the notes? A. I think so. Pardon me, when I say list I mean adding machine figures.

Q. A list of figures without anything preceding or following it? A. No, I think the list was in each instance, added, totaled.

Q. But there were no names of makers or endorsers on this list, just the list of figures? A. Not in the particular list that I refer to, no, simply the notes were taken off with the adding machine and added.

Q. Now did you compare the bills purchased with any other book or record, and by bills purchased I mean the actual items? A. I don't know that I had anything to do with the bills purchased in that examination.

Q. Do you know whether anyone did? A. I presume they did, but I have no recollection.

Q. Do you know what anyone did with regard to reconciling or checking up the accuracy of the bank balances in depositary banks? A. I have just a faint recollection of Mr. Sexton attending to those duties, I don't know just what he did.

Q. You don't know what he did? A. No.

Q. Was there any connection, Mr. McCord, between your sale of all of your stock two months later and your services on this examining committee? A. Will you put that again, please?

Q. Was there any possible connection between the fact that in February following this examination in December you sold all your stock, and anything that came to your attention in this examining committee? A. None whatever.

Q. Now what, if any, business dealings did you have with Raymond E. Smith? A. Personally, you mean?

Q. Yes, personally, Raymond E. Smith personally I mean? A. I am in the life insurance bus-

iness and insured Mr. Smith's life at several times at his suggestion, never solicited him.

Q. Large policies in the aggregate? A. Yes, comparatively large.

Q. Did you know that Mr. Smith was engaged in business as the Oakland Motor Sales Company? A. In a general way I knew that he had outside interests.

Q. And that he was connected with the Intercity Land & Securities Company? A. I didn't know that.

Q. Or the Home Ice & Products Company? A. I didn't know that.

Q. What other interests did you know he had outside of the Oakland Motor Sales and the Trust Company? A. I don't know that I knew he had any interests outside of the automobile business.

Q. Was that ever discussed in the board of directors meetings? A. Not to my knowledge.

Q. You don't remember it at all. Now at this examination in December, 1912, do you recall any discussion coming up in the committee with regard to certain loans having been found which the committee had not previously heard of? A. No, I do not recall anything like that.

Q. Don't recall anything about that? A. No.

Q. Do you recall anything in connection with that examination which was different or unusual, as compared to your previous examination? A. No, so far as I know the examination was very reaching, the committee did all that was expected of them and all that they had previously done.

Q. Do you recall whether or not there was anything discussed in the committee with regard to pages which were missing from some book? A. No, I do not recall any.

Q. Never heard of that at all? A. Never did.

By Mr. Stiefel: Q. You said you were connected with the life insurance, what company? A. The Penn Mutual of Philadelphia.

By Mr. Stiefel: Q. You are one of the released directors, you have received a release? A. I have.

By Mr. Stiefel: Q. Do you remember whether you officiated as a member of the examining committee early in the history of the bank at any time? A. It seems to me I did.

By Mr. Stiefel: Q. Was the course of procedure relatively the same towards the end of the bank's history as towards the beginning? A. I should say it was.

By Mr. Cornish: Q. Have you been present in court during any of these hearings? A. You refer to the present hearings?

By Mr. Cornish: Q. The present case? A. I have not.

By Mr. Cornish: Q. Has anything occurred since the close of the bank or during the past year to refresh your recollection on any of the incidents that you have been questioned on? A. Nothing.

Mr. Lum: If your Honor please, I would like to ask whether it has appeared on the record that Mr. William W. Woodward's connection with the executive committee ceased on January 9, 1912?

Mr. Clark: Yes, the date when ceased to act, January 9, 1912; that is in the bill, it is part of the bill.

Mr. Lum: And also as to Mr. William J. Banister, that he resigned in January of 1913.

Mr. Stiefel: I saw the letter this morning, in the minutes, his letter of resignation.

Mr. Clark: It appears when he ceased to act.

Mr. Lum: As in January, 1913?

Mr. Clark: Date when ceased to act as director, February 11, 1913.

Mr. Lum: Then, if your Honor please, I should like to offer in evidence the four original releases from George M. LaMonte to James B. Banister, William W. Woodward, Frances Banister, Alfred L. Banister and William A. Banister, executors of the estate of William J. Banister, deceased, and Clinton F. McCord, dated February 9, 1914, and ask that as to them I may have the benefit of the same stipulation that was entered into with reference to the clients represented by Mr. Fairlie who are in the same position, and that the copies that appear in the book may be used as though originals were offered.

Marked Exhibits D-2, D-3, D-4 and D-5.

WILLIAM C. PIERSON, sworn:

Direct-examination by Mr. Stiefel:

Q. You are connected with the Union National Bank of Newark? A. Yes.

Q. In what capacity? A. Cashier.

Q. Have been there for how many years? A. Thirty odd, thirty-two, three or four.

Q. Mr. Pierson, at the time the Roseville Trust Company failed, namely, on August 13, 1913, was it indebted to the Union National Bank, and, if so, in what amount? A. Indebted to us for the amount of exchanges on that morning.

Q. What was that aggregate?

Mr. Hinds: Your Honor, so that we may intelligently either make or refrain from making objection, may we learn what the materiality of this is? Perhaps we have no objection. I would like to know the purpose.

Mr. Stiefel: It is one of the items testified to by Mr. Vredenburgh, shown in his account, and I want to learn from this witness what the transaction is about.

Mr. Hinds: Is it in connection with the realization of the assets?

Mr. Stiefel: Both, and any other purpose for which it is germane.

Q. What is the amount? A. The exchanges that morning were $32,376.94.

Q. And as against that what assets of the trust company did you hold, if any? A. A balance of $12,364.34.

Q. So you cashed or honored exchanges in excess of the balance which the bank had on deposit with you? A. That balance should have been paid for that day.

Q. It should have been paid for that day? A. Yes.

Q. That was the day the examiners went in charge of the Roseville Trust Company? A. Yes; they paid every day but this one.

Q. Have you put in your proof claim in this case? A. Yes, it is in.

Q. Do you know whether your claim has been paid in full or not? A. No, it has not been paid in full.

Q. You just have received a dividend? A. Just the dividends.

CROSS-EXAMINATION by Mr. Clark:

Q. Your action in paying those exchanges in excess of the amount of deposits, was that usual or unusual? A. It was our plan and understanding to pay the exchanges, clear for them, as it were, and they were to deliver a check for it during the day.

Q. So that at the close of your business the transaction would not represent any overdraft or indebtedness to you? A. Not when payment was made.

Q. Now then, this account of the Roseville Trust Company with your bank, was it a satisfactory or unsatisfactory account during the last year?

Mr. German: I object to that; that has not been brought out anywhere.

The Court: It seems to me that you are not inquiring with reference to a fact, you are getting the opinion of the witness.

Q. Yes, I will withdraw the question. Will you state whether you at any time requested the Roseville Trust Company to improve their balance in your bank? A. Yes, we have.

Q. Did you make that known to some director of the Trust Company? A. My transactions were largely with officers of the company.

Q. Did you ever speak to Mr. Fairlie, a director, about it? A. No, I did not.

Q. Was it reported in your bank that some offi-

cer of your bank had done so, A. Well, it was not so reported; I am not sure whether the president spoke to him or not, he may have done so.

Q. Are you familiar with the information which was obtained from your bank by examining committees of the Roseville Trust Company? A. No, I am not.

Q. You cannot personally testify? A. No.

HARRY W. FOSTER, sworn:

Direct-examination by Mr. Congleton:

Q. Mr. Foster, it has been testified in this case by Mr. Jennings that a check of yours for $2.05 was returned by the bank as no good; is that so? A. Yes, sir.

Q. And when was that, do you recollect? A. Some time during the summer, in July or August.

Q. Of the year that the bank failed? A. I believe so, yes.

Q. And did you make any inquiry about that? A. Yes, sir.

Q. Of whom? A. Mr. Smith.

Q And what was stated to you? A. Mr. Smith said he was very sorry that a thing of that kind should have happened, that he would find out why it did happen; he left the room, we were in the directors' room at the time in the back of the building, and he came back in a few minutes and said, "Why, it was all a mistake," he said, "they got that check in the wrong pile and sent it back by mistake"; "Well," I said, "That is rather

embarrassing, to have an error like that happen''; he said, ''That is a fact''; he said ''Now what can I do to rectify that error for you''; ''Well, I said, ''I don't know what you can do, except to write to the bank you sent it back acknowledging that it was an error of the bank and not one of mine,'' and he said, ''I will do that or anything else that you suggest''; ''Well,'' I said, ''That seems to me that would be be sufficient''; he said, ''All right, sir, I will do that gladly.''

Q. Did any other employee of the bank speak to you about it at that time? A. Oh, yes.

Q. Who? A. Mr. Thompson.

Q. And who was Mr. Thompson? A. Why, he was the paying teller I believe at that time.

Q. And what did he say? A. He came in a few minutes after Mr. Smith had made this explanation and Mr. Smith left the room, he came in and he said, ''Now, Mr. Foster, I am awfully sorry that thing happened, but I guess Mr. Smith has explained to you that it got in the wrong pile and it was sent out by a mistake, that is all, and I am very sorry it happened.''

Q. And did you according to your records have a balance in the bank at that time which would make that check good? A. Oh, yes.

Mr. Hinds: I object, and ask that the answer be stricken out. First, if his records are material at all, as distinguished from what the fact was, certainly this is only secondary evidence of their contents. If those records should be introduced so as to obviate that difficulty I should have a still further objection, but in the meantime it is clearly secondary evidence.

The Court: You may answer the question.

Mr. Hinds: Since your Honor overrules the competency of the testimony, I object on the ground that it is not relevant. What self-serving documents or records of this witness showed has no bearing on the fact as to what the condition of his account was at that time.

The Court: I cannot rule upon the relevancy of this evidence now, but I will admit it subject to your objection.

Q. Did you have a balance in bank at that time more than sufficient to meet this check? A. I did.

Mr. Hinds: Just a moment. I object. I wish your Honor would admonish the witness not to answer until I made my objection. That is not the proper way to prove that the witness had a balance in the bank, for him to say so. I submit, your Honor, the best evidence would be the books of the bank, and if he wishes to challenge their correctness let him produce some other documents or proceed first after reference to them.

Admitted.

Q. Was the check subsequently returned to the party to whom it had been given and was it honored by the bank upon its return? A. It was.

Q. Mr. Jennings has also testified in this case, Mr. Foster, that he took up with you the matter of a transaction with Mr. H. J. Bierman, which was, as he testified, a note for $500, the notice to pay which had been sent to Mr. Bierman, and that Mr. Bierman came in the bank and saw Mr. Jen-

nings in the absence of Mr. Smith, that you were in the directors' room, and when Mr. Bierman told him, Jennings, that the note had already been paid that he took the matter up with you; is that so? A. I haven't any recollection of that.

Q. It has been further testified in this case, Mr. Foster, that for two months or two months and a half before the bank was closed by the Commissioner of Banking and Insurance that you were receiving a salary of $75 a month for performing certain services; is that a fact, were you receiving such a salary? A. I was receiving $75 a month, yes sir.

Q. And for the performance of what services? A. Why to go in there each day from around 10 o'clock in the morning until 1 o'clock in the afternoon, so that an officer might be there, if a signature of a officer was required that I could use my signature while Mr. Smith was out of the bank.

Q. And during your presence at the bank Mr. Smith was away from the bank? A. A good deal of the time, not all the time.

By Mr. German: Q. While you were in the bank during these months, or at any other time, did you know or was anything brought to your attention that any irregularities were made in the books? A. No.

By Mr. German: Q. Or that any of the officers or employees were doing other than performing their duties? A. No.

CROSS-EXAMINATION by Mr. Hinds:

Q. Now Mr. Foster, you testified, did you not, in your criminal trial at pages 151 and 152 of the printed papers on appeal as follows: "Q. That

is what you are reported as having said. (Reads.) 'I am very much embarrassed by the fact of a check for $2.05 having been returned as "N. G." I think the mark was on it.' Does that refresh your recollection? A. That is what I say now, yes. Q. I ask you whether that checks was not marked "N. G."? A. The form was ; the form pinned to the check when it is returned, yes. Q. It was marked with the mark 'N. G.'? A. I believe so. Q. Yet you made no inquiry at the bank concerning the condition of your account? A. No, sir." Did you so testify? A. Did I so testify?

Q. Yes. A. You are reading from the record, aren't you?

Q. Well, I show you a printed paper on appeal, state of the case, and ask you if that is not prepared by you or your attorney in connection with your appeal? A. If that is a matter of record I so testified.

Q. And I call it to your attention? A. Sure, that is all right.

Q. As a matter of fact is not your reason for saying that your account was not overdrawn at that time the fact that you were in your mind relying on Smith having given you credit for certain notes that you asked him to discount; is not that a fact? A. Yes, that might be so.

Q. Well, that is a fact, is it not? A. That might be so, yes.

Q. Well, is it not the fact? A. That might be so, yes.

Q. Is it not a fact that if those notes which you asked Mr. Smith to discount were not placed to your credit you would have had a substantial overdraft at that time? A. Not that I know of, no.

Q. Is it not a fact that you drew checks aggregating about eight hundred dollars on the strength purely of those notes that you asked Mr. Smith to discount about that time? A. Yes.

Q. Then isn't it the fact that if you had not, as you say you had, credit for those notes your account would have been overdrawn to at least the extent of eight hundred dollars, is not that a fact? A. I don't know what the amount would have been if I hadn't had the credit for the notes.

Q. Well, you know you would have been substantially overdrawn if you hadn't had or claimed to have had credit for those notes, isn't that a fact? A. Well, I was told I had credit for the notes.

Mr. Hinds: If your Honor please, that is a matter I am going to take up in a minute, but I think I am entitled to an answer to the question.

Mr. Congleton: It is a mathematical proposition, they have the books.

The Court: Well, on the theory that I admitted your question against objection I will admit this question.

Q. (Question read.) A. That would naturally follow.

Q. And didn't you testify at 148 as follows: "Q. If you had this credit of $500" referring to one of the notes, "how could you draw checks against it to the amount of $800? A. Because I had sufficient balance in my own mind there to draw these checks against it." Did you so testify? A. I did, yes.

Q. Now then, as a matter of fact what notes did you give Mr. Smith for the purpose of discount in that connection? A. Three notes.

Q. What were the amounts? A. Two one thousand dollar ones and one five hundred dollar, I gave him twenty-five hundred dollars.

Q. Do you know at what, if any, meeting of the directors those notes were passed upon? A. Meeting of what, directors of the Roseville Trust Company?

Q. Yes. A. They were never offered the Roseville Trust Company.

Q. They were discounted, however, were they not? A. Where?

Q. Well, I will ask you were any of those notes discounted anywhere? A. After the bank closed we found that the one five hundred dollar—

Q. No, I ask that that be stricken out, I want the fact.

The Court: You are asking the witness a question which he may or may not know, and he is giving you his information. They might have been discounted in his absence; he presented them to the officers of the bank and asked them to discount the notes; now what they do in his absence he cannot testify to as coming from his own knowledge; he may have been informed about it, but you are asking him for information and not for knowledge.

Q. I will withdraw that question. You say you had a balance in your own mind, and you also say that it was upon reliance upon the discounting of some of those notes that you drew eight hundred dollars' worth of check in the Roseville Trust Company. Will you tell us how you came to have that reliance in your own mind that you were entitled to credit for any of those notes in the Rose-

ville Trust Company? A. I gave Mr. Smith those notes to be sold to a country bank and not to go through the Roseville Trust Company at all, and at the time of handing them to him he asked me if I was in a hurry for the money; I said, no, not any particular hurry; he said, "Well, I haven't any applications for any loans just now of this kind, but," he said, "I will tell you what you do, you call me up when you want to draw, and I will let you know if it is all right to draw," which I did, called him up and told him I was going to draw some checks; he said, "That is all right, your credit is all right."

Q. Then having learned that it was, as you say, all right, was it your understanding that there was then a credit to your account in the Roseville—

The Court: Oh, no, that will not do. He said it was all right, now you have got all you can get.

Q. Now then, did the information that you got over the telephone from Mr. Smith indicate to you that these notes had been discounted by the Roseville Trust Company?

The Court: No. What was the information that he got over the telephone?

Q. What was the information as to where those notes had been discounted? A. He did not say.

Q. Did he say which of them had been discounted? A. No.

Q. Did he say that all of them had been discounted? A. He didn't say.

Q. You say that you had a balance in your own mind; what was there in your own mind which indicated to you that you had a credit to your ac-

count in the Roseville Trust Company because of those notes? A. Why because Mr. Smith said it was all right to draw the checks.

Q. To what extent, to what amount? A. Why about eight hundred dollars.

Q. But you didn't know, did you, whether there was that credit for only one of the notes, five hundred dollars, or for the whole twenty-five hundred dollars? A. No, I didn't know; he said it was all right.

Q. You didn't ask, did you? A. No; when he said it was all right I drew the checks, when he said it was all right.

Q. You as a director and officer of the Roseville Trust Company knew that it was necessary for the directors to authorize the purchase of your note, even for the purpose of selling that note to a country bank and putting the proceeds to your account in the Roseville Trust Company, did you not?

The Court: I overrule the question.

Q. Now then, at the time you had your original conversation with Mr. Smith about placing these notes in country banks, what else was said? A. He said he didn't have any application for such loans as that at that time.

Q. And was that all he said? A. No, he said, "I would take them myself only I just got a car load of automobiles come in and I can't do it, or I would be glad to do it;" I said I didn't expect him to dit it personally.

Q. What date was that? A. I don't know what date it was.

Q. Well, what month? A. I don't know what month; it was the time I offered them.

Q. In what year? A. 1913.

Q. I show you your testimony and ask you—

The Court: Well, read it.

A. Just read it to me and I will tell you.

Q. Page 132: "Q. Just when was that, Mr. Foster? You say that was about the middle of June? A. I think it was about the middle of June. He said, 'Do you need the money right away?' I said 'No, not for two or three weeks, possibly.' He said, 'Well, I guess probably I can take care of them by that time.' He said, 'Now, I would buy them myself only I got a carload of cars just come in and it is sight draft.' " Does that refresh your recollection? A. That is just what I said just now.

Q. Was that the first time that you had heard Mr. Smith was personally dealing in automobiles by the carload? A. By the carload, yes.

The Court: Now you are not cross-examining, you are going into another matter.

Mr. Hinds: This witness is produced in his own behalf for the first time, and Mr. German has asked him very general questions, sweeping questions as to his knowledge of what he was doing, and that during the whole course of the trust company's affairs he never did anything, never did anything to his knowledge that was out of the way or negligent, I cannot remember the exact words but they were very general.

Mr. Congleton: That was not the question and I am not bound by it.

(After discussion.)

The Court: It seems to me that in the present situation of affairs the witness was

Mr. Congleton's and Mr. Congleton was examiner-in-chief, and that any examination whether by Mr. German or by you should be limited to the matters inquired into on the examination in chief. I think Mr. Congleton has the right to object, and if Mr. Congleton now objects to the question put by Mr. German, I will rule it out and strike it from the record.

Mr. Congleton: I will make such an application.

Mr. German: I withdraw the two questions and answers.

Mr. Hinds: I would like to have that done only over my objection on the ground that those objections are untimely when they come after the lead has proved to be unfavorable, and I would like to submit further that even on the theory of cross-examination it is entirely and purely a matter of discretion.

The Court: I will allow Mr. German after this examination is over to call Mr. Foster as his witness and I will then have to rule upon the questions. Mr. Hinds may call Mr. Foster if he wants to and make him his witness, and any other counsel may call him and make him his witness, but as the matter now stands it seems to me I ought to limit the examination to Mr. Congleton's examination.

Mr. Hinds: If your Honor please, we would like to continue some of these subjects respecting this witness, and as matter of convenience we will do so now, rather than wait for our rebuttal.

The Court: Does anybody object?

Mr. Congleton: As your witness.

The Court: If nobody objects you may do that.

Mr. Hinds: If your Honor please, I understand we are not precluded of our right to argue later that this is cross-examination, but submitting to your Honor's ruling we label it direct-examination.

Mr. Congleton: If that is the purpose of it then I object to their going on with that examination at this time, and have the witness leave the stand if they are through with their cross-examination and let them re-call him.

The Court: Well, it is either cross-examination or direct-examination, and Mr. Hinds will have to make it one or the other, will have to state what it is.

Mr. Congleton: Are you through with your cross-examination?

Mr. Hinds: Well, this is direct-examination now.

Mr. Congleton: Then I would like to ask one other question with respect to one of their answers on cross-examination.

The Court: Are you through with the cross-examination?

Mr. Hinds: Yes, your Honor.

RE-DIRECT-EXAMINATION by Mr. Congleton:

Q. Had you any knowledge before the bank closed that the one note for $500 which Mr. Smith had had discounted had been discounted in the Roseville Trust Company?

Mr. Hinds: I object.

A. No.

Mr. Hinds: I object. This witness has specifically stated that he did not know which, if any, of those notes had been discounted; now counsel puts into his mouth that it was the five hundred dollar note which had been discounted. I particularly tried to bring that out and the witness particularly said no, I don't know which one of the notes.

The Court: You are asking for Mr. Foster's conclusions on this matter and that I think is plainly incompetent. You can ask him for any additional fact within his knowledge.

Q. After the bank closed did it come to your knowledge and, if so, had you any knowledge before that any of the notes which you had given to Mr. Smith had been discounted at the Roseville Trust Company?

Mr. Hinds: I object on the ground that what came to this witness's knowledge afterwards, after the Roseville Trust Com-Company failed, is not material.

Mr. Congleton: The banking department made demand upon this defendant at the close of the bank for the payment of a note, and I want to show, if I may, that it was one of these notes which he had given to Smith and which had gone through the Roseville Trust Company, but that this defendant had no knowledge of that, nor had it been presented to the executive committee or to the board of directors, because the other side will argue that here was a note found there endorsed by one of the di-

rectors of this institution which had not been submitted to the board of directors, which was not only a negligent act but a criminal act, and I want to show now from this witness that until after the bank closed and the commissioner was in charge this defendant had no knowledge that that note was in the Roseville Trust Company.

The Court: I will allow you to ask the witness when he first heard that this note was in the Roseville Trust Company.

Q. When did you first know—

The Court: Hear.

Q. When did you first hear that any of the three notes that you gave to Mr. Smith and that you have testified about were held by the Roseville Trust Company, if they were so held by the Roseville Trust Company? A. After the bank closed.

Q. From whom did you get that knowledge? A. The bank examiners in the bank then.

Q. Now, Mr. Foster, counsel made some reference to your having testified in your criminal case so and so, and quoted certain parts of the testimony. Was that criminal case decided in your favor? A. It was.

Mr. Hinds: Now I object to that. He answers so quickly that I cannot get my objections down.

The Court: I do not think that the evidence is at all relevant, each case must stand on its own foundation.

RE-CROSS-EXAMINATION by Mr. Hinds:

Q. Now prior to your drawing these checks aggregating, you say, about eight hundred dollars, in reliance upon the balance which as you say you had in your own mind because of your statement with Mr. Smith over the 'phone, had he told you how many of those notes had been used or who had acquired them?

Mr. Congleton: Objected to as not re-cross-examination.

The Court: You asked for some hearsay evidence; now counsel can ask him what it was that he heard.

Q. (Question read.) A. No.

Q. Where were those notes payable? A. I do not recollect that now.

Q. On whose forms were they written? A. I do not recollect that.

Q. Prior to the date that the bank closed did you make any effort to find out who held those notes or where they were payable? A. No.

Q. Did you ask Mr. Smith to return to you those, if any, which had not been used? A. No.

Q. Between that time and the time the bank closed did you get your book balanced? A. That I don't remember, really.

Q. Do you recall whether or not at any time thereafter you saw in your bank book that any of those notes had been, or the proceeds of any of those notes had been credited to your account? A. I don't remember that.

Q. During the period that you were in the bank at $75 a month, a part of that period was subsequent to the drawing of the $2.05 check, was it not? A. You mean that I was there after the $2.05?

Q. Yes. A. Yes, I was there after that.

Q. During any of that period did you look in your individual ledger account to see whether or not you had received credit for the proceeds of any of those notes against which you were drawing? A. No.

Q. Did you look in any book for that purpose? A. No.

Mr. Hinds: Now through an inadvertence I neglected to have in mind that Mr. Congleton brought out the subject of his employment there to relieve Mr. Smith, and I think I should be permitted to cross-examine him on that subject.

The Court: Oh, yes, if you overlooked it.

Q. Now what were the circumstances which made it necessary for you to take Mr. Smith's place part of each day in the bank? A. The deposits were decreasing in volume and we felt that our loans were rather high or too high, that is at that time, and the directors felt that if Mr. Smith could go out and interview these people that had these loans or had accounts there, either to decrease the loans or increase the accounts, it would help very materially, and they felt that while Mr. Smith was out of the bank there should be some officer there who could sign anything that required the signature of an officer.

Q. And as I understand, the situation then was that you were over-loaned at that time? A. Well, I don't say that; I will say that we wanted to improve the condition.

Q That is, to get in more funds and less of your own money loaned out, is that the fact? A. Get more accounts and reduce our loans?

Q. Did you take the hoped-for reduction of loans into account the time you went to Mr. Smith with your own three notes aggregating $2500? A. How is that again?

Q. Did you take into account in your own mind that there was a movement to reduce loans on foot when you took your own $2500 worth of notes to Mr. Smith?

The Court: He said that he gave him these notes for discount in some outside banks.

Mr. Hinds: I did not so understand him. I understood that the trust company was in the habit of selling its paper which it had purchased to country banks. Now if that is not the fact I would like to have the witness tell me what is the fact. I certainly understood it that way.

A. You misunderstand it then, because these notes were not offered to the trust company to be sold by the trust company, it was not a trust company matter at all, it was a matter that I took these three notes to Mr. Smith and asked him if he had any application from out of town banks to purchase paper, which frequently happens in different banks, that is all, and they were to be sold to some other bank; it was not a matter of the Roseville Trust Company matter at all.

Q. You say they were to be sold to the other banks; by whom were they to be sold to other banks? A. By Mr. Smith.

Q. Were they to bear the endorsement of the Roseville Trust Company, as you understand it? A. Oh, no, no,

Q. That is to say, you, as vice-president, had

known previously, had you not, of the sale by Mr. Smith of paper to country banks? A. No.

Q. Well, then what was it that led you to expect that he would be in a position to sell your notes without the trust company's endorsement to country banks? A. Because I knew that was the practice.

Q. The practice where? A. Of other banks.

Q. Had it ever been a practice of the Roseville Trust Company or rather of Mr. Smith? A. Oh, I don't know that.

Q. You didn't know of any previous instance where Mr. Smith had taken an individual's notes and sold them without the Trust Company's endorsements to any country bank? A. No.

Q. What was it that led you to believe that he would do this in your instance? A. I don't know as I can answer that.

Q. Will you try to make the best answer that you can? A. I think I have said that was a common practice in banks, and I asked him if he had any application.

Q. Did you know or believe at the time that it was a common practice in banks? A. I believed it was, yes.

Q. And where did you get that information? I don't know just where I got it.

Q. Had you had any similar experience with other banks yourself? A. Oh, I was connected with another bank, that is as a director.

Q. What other banks? A. American National Bank.

Q. Did it ever occur there that some officer for you or anyone that you knew of acted as a broker or intermediary to sell notes without the Ameri-

can Bank's endorsement to another institution? A. No.

Q. Where did you get the idea that there was such a practice in other banks? A. I told you I didn't remember where I got it but I had it.

Q. Had anyone told you that there was such a practice? A. I don't know whether anybody told me or not.

Q. When, as a matter of fact, had you ever before this very minute thought there was any such practice in any other banks? A. I don't know that.

Q. You don't know? A. No.

Q. Is it not a fact that at the time you offered those notes to Mr. Smith you had no such idea in your mind that it was a practice of banks and bank officers to act as intermediaries for disposing of the notes of customers to other banks?

Mr. Congleton: I object to that question, he has not so testified that he had any such notion.

Admitted.

Q. (Question read.) A. I did have that notion.

Q. Did you tell any other director that you were giving your notes to Mr. Smith so that he could dispose of them to other banks? A. No.

Mr. Congleton: Objected to as not cross-examination.

Q. Now you say that those notes were to be sold to other banks; were they to—

The Court: What is the object of pressing this to such an extreme limit. I do not see that it makes any difference at all; it happened at the very end of the bank's transactions; he is responsible of course if

anything was lost in the course of this transaction, nobody else would be.

Q. Now you have said that you did not recall whether or not you did have your book balanced between then and the close of the institution, and I read your testimony at page 152 of the other trial, wherein it was said: "Q. Where was your pass book on that date?" (meaning July 6th, 7th or 8th.) "A. At the bank. Q. I show you your pass book being Exhibit D-2, and ask you if you find any credit there as of July 6, 7, 8 or 9th of $500 or anything like it? A. No. Q. When according to the pass book, was it balanced in July, 1913? A. July 17th, according to this. Q. And down to that date is there any credit in your pass book of that note or the proceeds of that $500 note? A. No." Did you so testify? A. I did.

Q. Does that refresh your recollection so as to enable you to say that those facts are correct as you then testified? A. I cannot answer any otherwise than I testified there.

Q. Having learned that the proceeds of these notes against which you were drawing checks had not appeared in your pass book after the book had been there and been balanced, did you call that to the attention of any of the directors? A. No, I don't know that I looked at my bank book at that time; I think I so testified then; one frequently gets a bank book balanced and doesn't look at it for months after.

Mr. Hinds: That is the end of my re-cross-examination; I will now take him on direct-examination, unless there are some other questions.

Further RE-DIRECT-EXAMINATION by Mr. Congleton:

Q. Were these notes spoken of your individual notes? A. No, they were the Alfa Company notes.

Q. Notes made by another company upon which you were endorser? A. Yes.

By Mr. Hinds: Q. You were to receive the proceeds of those notes, were you not? A. Yes.

Q. Payable to your order, the notes were? A. Yes.

By Mr. Hinds: Q. Were the makers a corporation? A. Yes.

By Mr. Hinds: Q. Yet you personally were to have the proceeds put to your individual account; is that correct? A. Why, yes; that wouldn't make any difference.

Mr. Hinds: Now we will make him our witness.

DIRECT-EXAMINATION by Mr. Hinds:

Q. At any meeting of the board of directors were the methods pursued by the examining committee in making their examinations discussed? A. Why I cannot add anything more than what was said on the stand here.

Q. Was there any discussion as to the examining committee's methods as to whether or not the figures which they footed up in the general ledger were the figures that they had checked to the general ledger from the original source? A. Any discussion as to whether those figures reconciled with their examination?

Q. No, as to whether any precaution had been taken to ascertain that they had actually footed what they had previously checked? A. Pardon me but I do not quite understand the question.

Q. Was there any discussion whatsoever in any directors' meeting or executive committee meeting when you were present as to whether or not the committee had footed up the general ledger in connection with their examination? A. I do not remember any such at this late day.

Q. Was there any discussion as to what means had been employed to reconcile the trust company's accounts with its correspondent banks? A. Was there any discussion, did you say?

Q. Yes. A. Well, I do not remember at this late day what discussion took place.

Q. Did you make any inquiry as to what means were being employed? A. No, any more than the report.

Q. You knew that Mr. Smith alone had the power to draw checks on any of the depositary banks, did you not? A. Oh, I think I knew that, I think the bylaws said that any officer.

Q. Now following the Nones incident as it developed in the board of directors, was there any change in the system of the trust company with respect to putting any check upon Mr. Smith's control of those correspondent banks, or any of the other affairs of the institution? A. I do not recall any at this late day.

Q. You were present, were you not, at the directors' meeting wherein Smith's implication with the Nones account was discussed? A. I believe I was, I was at most of the meetings.

Q. Were you a member of the committee to look into the matter?

Mr. German: Don't the minutes show all this.

The Court: Anything in the nature of

corporate action not shown by the minutes can of course be testified to orally.

Mr. German: Your Honor ruled before that the witness's attention must be directed to that particular minute.

Q. I hand you the minutes and ask you to find there, if you can, the minutes of the meeting where the action was taken respecting the retention of Mr. Smith. I have not been able to find it.

Mr. German: I object to that question unless this witness is the secretary and he is familiar with the books; it is not fair to ask this witness to go through that minute book.

Q. Now I show you the minutes of June 21, 1909, which appear to contain no reference to an appointment of a committee to look into the matter of Raymond E. Smith's implication in the Nones matter and his resignation, and ask you whether by way of supplementing the minutes you will tell me whether there was such a committee appointed? A. Do you wish me to look in here to find out if there is any such minute as that?

Q. You can confirm—

The Court: Does not that appear in the testimony of the other witnesses?

Mr. Hinds: I think it does, your Honor.

The Court: Why do you want to prove it so many times?

Mr. Hinds: My question was, were you a member of that committee, and counsel rises and objects to the question because it implies there was a meeting, and they say

I must show him the minutes and establish over and over again there was such meeting before I can ask him if he was a member of it.

By the Court: Q. Was there a committee? A. I had forgotten all about it until I heard on the stand this morning that there was.

By the Court: Q. Have you any recollection on the subject? A. Yes.

By the Court: Q. What is your recollection now? A. That some of us went down to Trenton, as I remember it, to see Commissioner Lewis, I think at that time, to, as I recollect at this late day, amplify the letter that Mr. Odell sent; we talked it over with Mr. Lewis; and he said, "Well, from your explanation of this thing why it looks to me as if your stand is all right."

Q. Where was that conversation with Mr. Lewis? A. That was in Mr. Lewis's office at Trenton, if I recollect properly.

Q. That is the present vice-chancellor, then Mr. Vivian M. Lewis? A. He was Commissioner of Banking and Insurance, Mr. Vivian M. Lewis I think is his name.

Q. Where did you say that was? A. To the best of my recollection it was at Trenton.

Q. I know, you said that, but where in Trenton; in his office? A. In his office.

Q. You say you went there after Mr. Odell's letter for the purpose of amplifying it? A. That is the best of my recollection, I don't know just exactly what time it was.

Q. And was it before or after the meeting of the special committee? A. I don't remember that.

Q. Now I shall refresh your recollection by showing you page 84 of the bill of complaint to which you have pleaded, wherein it appears that there was a telegram to Vivian M. Lewis on June 15, 1909, does that refresh your recollection so as to enable you to say whether it was before or after the meeting of the special committee? A. No.

Q. Telegram reads: "Our committee will call on you today at 12:45 p. m." A. No, I have no recollection at this time when it was.

Q. Now did the meeting of the directors to pass on Smith's resignation come after or before you went to Trenton to see Mr. Lewis? A. That I do not recollect.

Q. Was it a matter of discussion between you and the commissioner as to there having been such a meeting? A. I cannot remember that now.

The Court: Now all you have to do is compare the dates of the telegram and the minutes as then recorded and you can find that out if it is at all important.

Q. Now is it not a fact that you went to see Mr. Lewis before you had any meeting? A. Oh, I don't know that.

Q. Now I show you again the bill of complaint and show you that your meeting occurred on June twenty-first, six days after you went down to see the Commissioner, and ask you if you do not want to correct your testimony wherein you state that Mr. Lewis endorsed what your directors had done; do you now desire to correct that testimony? A. I do not wish to correct it in any sense at all, I am giving you the answer to my

best recollection after so long a time has elapsed, I answered the question the best I could.

Q. Is it your recollection that when you went to see Mr. Lewis at Trenton he told you that in view of what you told him you directors have seemed to have acted wisely respecting Mr. Smith; is that right? A. I do not know the exact words, but he said "According to your explanation it seems to be all right."

Q. And yet when I show you that you did not meet until six days after that you say you do not wish to correct your testimony, that it is still to the best of your recollection correct that Mr. Lewis made that statement? A. Yes, I do.

Q. Now I call your attention to the letter at page 88, addressed by Mr. Lewis, as commissioner, to Mr. Odell, dated July 16, 1909, you will notice it is a month after the meeting of your directors, in which he says: "Dear Sir: I am in receipt of a letter dated the 21st ulto. signed by Mr. E. K. Sexton, secretray pro tem of the special meeting of the board of directors held on the last mentioned date, embodying the action of the board upon the resignation of Mr. Raymond E. Smith, secretary and treasurer of the institution. It will have my consideration. I will say now, however, that I emphatically disapprove of the decision of the board in the matter." Now having had the letter again brought to your attention do you now desire to corect your statement that Mr. Lewis before the meeting said that he approved of what you directors had done respecting Mr. Smith?

Mr. Stiefel: I object. I do not think this is direct-examination of the witness; he is trying to break down his own witness.

The Court: I think the question is very improper myself.

Q. Now Mr. Foster, you were the second vice-president of the institution? A. Yes.

Q. Throughout the period of its existence? A. Yes.

Q. Did it ever come to your notice that items other than cash were being carried as cash by the tellers in their drawer? A. No.

Q. Did it ever come to your attention that numerous checks were being paid by the tellers and treasurer upon accounts where there were no funds to meet them? A. No.

Q. Did any such check ever come to your attention? A. No.

Q. Not of the Home Ice & Products Company? A. No.

Q. Now you have said that in June you noticed a decrease in the deposits, in the amount of the deposits; did you also observe that there was an increase in the number of depositors? A. Yes, that was our report at the time, yes.

Q. Did you, or to your knowledge any other member of the board, make any investigation to see whether or not the amount of the deposits was actually less than had been previously? A. I do not recall that now.

Q. During the period of your connection with the Roseville Trust Company did you ever look in any of its books? A. Yes, I looked in some of them.

Q. What books? A. The collateral loan book and the bond and mortgage book.

Q. Did you ever look in the general ledger? A. Oh, just glanced at it, not to get any figures

or to harmonize any figures or anything of that kind.

Q. Did you ever look in the bills purchased book? A. Not that I recall.

Q. Do you know of any instance where pages were missing from the bills purchased book? A. No.

Q. Did you ever hear that matter discussed by any directors? A. No.

Q. Was it ever a matter of discussion in your presence whether or not the examining committee of the bank in their examination of the bills purchased were verifying whether or not each bill had been authorized by the board of directors or by the executive committee? A. I don't quite get that.

Q. (Question read.) A. No, there was no such discussion.

Q. And you never made inquiry in that connection yourself? A. No, no.

Q. Or heard anyone else inquire as to whether that was being checked up? A. No, sir.

Q. Did it ever come to your attention while you were a director that a charge was made against Mr. Smith to the board of directors respecting a personal affair of his?

Mr. Congleton: When?

Q. During the last year of the bank's existence? A. What kind of an affair?

Q. Any charge at all? A. About his work or about the institution?

Q. No, about an outside personal matter of his? A. Yes, I heard discussion about his being in an accident, automobile accident.

Q. Was he charged with anything? A. Not that I know of.

Q. Did you know or not, or did you hear while you were a director of any instance where complaint respecting Mr. Smith was made to the directors or any of them respecting an altercation or unpleasant incident that Mr. Smith had been a party to? A. I have a faint recollection, but I do not know what it was now.

Q. Tell us what the recollection is though it is faint?

Mr. Congleton: I think counsel ought to direct the witness's attention to what it is he has in mind that he wants to question him about.

Mr. Hinds: I think if his memory is not replete with such instances he can pick out the one, and if there are more than one I would like to hear them all.

Mr. Congleton: It seems to me we have a right to object if it is something that has nothing to do with the bank, and we ought to know what the question is aimed at.

Mr. Hinds: It has this to do with the bank, that it was brought to the attention of the directors of the bank and it was an unfavorable affair. I am asking the witness if he knows of any such instance, if he says he does not I am foreclosed.

Mr. German: I object unless it relates to the negligence of some or one of the directors.

The Court: The question of course must pertain to Mr. Smith's conduct of his affairs at the bank.

Mr. Hinds: I will be frank to say I did not have that in mind, but I did have in

mind an incident which if brought to the attention of a bank director would amount to negligence if it was not seriously considered, though it did affect his affairs outside of the bank, and the reason I have not told what I have in mind is that I think it would be highly prejudicial to the defendants and they would all properly accuse me of attempting to prejudice the case, but I think this witness knows about it and I want to have him tell me.

The Court: I will have to limit your question to anything that Mr. Smith did in connection with his conduct of the bank, unless you make an offer.

Mr. Hinds: I will make such offer then, your Honor. My offer—and for the sake of the defendants I won't specify the details unless they want me to—is to prove that there came to the attention of directors of this bank as such incidents which reflected very unfavorably upon Mr. Smith's character, moral character and fitness to hold any position of trust whatsoever. That is my offer and that is what I am attempting to bring out.

Mr. Stiefel: Are you referring to what Mr. Lurich testified to?

Mr. Hinds: I do not recall whether he testified to it or not; it was not an incident of intoxication, that was not the charge.

The Court: I cannot rule upon that, it is too indefinite. If you are going outside of the affairs of the bank you will have to make some specific offer so that I can see

that if the evidence is admitted it will bear upon the question of the negligence of these directors in their conduct of the affairs of the bank.

Q. Mr. Foster, did it ever come to your attention that complaint had been made to the directors or any of them in their capacity as directors that Mr. Smith had conducted himself in an immoral manner, and in a manner reflecting on his moral character? A. Not that I recall, no.

Mr. Stiefel: Now the only evidence I have is the stipulation which Mr. Clark and I will enter into, and which is in already in a great part, and then I want to put on the record the dates of the examinations.

Mr. Clark: I haven't my data here now.

Mr. Stiefel: You furnished them to me, Mr. Clark.

Mr. Hinds: If those are the dates we gave you, and conceding them to be the fact but subject to correction, and our objection as to their relevancy and materiality.

The Court: Oh, yes.

Mr. Stiefel: Examinations by the State Department, State Examiners, under charge of the Commissioner of Banking & Insurance, March 11, 1909, October 6, 1909, May 25, 1910, January 26, 1911, December 15, 1911, October 14, 1912 and August 13, 1913.

By Mr. Clark: Q. There have been introduced in evidence certain reports of condition of the Roseville Trust Company to the Banking Department as at various dates, certain of which bear

your signature; do you recall signing certain of such reports? A. I signed the reports, yes.

By Mr. Clark: Q. Now in any case where you signed such a report we would like to know what steps you took to verify the information which the report contained? A. I didn't take any special steps to verify it.

By Mr. Clark: Q. Did you look in any book or record? A. No.

By Mr. Clark: Q. Did you inquire from anyone but Mr. Smith? A. No, because that was a continuing thing.

By Mr. Congleton: Q. When you attested them as correct had they or not been executed by the president and treasurer of the institution? A. They had.

Defendant rests.

Oct. 18, 1917.

AUGUSTUS R. JENNINGS, re-called:

Direct-examination by Mr. Hinds:

Q. Mr. Jennings, what was the practice as you observed it in the Trust Company as to whether or not bills purchased were actually purchased before they were proved or reported to the executive committee or th board of dirctors?

Mr. German: Is this rebuttal, if your Honor please? Has there been any proof of the practice by the executive committee? It seems to me this is new testimony.

(After discussion.)

The Court: Under the circumstances I do not think you should now be permitted to introduce new evidence.

Mr. Hinds: Then with your Honor's permission I will withdraw it now and renew it later.

Q. What was the fact at the time of the examination by the committee in December, 1912 as to whether or not there were among the bills purchased that were examined by the committee certain bills purchased which had not been reported to or proved by the executive committee or the board of direcors?

Mr. German: Is that rebuttal? As I understand rebuttal it is that the question ought to be directed to some evidence given by a particular witness concerning a certain point. Now I think that we ought to know what evidence this rebuttal refers to and what person.

(After discussion.)

The Court: I overrule that question. If you have any specific instance I will allow you to examine the witness with regard to that.

Mr. Clark: We should like to have your Honor note on the record that we except to your Honor's ruling.

The Court: Oh, certainly.

Q. Did you shortly after the examining committee made their examination in December, 1912 have the bills purchased book in your possession? A. I did, yes, sir.

Q. Will you tell us what the condition of that book was with respect to whether or not all the leaves were present?

Mr. Congleton: I object.

The Court: It seems to me that that might or might not be rebuttal. I will let that question go in.

Q. (Question read.) A. I noticed there were several pages that were missing.

Q. What did you do? A. I reported the matter to Mr. Smith.

Q. What did he say?

The Court: I do not think that is proper.

Q. What next occurred?

Mr. German: I object to that of course.

The Court: I have allowed you to show there were missing leaves; now it seems to me that is about as far as you can go.

Q. So far as you know did that come to the attention of any director?

Mr. Congleton: I object.

The Court: That is plainly original evidence.

Mr. Hinds: I ask an exception.

Q. Will you tells us what you observed in the trust company respending any delay in the balancing of Mr. Denn's pass book, if any?

Mr. Newton: I object to that, that is original evidence.

Mr. Hinds: That is to rebut Mr. Dunn's statement that he did not observe any delays, and that nothing came to his attenany irregularities or anything suspicious.

The Court: If the evidence does not tend to show that the balancing of Mr. Dunn's book was unnecessarily delayed I will rule it all out.

Mr. Hinds: Page 1622 Mr. Dunn was

asked: "Did you ever have any difficulty in having your pass book balanced or notice any delay in balancing it? A. No, sir, I don't think so."

The Court: Well, that can be contradicted.

Q. (Question read.)

A. My recollection is that Mr. Dunn asked me on more than one occasion for his pass book. On taking it up with the bookkeeper I found it had not been balanced. There were several entries in Mr. Dunn's pass book that did not appear on the ledger and the bookkeeper was unable to balance the book. The book was referred to Mr. Smith. My recollection is that Mr. Smith balanced the pass book and that it was returned to Mr. Dunn possibly two or three months after the pass book was originally left for balance.

CROSS-EXAMINATION by Mr. Stiefel:

Q. Do you know whether it was ever returned to him or a new one written up? A. No, sir, I do not.

Q. Did you tell this to Mr. Dunn? A. No, sir.

By Mr. Hinds: Q. You said that Mr. Dunn was there himself, did you not? A. Mr. Dunn personally asked me for his book.

By Mr. Congleton: Q. Were you the one that usually handed out the balanced bank books? A. There wasn't anyone specifically handed out the pass books.

By Mr. Congleton: Q. You were not the bookkeeper at that time? A. The bookkeeper had no window.

By Mr. Congleton: Q. I say, you were a teller and not the bookkeeper? A. Yes.

By Mr. Congleton: Q. And it was not part of your duty to balance the books? A. Not at all.

Mr. Clark: In view of your Honor's ruling toward the other questions we have no further testimony to offer.

Mr. Newton: I would like to reserve the right to call Mr. Dunn in sur-rebuttal until I have talked with Judge Collins; I do not think it is necessary, myself, to call him but I would like to talk to Judge Collins about it.

The Court: Well, I cannot delay the closing of the case on that account.

Mr. Stifel: There is a stipulation between counsel which I would like to put in evidence.

Marked Exhibit D-6.

Case closed.

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EXHIBIT A.

Part of Chancery Record in the matter of Roseville Trust Company in charge of the Commissioner of Banking and Insurance, etc. (Docket 37, page 310).

The exhibit bears no exhibit number but is referred to on pages 1009-1015 of the printed state of the case.

The following parts of said record are material to this appeal.

IN CHANCERY OF NEW JERSEY.

IN THE MATTER OF THE ROSEVILLE TRUST COMPANY IN CHARGE OF THE COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY, UNDER THE PROVISIONS OF CHAPTER 171, LAWS OF 1913.	*Order Confirming Sale and Approving Certain Compromises.*

Order to show cause having heretofore been made in the above-entitled matter on filing the Petition of George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, on the fifteenth day of December, Nineteen Hundred and Thirteen, ordering that the depositors, creditors and stockholders of the Roseville Trust Company, a corporation of the State of New Jersey, organized under the Act of the Legislature of said State, entitled "An act concerning trust companies (Revision of 1899)," having its office and place of business in the City of Newark, County of Essex, and State

Exhibit A.

of New Jersey, in charge of said Commissioner of Banking and Insurance, pursuant to the statutes in such case made and provided, show cause before the Court of Chancery, at the Chancery Chambers in the State House in the City of Trenton, on Tuesday, the thirtieth day of December, Nineteen Hundred and Thirteen, at the hour of 10.30 o'clock in the morning of that day or as soon thereafter as the matter could be brought to the attention of the Court, why the said George M. LaMonte, Commissioner of Banking and Insurance, should not be authorized and directed to sell the property and assets of said Roseville Trust Company, particularly mentioned and described in a certain contract bearing date the tenth day of December, Nineteen Hundred and Thirteen, a copy of which was annexed to said Petition, entered into between the said George M. LaMonte, Commissioner of Banking and Insurance, and the Mutual Bank of Roseville, a corporation of the State of New Jersey, pursuant to and on the terms and conditions set forth in said Contract, and to compound certain claims against officers and directors of the said Roseville Trust Company for the amounts mentioned in said Contract, and in the name of said Roseville Trust Company to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate said sale of real and personal property, pursuant to said Contract and the compromises therein mentioned and set forth.

And notice having been given of the making of said Order to the depositors, creditors and stockholders of the said Roseville Trust Com-

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pany, as required by said Order, and proof by affidavit thereof having been filed.

And the matter having been brought on before the Chancellor and having been opened to the Court by John R. Hardin, of Counsel for the said George M. LaMonte, Commissioner of Banking and Insurance, and no person appearing in opposition, except James V. Herron, of Counsel with Michael Kane, Jr., having a claim as depositor of $58.00, and with three other persons having claims as depositors aggregating, with the said Kane's claim, less than Nine hundred dollars, and the Court having heard the argument of the said James V. Herron in opposition, and the arguments of Mr. Ralph E. Lum, of Counsel with certain of the directors of the said Roseville Trust Company with whom compromises had been recommended by the said Commissioner of Banking and Insurance, in his said Petition, and Mr. Edward F. Clark (of the New York Bar), representing the Depositors' Association, composed of depositors and creditors of the said Roseville Trust Company who have assigned their claims to the Mutual Bank of Roseville, referred to in the said petition.

And the Court being of opinion that the sale of the property and assets of said Roseville Trust Company particularly mentioned and described in the Contract, copy of which was attached to said Petition, pursuant to and on the terms and conditions set forth in said Contract, should be approved, and that the compounding of certain claims against the officers and directors of the said Roseville Trust Company referred to in said Petition and Contract should be approved, and that the said Commissioner of

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Banking and Insurance should be authorized to execute, acknowledge and deliver in the name of the said Roseville Trust Company any and all deeds, assignments, releases and other instruments necessary and proper to effectuate said sale of real and personal property pursuant to said Contract and the compromises therein mentioned and set forth.

It is on this thirtieth day of December, Nineteen Hundred and Thirteen, on motion of Pitney, Hardin and Skinner, Solicitors of the said George M. LaMonte, Commissioner of Banking and Insurance, by Edwin R. Walker, Chancellor of the State of New Jersey, pursuant to and in accordance with the provisions of an Act of the Legislature of the State of New Jersey entitled "An act to amend the act entitled 'An act concerning trust companies (Revision of 1899)', approved March twenty-fourth, One thousand eight hundred and ninety-nine," which amendment was approved April first, One thousand nine hundred and thirteen, being Chapter 171, of the Laws of 1913, ordered that George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, be and he is hereby authorized and directed to sell all the business, goodwill, real, personal and mixed property and assets of every kind and nature, moneys, bills, notes, negotiable instruments and securities for money, bonds and mortgages, book accounts and other documents and choses in action, all contracts and agreements, books of account, papers, documents, furniture, fixtures, supplies and generally all property of every kind and nature of the Roseville Trust Company, a corporation of the State of New Jersey, organized under the act

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of the Legislature of the State of New Jersey, entitled "An act concerning trust companies (Revision of 1899)", having its office and place of business in the City of Newark, in the County of Essex and State of New Jersey, now in charge of said Commissioner of Banking and Insurance pursuant to the statutes in such case made and provided, including all interest accrued or earned on any claim or asset to the date of the conveyance thereof, except, however, any right of action upon surety bonds of former officers or employees of said Roseville Trust Company on account of the negligence or the improper conduct of said officers and directors (exclusive of officers and directors with whom settlements may be made pursuant to compromises hereinafter referred to), and excepting also any concealed or undiscovered assets belonging to said Roseville Trust Company hereafter discovered; subject, however, to mortgages or liens existing as of the date of conveyance, and also subject to off-sets, counterclaims and defenses, if any, to the Mutual Bank of Roseville, a banking corporation organized under and pursuant to the laws of the State of New Jersey, for the consideration of Five hundred thirty-one thousand four hundred thirty-four dollars and ninety-seven cents ($531,434.97), payable at the time and in the manner set forth in a certain Contract made the tenth day of December, One thousand nine hundred and thirteen, by and between the said George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, and the said Mutual Bank of Roseville, a copy of which Contract is annexed to and a part of the Petition of the said Commissioner of Banking

Exhibit A.

and Insurance in the recital of this Order referred to, and on the further terms and conditions set forth in said Contract.

And it is further ordered that the said George M. LaMonte, Commissioner of Banking and Insurance, be and he is hereby authorized to complete and carry out the compromises and settlements by reason of any liability of said persons for loss or damage caused or produced to the said Roseville Trust Company by any act of commission or omission of said persons while acting as directors or officers of said Roseville Trust Company, with William P. Odell, William Fairlie, John S. Bell, Fred Kilgus, William J. Banister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton, in the amounts and upon the terms and conditions set forth in the said Contract between the said Commissioner of Banking and Insurance and the said Mutual Bank of Roseville, dated December tenth, One thousand nine hundred and thirteen, above referred to, and expressly subject to the provisions of said Contract that no releases in pursuance of such compromise shall acquit or relieve any such person of or from any liability for money due said Roseville Trust Company, either on notes, overdrafts, or other instruments of indebtedness or for money had or received or otherwise, or in any way relieve, acquit or absolve any of such persons of or from any responsibility or liability for any violation of any law or statute imposing criminal liability.

And it is further ordered that the said George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, be and he is hereby authorized in the name of the said Rose-

Exhibit A.

ville Trust Company to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate the sale of real and personal property above authorized and the compromise or compounding with the persons above mentioned, as above authorized.

And the Court being of opinion that the said Mutual Bank of Roseville should continue to accept and receive assignments of claims from depositors or creditors who have not heretofore executed and delivered such assignments, as contemplated by paragraph nine of said Contract between the said Commissioner of Banking and Insurance and the said Mutual Bank of Roseville, dated December tenth, One thousand nine hundred and thirteen, hereinabove referred to, until the expiration of thirty days from the date of this Order.

It is further ordered as a condition of and a term of the sale to said Mutual Bank of Roseville hereby authorized, that the said Mutual Bank of Roseville shall continue to accept and receive assignments of claims from depositors or creditors who have not heretofore executed and delivered such assignments, on the same terms and conditions as heretofore, until the expiration of thirty days from the date of this Order, and that a copy of this Order (which need not be certified) be mailed to each of such creditors within ten days from the date hereof, directed to them at their several and respective post office addresses if the same can be ascertained.

E. R. WALKER, *C.*

A true copy.

SAM K. ROBBINS, *Clerk.*

Exhibit A.

To the Depositors and Creditors of the Roseville Trust Company:

TAKE NOTICE of the provisions of the foregoing order of the Court of Chancery, made on this date.

PITNEY, HARDIN & SKINNER,
763 Broad Street, Newark, N. J.
Solicitors for George M. LaMonte,
Commissioner of Banking and Insurance,

December 30th, 1913.

AGREEMENT, made this tenth day of December, nineteen hundred and thirteen, by and between GEORGE M. LAMONTE as Commissioner of Banking and Insurance of the State of New Jersey, hereinafter called the "Commissioner," party of the first part, and MUTUAL BANK OF ROSEVILLE, a banking corporation organized under and pursuant to the laws of the State of New Jersey, hereinafter called the "Bank", party of the second part,

WITNESSETH:

WHEREAS the "Commissioner" has heretofore, on the fourteenth day of August, nineteen hundred and thirteen, taken possession of the property and business of the Roseville Trust Company, under and pursuant to the provisions of Chapter One hundred and seventy-one, of the laws of Nineteen hundred and thirteen, of the State of New Jersey, and is in possession of said property and business, and is engaged in performing the duties devolving on him under the provisions of the aforesaid Act;

Exhibit A.

AND WHEREAS the Bank has been duly organized and incorporated on behalf generally of the depositors of the said Roseville Trust Company, and said Bank is the assignee of a very large majority, both in number and amount of depositors or creditors having claims against said Roseville Trust Company, its assets and property;

AND WHEREAS the Bank desires to purchase from the Commissioner all of the property, assets and effects including the business and good will of the said Roseville Trust Company, as hereinafter set forth, and to carry on, in the quarters formerly occupied by the said Roseville Trust Company, a banking business, in order that the depositors of the said Roseville Trust Company may realize the rights and benefits accruing from such purchase of the assets in their behalf and enjoy the resumption of banking facilities;

AND WHEREAS the "Commissioner" deems it for the best interests of all persons having rights in and claims against the said assets and property of the Roseville Trust Company that a sale of said assets as a whole shall be made without delay and at a minimum of expense and at a price which, in the judgment of the Commissioner, represents the full and fair value of said assets, as hereinafter set forth:

NOW, THEREFORE, in consideration of One Dollar ($1.00) by each of the parties to the other in hand paid, and of the covenants and agreements herein contained, the parties agree as follows:

1. The Commissioner hereby agrees, subject to the approval of the Court of Chancery as hereinafter provided, to sell, convey, assign,

Exhibit A.

transfer, and set over, to the Bank, its successors and assigns, all the business, good will, real, personal and mixed property, and assets of every name and nature, moneys, bills, notes, negotiable instruments and securities for money, bonds and mortgages, book accounts and other debts and choses in action, all contracts and agreements, books of account, papers, documents, furniture, fixtures, supplies, and generally all property of every kind and nature, of the Roseville Trust Company, aforesaid, including all interest accrued or earned on any claim, or asset, to the date of the transfer as hereinafter set forth, excepting, however, any right of action upon surety bonds of former officers or employees of said Roseville Trust Company and any right to recover from officers or directors of said Trust Company on account of the negligence or improper conduct of said officers or directors, exclusive of officers and directors with whom settlement may be made contemporaneously herewith. And excepting also any concealed or undiscovered assets belonging to said Roseville Trust Company discovered after approval of this agreement by the Court of Chancery. The said transfer, assignment and conveyance shall be made to and accepted by the Bank, subject to mortgages or liens existing as of the date of said transfer and conveyance; and also subject to offsets, counterclaims and defenses, if any.

2. The Bank agrees to pay to the Commissioner as and for the purchase price of the aforesaid property, the sum of Five hundred thirty-one thousand four hundred thirty-four and 97/100 dollars which payment shall be made at

Exhibit A.

the time and in the manner hereinafter fixed, as follows: So much of the purchase price payable by the Bank as shall equal the aggregate share therein of all claims (excluding secured claims to the value of the security) assigned to the Bank, shall be paid by the execution and delivery by the Bank to the Commissioner of a full release and acquittance of the Commissioner, and of the said assets and property of the said Roseville Trust Company, which are to be sold and conveyed hereunder and of any share or participation in the purchase price thereof; provided, however, that such release and acquittance shall not prevent the future participation of the Bank in its proportionate share or participation in the causes of action and assets now excluded from the sale by paragraph 1 hereof. The balance of said purchase price shall be paid in cash to the Commissioner, or his order. It being the intent of this agreement that the amount so to be paid to the Commissioner in cash shall equal only the proportionate part of the purchase price which the amount of claims (excluding secured claims to the value of the security) not assigned to the Bank bears to the aggregate of all such claims against said Roseville Trust Company.

3. It is understood and agreed that the sale and transfer by the Commissioner to the Bank shall include any and all payments, or the proceeds thereof, and all securities or other property, paid, transferred or delivered to the Commissioner, simultaneously with the delivery of the instruments contemplated hereunder, less the proportionate part for non-assenting creditors which shall be retained by the Commissioner, by any and all of the persons who now

Exhibit A.

are or formerly were officers or directors of the Roseville Trust Company, whose names appear upon the schedule hereto annexed, or such modifications thereof as may be made with the consent of the Commissioner prior to the time fixed for the delivery of instruments hereunder. It is intended that said payments shall be made for and in consideration of the delivery, to the persons making such payments, of releases from liability of each of said persons by the Commissioner of and from any and all claim for loss or damage caused or produced by any act of commission or omission of said persons while acting as directors or officers of said Trust Company. But no such release shall acquit or relieve any such person of or from any liability to the said Trust Company, or to the Commissioner, for money due said Trust Company either on notes, overdrafts or other instruments of indebtedness, or for money had and received, or otherwise. Nor shall any such release, or any negotiations with, or offers of settlement from any such persons, nor anything herein contained, in any way relieve, acquit or absolve any of such persons of or from any responsibility or liability for any violation of any law or statute imposing criminal liability.

4. It is expressly understood and agreed that the Commissioner shall hold and retain, and shall not assign, transfer or deliver hereunder any right of action upon surety bonds or former officers or employees of said Roseville Trust Company, any right to recover from officers or directors of said Trust Company on account of the negligence or improper conduct of said officers or directors, exclusive of officers and directors

Exhibit A.

with whom settlements may be made contemporaneously herewith, and any concealed or undiscovered assets belonging to said Roseville Trust Company discovered after approval of this agreement by the Court of Chancery; and that the Commissioner will institute proper proceedings, actions or suits, against any or all of said persons, to recover for loss or damage caused to the said Roseville Trust Company its property and business, by the negligence or improper conduct of the said persons while acting as directors or officers of the said Trust Company, and to recover upon other causes of action and for other assets reserved as aforesaid, and have the same carried forward to final judgment or decree, with all convenient speed. Any sums received by the Commissioner as the result of any such suit or proceeding, or from surety bonds or from concealed or undiscovered assets belonging to the Trust Company discovered after approval of this agreement by the Court of Chancery, shall be applied as follows: After paying therefrom the costs and expenses of any such suit or proceeding or costs and expenses of recovering on said surety bonds or discovering and collecting any such concealed or undiscovered assets, there shall be paid to the Bank its share thereof, to wit: the proportion which the total amount of claims (excluding secured claims to the value of the security) or accounts against said Roseville Trust Company assigned to the Bank, shall bear to the total amount of such claims or accounts owing by said Roseville Trust Company; and the remainder shall be retained by the Commissioner for like administration with other funds under his control.

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The Bank agrees to indemnify and save harmless the said Commissioner from the costs and expenses of such proceedings, actions or suits in the event the same shall not result in the recovery of a sum sufficient to pay the costs and expenses thereof; provided, however, that the Commissioner shall entrust the conduct of said litigations to such attorney or attorneys approved by him as may be selected by the Bank. The Commissioner agrees that in the event any offer of settlement shall be made by any such person or persons, and the same shall be approved by the Commissioner, he will, at the request of the Bank, submit such offer or offers to the Court of Chancery of New Jersey for approval, and, if approved by said Court, that he will consummate such settlement without delay, and, upon receipt of the sum payable upon such settlement, distribute the same as herein provided.

5. The Commissioner agrees that he will, with all due speed, apply to the Court of Chancery of the State of New Jersey for the approval of this contract, and for authority to settle and compromise with the persons now or formerly directors or officers of the Roseville Trust Company, from whom offers of settlement shall have been received, and will take any steps and give any and all notices which may be required or necessary in order to properly bring said application before the Court of Chancery, obtain its decree, and consummate the settlement thereby authorized.

6. In the event that the Court of Chancery shall approve the said sale and the said compromise with persons now or formerly directors

Exhibit A.

or officers of said Trust Company, and shall authorize the Commissioners to perform and complete this contract in the various respects herein set forth, the Commissioner will appoint a day, as soon as may be possible subsequent to said approval by the Court, for the transfer of the assets and making of the payments herein provided, and, upon the day so fixed, or upon such other day to which the closing of such matters may be postponed, the Commissioner will, upon the receipt of the payments and releases herein provided for, deliver, assign and transfer to the Bank, its successors and assigns, by a proper instrument in writing, in each case respectively, all of the assets and property heretofore enumerated, excepting, however, any right of action upon surety bonds of former officer or employees of said Roseville Trust Company, and any right to recover from officers or directors of said Trust Company on account of the negligence or improper conduct of said officers or directors, exclusive of officers and directors with whom settlements may be made contemporaneously herewith, and excepting also any concealed or undiscovered assets belonging to said Roseville Trust Company discovered after approval of this agreement by the Court of Chancery.

7. It is understood and agreed that if there shall be one or more creditors of the Roseville Trust Company whose claims are preferred as to payment under the laws of the State of New Jersey, or are secured, that the Commissioner may, at his election, pay the said claims, or any of them, to the extent to which they are preferred or secured; and that otherwise the Bank will take the title to said property and assets

Exhibit A.

subject to the claims of said preferred or secured creditors; but in either event the purchase price to be paid for the assets and property herein referred to shall be reduced by the amount of every preferred or secured claim paid or assumed as aforesaid.

8. On transferring assets under this agreement it is understood and agreed that the Commissioner is to receive and agreed that the Commissioner is to receive and retain that part of the settlements with directors or officers contemporaneously made covering the proportion thereof of the non-assenting creditors and depositors referred to in Paragraph 3 hereof; it is also understood and agreed that the Commissioner shall retain from the assets to be transferred and credit on the purchase price the estimated amount necessary for all the costs, expenses and counsel fees of the Commissioner while acting in reference to the affairs of said Roseville Trust Company, under and pursuant to such provisions of the aforesaid act of the Legislature, less any moneys paid on account thereof from said assets prior to such conveyance.

9. And it is further understood and agreed that the Bank will continue to accept and receive assignments of claims under the terms of a circular letter issued by it, bearing date October twenty-fourth, nineteen hundred and thirteen, from depositors or creditors who have not theretofore executed and delivered such assignments, so long as, in the opinion of the Commissioner, it is advisable so to do, but no longer than five days after the Court shall have made its order or decree approving this contract; unless the Court shall otherwise direct.

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10. It is understood and agreed that the schedule of assets of Roseville Trust Company, now on file in the office of the Commissioner of Banking and Insurance, with such additions or modifications as may be made therein by the Commissioner or his duly authorized representative on or before the date of submitting this application to the Court of Chancery for approval, shall be deemed to be a true and correct list of the property to be sold hereunder. But should it appear that any items have been omitted from said Schedule in error, or that any items have been included in said Schedule in error, proper corrections shall be made by the Commissioner or his duly authorized representative, and proper adjustment in the purchase price, if necessary, shall be made therefor, by the Commissioner at any time before the said application has been acted upon by the Court of Chancery. Said schedule, which will be produced upon the hearing before the Court of Chancery, is hereby referred to as if incorporated herein in full.

11. All books, deeds, documents, muniments of title, accounts, contracts, statements and memoranda, and all records of every nature and description, of the Roseville Trust Company, in use before or after the fourteenth day of August, nineteen hundred and thirteen, shall be and remain in the custody and under the control of the Commissioner, and the Bank will provide a proper and safe place for the preservation of said books, records, etc.

Exhibit A.

12. It is understood and agreed that if at any time it shall appear that any error or errors have been made, or if any such shall be made, in ascertaining the amount due any creditor of the Roseville Trust Company, each and every such error shall be promptly corrected, and, if corrected prior to the closing hereunder, adjustment shall be made therefor in the purchase price and in the amount of the cash payment to be made by the Bank as herein provided; if corrected subsequent to the closing hereunder, then such error or errors shall be adjusted by the payment to the Commissioner, or by the Commissioner repaying to the Bank such sum or sums respectively as will adjust the purchase price, and the total cash payment to be made by the Bank hereunder, to the true and correct basis, provided, however, that no such correction shall be made for any error claimed after the said Commissioner shall cease to have in hand funds of said Roseville Trust Company available for such adjustment.

13. This agreement shall bind and inure to the benefit of the successor or successors of the party of the first part, and the successors and assigns of the party of the second part.

In witness whereof the party of the first part has hereunto set his hand and seal of office, and the party of the second part has caused these presents to be executed by its President and attested by its Cashier, and its corporate seal to

Exhibit A.

be hereto affixed, on this, the tenth day of December, nineteen hundred and thirteen.

SEAL

(signed) GEORGE M. LA MONTE,
Commissioner Banking & Insurance of the State of New Jersey.

(signed) MUTUAL BANK OF ROSEVILLE,
by ELWOOD S. MACNABB,
President.

SEAL

Attest.

FREDERICK BOWDEN,
Cashier.

SCHEDULE OF OFFERS OF SETTLEMENT AND COMPROMISE APPROVED BY THE COMMISSIONER OF BANKING AND INSURANCE.

William P. Odell,	$41,000.
William Fairlie,	30,000.
John S. Bell,	15,000.
Fred Kilgus,	15,000.
William J. Banister,	12,500.
Clinton F. McCord,	9,000.
James B. Banister,	8,000.
William W. Woodward,	5,000.
Elmer K. Sexton,	5,000.

The foregoing order is based upon an order to show cause mentioned in said order and upon the petition mentioned in said order; annexed to and made a part of said petition was a copy of a contract of the form above set forth; said

petition set forth the condition of the Roseville Trust Co. and prayed for approval of said contract and an authorization to complete and carry out the compromises and settlements therein referred to. In accordance with an order duly made by the Chancellor notice of the hearing upon the order to show cause was duly mailed to each and every one of the defendants and to all parties in interest.

EXHIBIT C 594.

(Referred to on page 999 of the printed state of the case.)

Consists of a tabulation of over 600 checks bearing date between November 31, 1912, and August 11, 1913, drawn by Intercity Land and Securities Co., on Roseville Trust Co., payable to many hundreds of different payees. These checks were honored by Roseville Trust Co., but were not charged to the makers' account. The aggregate of the amounts of these checks runs into tens of thousands of dollars and represents a large loss of funds of the Trust Co.

EXHIBIT C 595.

(Referred to on pages 999-1001 of the printed state of the case.)

Consists of tablulations of checks drawn by Wm. C. Armstrong, F. W. Holbrook, Home Ice & Products Co., Antonio Miele, Frank Bruno and Frank Bruno Co., on Roseville Trust Co., payable to many hundreds of different payees.

Exhibit C. 596.

These checks were honored by Roseville Trust Co., but were not charged to the makers' accounts. The aggregate of the amounts of these checks runs into tens of thousands of dollars, and represents a large loss of funds of the Trust Co.

The periods during which these checks were drawn is shown in the following tabulation:

Wm. C. Armstrong, June, 1912—August, 1913.

F. W. Hollbrook, February, 1911—December, 1912.

Home Ice & Products Co., September, 1912—June, 1913.

Antonio Miele, February, 1913—May, 1913.

Frank Bruno, January, 1913—April, 1913.

Frank Bruno Co., February, 1913—June, 1913.

EXHIBIT C 596.

(Referred to page 1002 of the printed state of the case.)

Consists of a tabulation of notes found either in "Box 55" or in Mr. Smith's desk, and represented moneys paid out of the Trust Company's funds by Mr. Smith; said notes were never paid, nor charged to proper accounts on the ledger of the Trust Co.

The aggregate of said notes is $175,547.33. Some of these notes run as small as $3.74, $23.00 or $36.00; others are in the sum of $1,000; one, of Miele & Bruno, runs as high as $12,861.54; another of Frank Bruno is for $11,500.00. There are six notes of the Home Ice & Products Co., each for $5,000.00. There are about 140 notes in all set forth in this tabulation.

Exhibit C. 597.

EXHIBIT C 597.

(Referred to on page 1002 of the printed state of the case.)

Consists of a tabulation of about 36 notes, found in "Box 55" and in the desk of Raymond Smith, and represented money paid by Smith out of Trust Company funds; there notes were later either renewed, or paid in whole or part. The aggregate of these notes is $25,026.02. The largest note is in the sum of $10,000.00. The smallest is in the sum of $20.00.

Exhibit C. 1461.

EXHIBIT C. 1461.

(See Page 1064)

STATEMENT SHOWING NUMBER OF DEPOSITORS AND ALLEGED TOTAL AMOUNT OF DEPOSITS AS REPORTED BY RAYMOND E. SMITH AT MEETINGS OF THE EXECUTIVE COMMITTEE AND BOARD OF DIRECTORS.

DATE	MEETING	NO. OF DEPOSITORS	AMOUNT
January 4, 1911	Executive Comm.	1955	$746,000.00
" 11, "	" "	1979	758,000.00
" 16, "	" "	2007	755,000.00
" 23, "	" "	2028	735,000.00
" 30, "	" "	2033	672,000.00
February 8, "	" "	2060	Not given
" " "	Directors	"Statement for month was carefully looked over showing a general increase in all branches."	
" 20, "	Executive Comm.	2077	700,000.00
" 28, "	" "	2095 (pencil entry)	725,000.00
March 8, "	" "	2130	730,000.00
" 13, "	" "	2143 (pencil entry)	725,000.00
" 20, "	" "	2158	710,000.00
" 27, "	" "	2160	702,000.00
April 3, "	" "	2178	754,000.00
" 12, "	" "	2213	810,000.00
" " "	Directors	"Statement showed general increase in profits, deposits, etc."	
" 17, "	Executive Comm.	2223	805,000.00
" 25, "	" "	2248	775,000.00
May 2, "	" "	2263	745,000.00
" 10, "	" "	2264	762,000.00
" 10, "	Directors	Statement looked over showing general increase in profits, deposits, etc.	
" 15, "	Executive Comm.	2281	740,000.00
" 23, "	" "	2288	675,000.00
" 31, "	" "	2295	750,000.00
June 14, "	" "	2331	755,000.00
" 14, "	Directors	No mention of deposits.	
" 20, "	Executive Comm.	2335	670,000.00
" 27, "	" "	2345	600,000.00
July 11, "	" "	2361	560,000.00
" 12, "	Directors	No mention of deposits.	
" 18, "	Executive Comm.	2372	565,000.00
" 28, "	" "	2379	560,000.00
Sept. 5, "	" "	No mention of deposits.	
" 13, "	" "	2491	750,000.00
" 13, "	Directors	No mention of deposits.	
" 19, "	Executive Comm.	2492	750,000.00
" 26, "	" "	2507	740,000.00
Oct. 3, "	" "	2526	740,000.00
" 11, "	" "	2445	
" " "	Directors	No mention.	
" 18, "	Executive Comm.	2566	565,000.00
" 22, "	" "	2568 (pencil entry)	560,000.00
" 30, "	" "	2574	552,000.00

Exhibit C. 1461.

DATE			MEETING	NO. OF DEPOSITS	AMOUNT
Nov.	8,	"	" "	2580	
"	"	"	Directors	No mention.	
"	14,	"	Executive Comm.	2593	645,000.00
"	21,	"	" "	2601	560,000.00
"	28,	"	" "	2602	
Dec.	5,	"	" "	2606 (pencil entry)	617,000.00
"	13,	"	" "	2617	663,000.00
"	13,	"	Directors	No mention.	
"	19,	"	Executive Comm.	2580	670,000.00
"	26,	"	" "	2549	601,000.00
January	2,	1912	Executive Comm.	2563	$658,000.00
January	9,	1912	Stockholders' annual	President's report showed increase in profits, number of depositors, etc.	
"	9,	"	Directors	Committee appointed to increase deposits.	
"	9,	"	Executive Comm.	2575	625,000.00
"	16,	"	" "	2598	610 000.00
"	23,	"	" "	2609	632,000.00
"	31,	"	" "	2614	615,000.00
February	6,	"	" "	2533	615,000.00
"	14,	"	" "	2650	620,000.00
"	"	"	Directors	Committee on deposits authorized to perfect their plan to increase same.	
"	20,	"	Executive Comm.	2667	642,000.00
"	27,	"	" "	2676	650,000.00
March	4,	"	" "	2676	650,000.00
"	13,	"	" "	2699	645,000.00
"	13,	"	Directors	No mention.	
"	19,	"	Executive Comm.	2714 (in pencil)	650,000 00
"	26,	"	" "	2733	604,000.00
April	10,	"	" "	2778	
"	10,	"	Directors	No mention.	
"	16,	"	Executive Comm.	2800	660,000.00
"	23,	"	" "	2817	630 000.00
"	30,	"	" "	2819	682,000.00
May	8,	"	" "	2851	690,000.00
"	8,	"	Directors	Statement for month carefully gone over showing increase in number of accounts and profits.	
May	14,	"	Executive Comm.	2858	695,000.00
"	21,	"	" "	2874	706.000.00
"	28,	"	" "	2886	696 000.00
June	4,	"	" "	2903	701,000.00
"	12,	"	" "	2918	772,000.00
"	"	"	Directors	Statement looked over showing general increase in profits, deposits, etc.	
June	18,	"	Executive Comm.	2924	705,000 00
"	25,	"	" "	2939	735,000.00
July	2,	"	" "	2921	720,000 00
"	16,	"	" "	2940	705,000.00
Aug.	9,	"	" "	3009	715 000.00
"	22,	"	" "	3026	727,000.00

Exhibit C. 1461.

DATE		MEETING	NO. OF DEPOSITS	AMOUNT
Sept.	5, "	" "	3029	730,000.00
"	11, "	" "	3045	730,000.00
"	11, "	Directors	General synopsis for first six months reviewed, showing healthy growth in number of accounts and profits.	
Sept.	17, "	Executive Comm.	3048	720,000.00
"	25, "	" "	3070	735,000.00
Oct.	1, "	" "	3088	725,000.00
"	9, "	" "	3095	757,000.00
"	" "	Directors	Statement looked over showing healthy growth in all departments.	
"	22, "	Executive Comm.	3108	790,000.00
"	29, "	" "	3133	771,000.00
Nov.	6, "	" "	3149	790,000.00
"	13, "	" "	3163	804,000.00
"	13, "	Directors	Statement carefully looked over showing increase in profits and deposits.	
"	19, "	Executive Comm.	3179	840,000.00
Dec.	3, "	" "	3203	755,000.00
"	11, "	" "	3218	785,000.00
"	11, "	Directors	Statement showing increase in profits, deposits, etc., read.	
"	17, "	Executive Comm.	3201	760,000.00
"	30, "	" "	Not mentioned.	
January	7, 1913	Executive Comm.	3208	$725,000.00
"	14, "	Stockholders' annual	Report read by president showing profits.	
"	"	Directors	No mention.	
"	20, "	Executive Comm.	3151	760,000.00
"	28, "	" "	3162	720,000.00
February	4, "	Executive "	3179	780,000.00
"	11, "	" "	3192	765,000.00
"	11, "	Directors	No mention.	
"	19, "	Executive Comm.	3212	763,000.00
"	25, "	" "	3227	765,000.00
March	4, "	" "	3240	780,000.00
"	12, "	Directors	No mention.	
"	18, "	Executive Comm.	3262	760,000.00
"	25, "	" "	3270	675,000.00
April	2, "	" "	3281	650,000.00
"	8, "	" "	3296	670,000.00
"	8, "	Directors	Statement gone over showing increase, number of accounts, etc.	
"	15, "	Executive Comm.	3315	680,000.00
"	22, "	" "	3326	670,000.00
"	29, "	" "	3333	680,000.00
May	6, "	" "	3339	680,000.00
"	13, "	" "	3349	695,000.00
"	13, "	Directors	Statement carefully looked over showing general increase in profits and number of depositors.	
May	20, 1913	Executive Comm.	3359	704,000.00
"	27, "	" "	3373	685,000.00

Exhibit C. 1461.

June	3,	"	"	3384	685,000.00
"	10,	"	"	3400	710,000.00
"	"	"	Directors	Statement was carefully looked over.	
"	17,	"	Executive Comm.	3400	708,000.00
"	24,	"	"	3427	653,000.00
July	3,	"	"	No mention.	
"	8,	"	"	3450	690,000.00
"	8,	"	Directors	Statement carefully looked over.	
"	16,	"	Executive Comm.	3458	675,000.00
"	23,	"	"	3470	675,000.00
"	30,	"	"	3479	640,000.00

Exhibits D. 2 to D. 5.

DEFENDANT'S EXHIBITS D 2 to D 5.

(See page 1415 of the printed state of the case.)

The releases given by the Commissioner of Banking and Insurance to the Directors with whom compromises were made are all of the form of the release described in the order amending the answer of the defendant Lurich, which order is printed in full in this state of the case.

The releases are all of the following form:

"To All to Whom These Presents Shall Come or May Concern.

Greeting:

Know Ye that I, George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, for and in consideration of the sum of Six Thousand Seven Hundred and Seventy Dollars and Fourteen cents ($6,770.14), lawful money of the United States to me in hand paid by Fred Kilgus, of the City of Newark, County of Essex and State of New Jersey, and the release, concellation and satisfaction of a claim amounting to Eight thousand two hundred twenty-nine dollars and eighty-six cents ($8,229.86) against the Roseville Trust Company, have remised, released and forever discharged, and by these presents do for myself and my successors in office remise, release and forever discharge the said Fred Kilgus, his heirs, executors and administrators of and from all manner of action and actions, cause and causes of action, suits, sums of money, damages, claims or demands arising from the civil liability of the said Fred Kilgus for loss or damage caused or

produced by any act of commission or omission while acting as an officer or director of the Roseville Trust Company; it being expressly understood and agreed, however, that the said Fred Kilgus by this payment and by the release, cancellation and satisfaction of said claim shall not be released or acquitted of or from any liability to the said Roseville Trust Company or to the Commissioner of Banking and Insurance of the State of New Jersey for money due said Trust Company either on notes, overdrafts or other instruments of indebtedness, or for money had or received, or obtained by collusion with any officer or employee of said Trust Company; nor shall this release in any way relieve, acquit, or absolve the said Fred Kilgus of or from any responsibility or liability for any violation of any law or statute imposing criminal liability.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 9th day of February, One Thousand nine hundred and fourteen.

GEO. M. LA MONTE (L. S.)
Comm. Banking & Inc. of State of N. J."

Signed, sealed and delivered
in the presence of:

WM. L. MORGAN.

Exhibit D. 6.

EXHIBIT D. 6.

(See page 1453 of state of the case.)

IN CHANCERY OF NEW JERSEY.

Between GEORGE M. LA MONTE, as Commissioner, etc., suing in the name of and in behalf of Roseville Trust Company, *Complainant,* *and* HARVEY MOTT, *et al.*, *Defendants.*	*On Bill.* *Stipulation.*

The complainant, through its solicitor, at the request of Charles C. Lurich, defendant, hereby concedes the following to be facts, but does not admit that such facts are relevant or material in this cause:

1. That the copies of the proofs of claim against Roseville Trust Company executed by said defendant, and shown to him during the course of his examination (which copies were furnished to said defendants solicitor by complainants solicitor) shall be substituted as exhibits in this cause instead of the original proofs of claim, subject to the right of either party to require the production of the originals.

2. That prior to the order confirming sale and approving certain compromises, made by the Chancellor of the State of New Jersey on December 30th, 1913, (in the matter of Roseville Trust Company in charge of the Commissioner

Exhibit D. 6.

of Banking and Insurance of the State of New Jersey, under the provisions of Chapter 171, Laws of 1913) the claims described in said proofs of claim were assigned by said Lurich to Mutual Bank of Roseville, the form of said assignments being the same as the form of assignment hereto annexed and made a part hereof.

3. That prior thereto the said Commissioner had given due notice to said defendant to present this claim to the said Commissioner at or before a time therein stated, (in accordance with the provisions of Chapter 171 of the Laws of 1913 of the State of New Jersey); and to make legal proof at a place therein specified and within such time so stated (in accordance with such statute); that said Commissioner also caused due notice to the same effect to be given by advertisement (in accordance with such statute).

4. That the said defendant made such proofs of claim at the place and within the time mentioned in such notice and the same were by said defendant duly filed with said Commissioner, namely, on or about the dates on which such proofs were verified.

5. That no notice of rejection of such claims or any of them was given to the defendant.

6. That hereto annexed and made a part hereof is a letter sent by said Commissioner of Banking and Insurance, on or about July 8, 1915, to said defendant.

7. That hereto annexed and made a part hereof is a copy of a letter written on behalf of said defendant to said Commissioner on July 1st, 1915.

ROGER HINDS,
Solicitor of Complainant.

Exhibit D. 6.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, a depositor of Roseville Trust Company, which Trust Company is now in the possession of the Commissioner of Banking and Insurance of the State of New Jersey, Pursuant to the provisions of Chapter 171 of the Laws of 1913, of the State of New Jersey, for value received have sold, assigned, transferred and set over, and by all these presents do sell, assign, transfer and set over, unto Mutual Bank of Roseville, a corporation organized under the Banking laws of the State of New Jersey, its successors and assigns, to its own proper use and benefit, any and all sums of money now due or to grow due to the undersigned from the said Roseville Trust Company or from the Commissioner of Banking and Insurance of the State of New Jersey in possession of the assets and property of said Roseville Trust Company, or out of or from the assets and property of the said Roseville Trust Company.

And I do hereby give the said Mutual Bank of Roseville, its successors and assigns, full power and authority, for its own use and benefit, but at its own cost, to ask, demand, collect, receive, compound and give acquittance for the same or any part thereof, and in my name or otherwise, to prosecute and withdraw any suits or proceedings at law or in equity therefor.

PROVIDED, however, that this assignment shall not be or become effective until such time as the Commissioner of Banking and Insurance of the State of New Jersey shall authorize the said Mutual Bank of Roseville to commence business upon or after the acquisition by the said Mutual Bank of Roseville of the assets and property of the said Roseville Trust Company.

Exhibit D. 6.

In witness whereof, I have hereunto set my hand and seal, this.....day of October, nineteen hundred and thirteen.

.....(L. S.)

In the presence of

Witness;

State of New Jersey.

Department of Banking and Insurance.
Trenton.

July 8, 1915.

Charles C. Lurich, Esq.,
4 North 9th St.
Newark, N. J.

Dear Sir:

You are hereby notified that the losses suffered by the Roseville Trust Company due to the neglect and improper conduct of its directors, of which you were one, amount, after deducting therefrom the total payments heretofore made by certain of said directors for the purpose of being released from liability thereunder, to the sum of at least $500,000. You and each of said directors of the Roseville Trust Company are individually and severally liable for the amount of said losses, and demand is hereby made upon you for the prompt payment of the same to me as Commissioner of Banking and Insurance of the State of New Jersey in charge of the affairs

Exhibit D. 6.

of the Roseville Trust Company pursuant to statute.

Very truly yours,

GEO. LA MONTE,
Commissioner of Banking and Insurance of the State of New Jersey, in charge of Roseville Trust Company in Liquidation.

Monday,
July 12th
1915

Mr. George M. La Monte,
Commissioner of Banking &
Insurance of the State of
New Jersey, in charge of Roseville Trust Co.
in liquidation,
Trenton, N. J.

Dear Sir:—

Your communication under date of the 8th instant addressed to Mr. Charles C. Lurich. Maplewood, N. J., has been handed to me by my client and has had my careful scrutiny. You say in that letter that my client and each of the directors of the Roseville Trust Company are individually and severally liable for the amount of the loss of $500,000, which you say the Roseville Trust Company suffered. Without prejudice to the rights of my client in any particular, and especially without prejudice to the right of my client arising from delay, might I ask you upon what basis you predicate the alleged liability of my client; I have gone over the situation with him and I can find in

Exhibit D. 6.

his conduct as a director of the Roseville Trust Company not the slightest indication of any act omitted or committed by him in his just mentioned capacity which would justify even the allegation of liability for any part of the above mentioned losses; if you are informed that my client has been guilty of any omission or any active neglect or wrong which has resulted in loss to the company, despite the lateness of the day, without waiver of any right with respect thereto, will you not kindly point out to me the acts or failures to act with respect to which you are informed and the losses which accrued by reason thereof; I will then be glad to take up the matter again with my client.

Yours very truly,

(signed) OTTO A. STIEFEL.

PROOF OF CLAIM (part of Exhibit D. 6).

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Personally appeared before me the undersigned, a Notary Public in and for the County and State aforesaid, C. C. Lurich, who being duly sworn says that Roseville Trust Company of Newark, N. J., is justly indebted to him in the sum of One hundred and fifty-one dollars and ninety-three cents, to wit,

Balance due on open account subject to check, 151.93

All of which is due and payable to him alone he having given no endorsements or assignments of the same or any part thereof; and he further

Exhibit D. 6.

says that he knows of no set off or other legal or equitable defense to said claim or any part thereof; that deponent is the claimant and that the facts stated in this affidavit are within the actual knowledge of the deponent and that he is duly authorized to make this proof.

Name—CHARLES C. LURICH.
Residence—197 North Maple Ave.,
East Orange, New Jersey.

Sworn and subscribed
before me this day
of 1913 A. D.

Witness my hand without seal

GASTON G. L. LA VALLE,
Notary Public, State
of New Jersey.

Exhibit D. 6.

Proof of claim (Part of Exhibit D. 6).

STATE OF NEW JERSEY }
COUNTY OF ESSEX } *ss*

Personally appeared before me the undersigned, a Notary Public in and for the county and state aforesaid, C. C. Lurich who being duly sworn says that Roseville Trust Company of Newark, N. J., is justly indebted to C. C. Lurich & Co., a partnership in the sum of Nineteen hundred seventy-eight Dollars and fifteen cents, upon the following claim to wit:

Balance due on open account subject to check $1,978.15.

All of which is due and payable to them alone they having given no indorsements or assignments of the same or any part thereof; and they further say that they know of no set-off or other legal or equitable defense to said claim, or any part thereof; that deponent is one of the partners of said firm claimant and that facts stated in this affidavit are within the actual knowledge of the deponent and that he is duly authorized to make this proof.

Name Charles C. Lurich
Residence 197 North Maple Ave.,
East Orange, New Jersey.

Sworn to and subscribed before me this
day of Nov. 18, 1913 A. D.
Witness my hand without Seal.

GASTON G. L. VALLE
Notary Public
State Of New Jersey.

Exhibit D. 6.

Proof Of Claim (Part of Exhibit D. 6).

STATE OF NEW JERSEY }
COUNTY OF ESSEX } *ss*

Personally appeared before me, the undersigned, a Notary Public in and for the county and state aforesaid, C. C. Lurich & Geo. R. Ford who being duly sworn says that Roseville Trust Company of Newark, N. J., is justly indebted to Geo. Reynolds and to them as trustees in the sum of Two Hundred forty-five Dollars and no cents, upon the following claim to wit:
Balance due on open account subject to check
$245.00
All of which is due and payable to them as trustees alone having given no indorsement or assignments of the same or any part thereof and they further says that they know of no set-off or other legal or equitable defense to said claim, or any part thereof; that deponent are the trustees of said claimant and that the facts stated in this affidavit are within the actual knowledge of the deponent and that he is duly authorized to make this proof.

Name GEO. R. FORD
C. C. LURICH
Residence 4 No. 9 St., Newark, N. J.

Sworn to and subscribed before me this
day of Dec. 1, 1913. A. D.,

Witness my hand and without seal

GASTON G. L. VALLE
Notary Public,
State of New Jersey

Interrogatories.

Interrogatories to be exhibited to Harvey Mott, Emile C. Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim, George E. Krug, Charles C. Lurich, G. Rowland Munroe, John B. Scarlett, Raymond E. Smith and Edward D. Dunn, in a certain cause depending in the Court of Chancery of New Jersey wherein Roseville Trust Company is complainant, and said Harvey Mott, Emile C. Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim, George E. Krug, Charles C. Lurich, G. Rowland Munroe, John B. Scarlett, Raymond E. Smith and Edward D. Dunn are defendants, on the part and behalf of said complainant, pursuant to Rule 84 of the Court of Chancery:

1. Did you know, while you were a director of the Roseville Trust Company, that the treasurer Raymond E. Smith was engaged in the automobile business under the trade name of "Oakland Motor Sales Company"?

2. If your answer to the 1st interrogatory is "yes" state when you first learned of the fact.

3. Did you know, while you were a director of the Roseville Trust Company, that Raymond E. Smith was a large stockholder and a director and a managing officer of the Home Ice and Products Company, or substantially interested therein?

4. If your answer to the 3rd interrogatory shows that while you were a director of the Roseville Trust Company you knew that Raymond E. Smith was a large stockholder and a director and a managing officer of the Home Ice and Products Company, or substantially inter-

ested therein, when did you first learn of his connection therewith?

5. Did you know, while you were a director of the Roseville Trust Company, that Raymond E. Smith was a large stockholder and a director and a managing officer of the Dunnellen Coal and Supply Company, or that he was substantially interested in said company?

6. If your answer to the 5th interrogatory shows that while you were a director of the Roseville Trust Company you know that Raymond E. Smith was a large stockholder and a director and a managing officer of the Dunnellen Coal and Supply Company, or substantially interested therein, when did you first learn of his connection therewith?

7. Did you know, while you were a director of the Roseville Trust Company, that Raymond E. Smith was a large stockholder and a director and a managing officer of the Intercity Land and Securities Company, or that he was substantially interested in said Company?

8. If your answer to the 7th interrogatory shows that while you were a director of the Roseville Trust Company you knew that Raymond E. Smith was a large stockholder and a director and a managing officer of the Intercity Land and Securities Company, or that he was substantially interested in said Company, when did you first learn of his connection therewith?

9. While you were a director of the Roseville Trust Company did you personally (other than in your capacity as such director) have any business dealings with Raymond E. Smith, or with any firm or corporation (other than the

Roseville Trust Company) with which said Smith was connected or associated?

10. If your answer to the 9th interrogatory is "yes" state when you had such dealings and what they consisted of.

11. While you were a director of the Roseville Trust Company did you, or any member of your family, or any firm or corporation with which you were then connected or associated borrow any money from the Roseville Trust Company, or sell any commercial paper or other property to the Roseville Trust Company?

12. If your answer to the 11th interrogatory is "yes" state in detail to the best of your recollection the date of each such transaction, the names of the parties thereto, the amounts of money involved, the nature of the transaction and (if a note was involved) the period during which said note remained unpaid.

13. While you were a director of the Roseville Trust Company did you endorse any notes for the benefit of Raymond E. Smith personally?

14. If your answer to the 13th interrogatory is "yes" state when you endorsed such notes, the amount thereof, where the same were discounted or sold, and how long a period elapsed before the indebtedness was entirely paid.

15. If your answer to the 13th interrogatory is "yes" state whether Raymond E. Smith stated to you the purpose for which he intended to use the funds realized from said note or notes.

16. If your answer to the 13th interrogatory is "yes" state what Raymond E. Smith stated to you in that connection.

Interrogatories.

17. If your answer to the 13th interrogatory is "yes" state whether you informed the Roseville Trust Company of that fact, and, if so, when and through what person or persons representing the Roseville Trust Company.

18. If your answer to the 11th interrogatory shows that you at any time borrowed from the Roseville Trust Company or sold it any notes, bills or other commercial paper, state whether before doing so you made an application or proposition therefor as required by section 15 of the Trust Companies Act, and, if so, when; and whether said proposition was accepted and said loan (or purchase) was approved by a vote of a majority of those present at a meeting of the board of directors of the Roseville Trust Company, and, if so, when; and state when the proceeds thereof or any part thereof first became available to you by check or otherwise; and state whether the proceeds thereof or any part thereof were received by you or became available to you before said loan was (in each instance) approved by a vote of a majority present at a meeting of the board of directors of the Roseville Trust Company.

19. While you were a director of the Roseville Trust Company were you a stockholder of the International Tobacco Company? If so, what percentage of its stock did you own?

20. While you were a director of the Roseville Trust Company were you a director of the International Tobacco Company?

21. While you were a director of the Roseville Trust Company were you an officer of the International Tobacco Company, and, if so, what office did you hold?

Interrogatories.

22. Did the Roseville Trust Company loan money to, or purchase the bills or other commercial paper of, the International Tobacco Company, or on which it was obligated?

23. If your answer to the 22nd interrogatory is "yes" state when this first occurred, and state as nearly as you can what was the maximum amount of any such paper at any one time, and when.

24. Did you have any active part either in behalf of the International Tobacco Company or in behalf of the Roseville Trust Company in extending said credit, and if so, what?

25. Did the International Tobacco Company become financially embarrassed and unable to meet its obligations?

26. If your answer to the 25th interrogatory is "yes" state when you first knew that the or officer of any other banking institution? International Tobacco Company was financially embarrassed, and when it first became unable to meet its obligations as they became due.

27. If your answer to the 25th interrogatory is "yes" state whether you communicated that fact to the Roseville Trust Company, and, if so, when, and to what person or persons connected with the Roseville Trust Company.

28. Did you take any measures to protect the Roseville Trust Company against loss upon notes or other commercial paper of the International Tobacco Company?

29. If your answer to the 28th interrogatory is "yes" state in detail what measures you took, and when.

30. Were you, while a director of the Roseville Trust Company, or prior thereto, a director or officer of any other banking institution?

Interrogatories.

31. If your answer to the 30th interrogatory is "yes" state what banking institution, and the period of your connection therewith.

32. If your answer to the 30th interrogatory is "yes" state whether Raymond E. Smith borrowed from said banking institution or was obligated upon any commercial paper purchased or acquired by said banking institution.

33. If your answer to the 32nd interrogatory is "yes" state when it first occurred, the amount of said loan or obligation, and the period elapsing before the same was entirely paid.

34. If your answer to the 32nd interrogatory is "yes" state whether Raymond E. Smith stated to you (or to your knowledge to any other person) for what purpose he intended to use the proceeds of said commercial paper.

35. If your answer to the 34th interrogatory is "yes" state what Raymond E. Smith stated in that connection.

36. If your answer to the 32nd interrogatory is "yes" state whether you informed the Roseville Trust Company of that fact, and, if so, when and through what person or persons representing the Roseville Trust Company.

37. If your answer to the 30th interrogatory is "yes" state whether or not you were in a general way familiar with the banking practice and operating methods of said banking institution.

38. If your answer to the 37th interrogatory is "yes" state whether the practice and method of that other banking institution (during your connection therewith) differed from the practice and method of the Roseville Trust Company in

respect to supervision and independent check upon the transactions of the treasurer or cashier.

39. If your answer to the 38th interrogatory is "yes" state in what features the difference lay.

40. If your answer to the 38th interrogatory is "yes" state whether, while a director of the Roseville Trust Company, you took any steps to bring about the introduction into the Roseville Trust Company of a practice and methods respecting supervision and independent check upon the transactions of the treasurer such as to insure that its assets and interests were protected and safeguarded to an extent equal to that prevailing in the other banking institution with which you were connected.

41. If your answer to the 40th interrogatory is "yes" state in detail what steps you took in that regard.

42. Did you, at any time while you were a director of the Roseville Trust Company, know that the director John B. Scarlett was financially embarrassed and unable to meet his obligations when due?

43. If your answer to the 42nd interrogatory is "yes" state when you first learned that.

44. While you were a director of the Roseville Trust Company did you, at any time, know that the director John B. Scarlett and the treasurer Raymond E. Smith had personal business dealings together?

45. If your answer to the 44th interrogatory is "yes" state whether, in connection with said business dealings, you represented either said

Smith or said Scarlett in your professional capacity as counselor at law, and, if so, which party.

46. If your answer to the 44th interrogatory is "yes" state respecting each transaction between said Smith and said Scarlett the nature, dates and important features thereof.

47. While you were a director of the Roseville Trust Company did said Scarlett to your knowledge execute and deliver a mortgage or deed in trust upon certain Newark real estate in which said Smith appeared as the mortgagee or grantee?

48. If your answer to the 47th interrogatory is "yes" state when and how you acquired your information with respect to that transaction, and what part, if any, you took in the same.

49. If your answer to the 47th interrogatory is "yes" state to the best of your recollection the date and amount of said mortgage or deed in trust, and the purpose for which the same was given.

50. If your answer to the 47th interrogatory is "yes" state whether your brought to the attention of the board of directors of the Roseville Trust Company the fact that said mortgage or deed in trust was executed in favor of Raymond E. Smith individually as mortgagee or grantee.

51. If your answer to the 47th interrogatory is "yes" state whether you took any measures thereafter for the purpose of safeguarding the Roseville Trust Company against loss from possible dishonesty and irregularities of the said Raymond E. Smith, and, if so, what measures, and when.

Interrogatories.

52. While you were a director of the Roseville Trust Company were you a stockholder of the Home Ice and Products Company? If so, what percentage of its stock did you own?

53. While you were a director of the Roseville Trust Company were you a director of the Home Ice and Products Company?

54. While you were a director of the Roseville Trust Company were you an officer of the Home Ice and Products Company, and, if so, what office did you hold?

55. Did the Roseville Trust Company loan money to or purchase the bills or other commercial paper of, the Home Ice and Products Company, or on which it was obligated?

56. If your answer to the 55th interrogatory is "yes" state when this first occurred, and state as nearly as you can what was the maximum amount of any such paper at any one time, and when.

57. Did you have any active part either in behalf of the Home Ice and Products Company or in behalf of the Roseville Trust Company in extending said credit, and, if so, what?

58. Did the Home Ice and Products Company become financially embarrassed and unable to meet its obligations?

59. If your answer to the 58th interrogatory is "yes" state when you first knew that the Home Ice and Products Company was financially embarrassed, and when it first became unable to meet its obligations as they became due.

60. If your answer to the 58th interrogatory is "yes" state when you communicated that fact to the Roseville Trust Company, and, if so,

when, and to what person or persons connected with the Roseville Trust Company?

61. Did you take any measures to protect the Roseville Trust Company against loss upon notes or other commercial paper of the Home Ice and Products Company?

62. If your answer to the 61st interrogatory is "yes" state in detail what measures you took, and when.

63. While you were a director of the Roseville Trust Company were you at any time associated with or connected in any capacity with the Postcraft Company, or corporation or firm of similar name?

64. If your answer to the 63rd interrogatory is "yes" state during what period you were connected or associated with such company, and in what capacity.

65. Was money borrowed from the Roseville Trust Company, or did the Roseville Trust Company purchase or acquire any notes or commercial paper the proceeds of which in whole or in part were used by said company (or firm above referred to as "Postcraft Company")?

66. If your answer to the 65th interrogatory is "yes" state to the best of your recollection the date and character of said transaction, all the parties thereto and the amount involved therein.

67. If your answer to the 65th interrogatory is "yes" state whether you personally took any part in the transaction, and, if so, what part.

68. If your answer to the 65th interrogatory is "yes" state whether or not said company was of such financial condition as to justify an ex-

tension of credit to the amount involved in said transaction without individual guarantors or endorsements.

69. If your answer to the 68th interrogatory is "yes" state the sources of your information and the facts upon which you base your answer.

70. State whether the Roseville Trust Company loaned any money or acquired any commercial paper in reliance upon the endorsement of one Jane A. Curtis.

71. If your answer to the 70th interrogatory is "yes" state whether or not this was the same transaction or one of the same transactions referred to in your answers to the 65th and 66th interrogatories.

72. If your answer to the 71st interrogatory is "no" and your answer to the 70th interrogatory is "yes" state to the best of your recollection the date and character of said transaction (to which Jane A. Curtis was a party), all the parties involved therein and the amount involved therein.

73. If your answer to the 70th interrogatory is "yes" state whether or not said Jane A. Curtis was at the time a married woman.

74. If your answer to the 73rd interrogatory is "yes" state whether or not said Jane A Curtis herself received the funds obtained from the Roseville Trust Company in that transaction.

75. If your answer to the 73rd interrogatory is "yes" state whether or not you knew at the time of said transaction that said Jane A. Curtis was a married woman.

76. Did you at any time deliver or cause to be delivered to the Roseville Trust Company,

for which value was given by said Trust Company, a note or bill purchased made by Jane A. Curtis to her own order, which did not bear her endorsement?

77. If your answer to the 75th interrogatory is "yes" state whether you communicated to the Roseville Trust Company at the time of said transaction the fact that said Jane A. Curtis was a married woman.

78. If your answer to the 77th interrogatory is "yes" state to what persons connected with the Roseville Trust Company you communicated such information.

79. If your answer to the 74th interrogatory shows that Jane A. Curtis did not receive any of the funds obtained from the Roseville Trust Company, state whether or not at the time of said transaction you knew that said Jane A. Curtis did not receive any of said funds.

80. If your answer to the 79th interrogatory shows that you knew said Jane A. Curtis did not receive any of said funds obtained from the Roseville Trust Company, state whether or not you at the time of said transaction communicated to said Roseville Trust Company the fact that said Jane A. Curtis did not receive the funds obtained from Roseville Trust Company in connection with that transaction.

81. What was your occupation while you were a director of the Roseville Trust Company?

82. Was your occupation and previous experience such as to give you special ability and facility in the valuation of lands and buildings in Newark and vicinity?

Interrogatories.

83. Did the director John B. Scarlett ever submit to the board of directors of the Roseville Trust Company for the purpose of obtaining credit there, a statement of his financial condition?

84. If your answer to the 83rd interrogatory is "yes" state whether you personally saw said statement, and when you first saw any such statement.

85. If your answer to the 83rd interrogatory is "yes" state whether said Scarlett's assets as shown upon said statement included any real estate, or stock of corporations holding real estate.

86. If your answer to the 85th interrogatory is "yes" state whether you made any inquiry or examination with a view to testing the correctness of the valuation by said Scarlett in such statement of his real estate or the real estate of corporations whose stock is owned.

87. If your answer to the 86th interrogatory is "yes" state what inquiry or examination you made and whether or not you found that said valuations of the said Scarlett were justified by the actual facts.

88. Did the Roseville Trust Company or its board of directors at any time obtain from William C. Armstrong a written statement of his financial condition.

89. If your answer to the 88th interrogatory is "yes" state when such statement was obtained.

90. If your answer to the 88th interrogatory is "yes" state whether you saw said statement, and when you first saw same.

Interrogatories.

91. If your answer to the 88th interrogatory is "yes" state whether any of the assets described in said statement consisted of real estate.

92. Did you at any time make any inquries or examination respecting the character or value of real estate or interests in real estate owned or claimed to be owned by William C. Armstrong?

93. If your answer to the 92nd interrogatory is "yes" state what inquiry or examination you made, and when.

94. If your answers to both the 91st and 92nd interrogatories are "yes" state whether you found the valuations by said Armstrong in his financial statement were justified by the actual facts.

95. Did the Roseville Trust Company or its board of directors obtain from any of the following borrowers a written statement of the borrower's financial condition: Intercity Land and Securities Company, C. A. Morel, D. C. Newell, Edward D. Birkholz, Casper J. Maier, Fisk's Real Estate Exchange, F. N. Fisk?

96. If your answer to the 95th interrogatory shows that a financial statement was obtained from any of the said borrowers, state from which of said borrowers such statements were obtained, and when (to the best of your recollection).

97. If your answer to the 95th interrogatory shows that financial statements were obtained from any of said borrowers, state whether you saw any of said statements, and, if so, when, in each instance, you first saw same.

Interrogatories.

98. If your answer to the 97th interrogatory shows that you saw statements of any of said borrowers, state, respecting each such statement that you saw, whether there were included among the assets of each such borrower as shown in such statement any lands or buildings or any interest in real estate.

99. If your answer to the 98th interrogatory shows, in the instance of a financial statement obtained from any of said borrowers, that lands, buildings or interests in real estate were included among the assets, state which of such borrowers included same in their statements.

100. Did you make any inquiry or examination respecting the character or value of lands, buildings or interests in real estate owned or claimed to be owned by any of the said last mentioned borrowers?

101. If your answer to the 100th interrogatory is "yes" state in respect to which of said borrowers you made any inquiry or examination as to the value of their lands, buildings or interests in real estate, and when, in each instance, you made such inquiry or examination.

102. If your answer to the 101st interrogatory shows that you made any such inquiry or examination, state what inquiry or examination you made in each such instance.

103. Did you in the instance of any of the borrowers above mentioned find that the valuation of lands, buildings or interests in real estate were justified by the actual facts, and, if so, in what instances?

104. Did you at any time introduce to the Roseville Trust Company any borrower (or any

party to commercial paper purchased or acquired by said Roseville Trust Company) the amount of whose obligations on notes or other commercial paper acquired by said Roseville Trust Company at any time exceeded $2000?

105. If your answer to the 104th interrogatory is "yes" give the name of each such borrower (or party to commercial paper) and the date or approximate date in each instance when you introduced said party to the Roseville Trust Company.

106. If your answer to the 104th interrogatory is "yes" state what measures, if any, you employed to investigate the financial standing of each said party with a view to safeguarding the Roseville Trust Company against possible loss.

107. If your answer to the 104th interrogatory is "yes" state whether the Roseville Trust Company subsequently suffered a loss through any such borrower or party (introduced by you) being unable to meet his (her or its) obligations.

108. If your answer to the 107th interrogatory is "yes" state in each such instance when you first learned that such borrower or party was unable to meet his (her or its) obligations as they became due.

109. If your answer to the 107th interrogatory is "yes" state in each such instance whether you communicated to the Roseville Trust Company the information that such borrower or party was unable to meet his (her or its) obligations when due.

Interrogatories.

110. If your answer to the 109th interrogatory is "yes" (in any of such instances), state when, in each such instance, you first communicated such information to the Roseville Trust Company.

111. Was an examination of the books, records and affairs of the Roseville Trust Company made by the examining committee on or about the 16th day of December, 1912, as of the 14th day of December, 1912?

112. If you cannot at present recall whether or not an examination was made on or about the 16th day of December, 1912, or whether such examination was made as of the 14th day of December, 1912, give the day, week or month, and year, of *each* examination of the books, records and affairs of the Roseville Trust Company made by the examining committee while you were acting as a member of said committee?

113. On the occasion of the examination as of the 14th day of December, 1912 what steps or measures were taken by the examining committee in the course of the examination?

114. In the course of said examination what did you do personally, and what books and records did you personally examine?

115. In the course of said examination did the examination committee examine the daily trial balance of the Roseville Trust Company as of the date on which the examination was made?

116. Did you do so personally?

117. In the course of said examination, did the examining committee examine the daily trial balance of the Roseville Trust Company as of the business day next preceding or the business

day next succeeding the day on which the examination was made?

118. In the course of said examination did you personally examine the daily trial balance, and, if so, as of what dates (with respect to the date as of which the examination was made)?

119. In the course of said examination did the examining committee or any member thereof add up the several items therein (in the daily trial balance), and compare the correct totals with the total therein recorded?

120. Did you personally do so?

121. In the course of said examination did the examining committee or any member thereof compare any of the several items of the daily trial balance with the corresponding items as shown in the several books from which the said daily trial balance items were taken or purported to be taken?

122. Did you personally do so?

123. In the course of said examination did the examining committee or any member thereof compare the entries in the daily trial balance for the date as of which said examination was made with the corresponding entries in the daily trial balance for the previous day, or with corresponding entries in the daily trial balance for the next succeeding day?

124. Did you personally do so?

125. If you cannot identify in your memory the examination as of the 14th day of December, 1912, answer the last twelve interrogatories (from the 113th to the 124th inclusive) as if they had been asked with respect to *each* of the examinations by the examining committee while you were acting on such committee.

Interrogatories.

126. How many examinations were made by the examining committee while you were acting as a member thereof?

127. Was an examination of the books, records and affairs of the Roseville Trust Company made by the examining committee on or about the 22nd day of May, 1913 as of the 21st day of May, 1913, or thereabouts?

128. If you cannot at present recall whether or not an examination was made on or about the 22nd day of May, 1913, or whether such examination was made as of the 21st day of May, 1913, give the day, week or month, and year of *each* examination of the books, records and affairs of the Roseville Trust Company made by the examining committee while you were acting as a member of said committee?

129. On the occasion of the examination as of a day in the month of May, 1913, what steps or measures were taken by the examining committee in the course of the examination?

130. In the course of said examination what did you do personally, and what books and records did you personally examine?

131. In the course of said examination did the examining committee examine the daily trial balance of the Roseville Trust Company as of the date on which the examination was made?

132. Did you do so personally?

133. In the course of said examination did the examining committee examine the daily trial balance of the Roseville Trust Company as of the business day next preceding or the business day next succeeding the day on which the examination was made?

Interrogatories.

134. In the course of said examination did you personally examine the daily trial balance, and, if so, as of what dates (with respect to the date as of which the examination was made)?

135. In the course of said examination did the examining committee or any member thereof add up the several items therein, (in the daily trial balance) and compare the correct totals with the totals therein recorded?

136. Did you personally do so?

137. In the course of said examination did the examining committee or any member thereof compare any of the several items of the daily trial balance with the corresponding items as shown in the several books from which the said daily trial balance items were taken or purported to be taken?

138. Did you personally do so?

139. In the course of said examination did the examining committee or any member thereof compare the entries in the daily trial balance for the date as of which said examination was made with the corresponding entries in the daily trial balance for the previous day, or with corresponding entries in the daily trial balance of the next succeeding day?

140. Did you personally do so?

141. In the course of said examination did the examining committee or any member thereof examine the debits to the Union National Bank of Newark which appeared on the cash book, to see whether they were posted in the general ledger?

142. Did you personally do so?

Interrogatories.

143. In the course of said examination did the examining committee or any member thereof examine the debit of the Irving National Bank of New York which appeared on the cash book, to see if it was posted in the general ledger?

144. Did you personally do so?

145. In the course of said examination did the examining committee or any member thereof inquire from each of the banks with whom the Roseville Trust Company had, or purported on its books to have, a deposit, to compare the amount of Roseville Trust Company's balance on the date as of which the examination was made, as reported by said depositary bank, with the said balance as shown on the books of the Roseville Trust Company?

146. Did you personally so inquire?

147. If your answer does not show that said inquiry was made by the examining committee, state whether said inquiry was made by Raymond E. Smith with respect to any of said banks.

148. Did the examining committee or members thereof receive replies from said depositary banks to said inquiry?

149. Were there any of said depositary banks from whom such replies were not received, in connection with said examination?

150. Was there, in the instance of any of said depositary banks, a discrepancy between the balance as shown on the books of the Roseville Trust Company and the balance as reported by said depositary bank, on the occasion of said examination?

Interrogatories.

151. If your answer to the 150th interrogatory is "yes" state whether such discrepancies or any of them were explained, or partially explained, by Raymond E. Smith or any other employee of the Roseville Trust Company, or by their entries in the books of the Roseville Trust Company, as comprising items at the moment in transit from the Roseville Trust Company to a depositary bank.

152. If your answer to the 151st interrogatory is "yes" state whether the examining committee or any member thereof inquired of the depositary bank in question concerning the arrival and amount of the said items so reported to be in transit on the occasion of said examination.

153. Did you personally do so?

154. Were any of the replies by depositary banks to any of such inquiries received by Raymond E. Smith *personally?*

155. After the examining committee had made its examination as of the 14th day of December, 1912 did it report to the board of directors that it had reason to believe that any of the assets of the Roseville Trust Company were not of the value at which they appeared on the books and records of the Trust Company?

156. If the answer to the 155th interrogatory is "yes" state whether the said examining committee on said occasion reported said items in detail and reported the true value in their judgment of each of such items.

157. Did the examining committee present to the directors a report in writing of the examination as of the 14th day of December, 1912?

Interrogatories.

158. If your answer to the 157th interrogatory is "yes" state whether the board of directors caused said report to be recorded in the minute book of the Roseville Trust Company.

159. After the examining committee had made its examination as of the 21st day of May, 1913 did it report to the board of directors that it had reason to believe that any of the assets of the Roseville Trust Company were not of the value at which they appeared on the books and records of the trust company?

160. If your answer to the 159th interrogatory is "yes" state whether the said examining committee on said occasion reported said items in detail and reported the true value in their judgment of each of such items.

161. Did the examining committee present to the directors a report in writing of the examination as of the 21st day of May, 1913?

162. If your answer to the 161st interrogatory is "yes" state whether the board of directors caused said report to be recorded in the minute book of the Roseville Trust Company.

163. Did the examining committee, or any member thereof, or of the board of directors, inform Raymond E. Smith prior to the examination as of December 14th, 1912, that such examination was to be made?

164. Did the examining committee, or any member thereof, or of the board of directors, inform Raymond E. Smith prior to the examination as of May 21st, 1913, that such examination was to be made?

165. To the best of your knowledge and belief did said Raymond E. Smith have any warning,

intimation or knowledge from any source prior to the examining committee's examination as of the 14th day of December, 1912, that such examination was about to be made?

166. To the best of your knowledge and belief did said Raymond E. Smith have any warning, intimation or knowledge from any source prior to the examining committee's examination as of the 21st day of May, 1913, that such examination was about to be made?

167. In the course of the examining committee's examination as of December 14, 1912, did Raymond E. Smith have access to any of the books or records examined, between the time the committee began to inspect or refer to any such book or record and the time when its inspection of or reference thereto was completed?

168. In the course of the examining committee's examination as of May 21, 1913, did Raymond E. Smith have access to any of the books or records examined, between the time the committee began to inspect or refer to any such book or record and the time when its inspection of or reference thereto was completed.

169. Did you at any time make any inquiry of any person in the employ of or connected with the Roseville Trust Company in order to learn whether or not there were on hand available funds amounting to at least fifteen per cent. of the immediate demand liabilities of the Roseville Trust Company?

170. If your answer to the 169th interrogatory is "yes" state when you made such inquiry, of whom you inquired, and what you learned.

171. Did you personally at any time examine any book or record of the Roseville Trust Com-

pany, or any report of its affairs in order to learn whether there were on hand available funds amounting to at least fifteen per cent. of its immediate demand liabilities?

172. If your answer to the 171st interrogatory is "yes" state what particular book, record or report you examined, and what you learned in that respect, and when.

173. Did you at any time learn that there were not on hand available funds amounting to at least fifteen per cent. of the immediate liabilities? If so, when?

174. If your answer to the 173rd interrogagatory is "yes" state whether you made any protest or took any action with a view to correcting the said condition, and, if so, what did you do in that connection?

175. Did you at any time make any inquiry of any person in the employ of or connected with the Roseville Trust Company in order to learn whether or not there was cash on hand amounting to at least one-fifth of 15% of the immediate demand liabilities of the Roseville Trust Company?

176. If your answer to the 175th interrogatory is "yes" state when you made such inquiry, of whom you inquired, and what you learned.

177. Did you personally at any time examine any book or record of the Roseville Trust Company, or any report of its affairs in order to learn whether there was on hand cash amounting to at least 1/5 of 15% of the immediate demand liabilities of the Roseville Trust Company?

178. If your answer to the 177th interrogatory is "yes" state what particular book, record

or report you examined, and what you learned in that respect, and when.

179. Did you at any time learn that there was not on hand cash amounting to at least 1/5 of 15% of the immediate demand liabilities? If so, when?

180. If your answer to the 179th interrogatory is "yes" state whether you made any protest or took any action with a view to correcting the said condition, and if so, what did you do in that connection?

181. Did you personally on the occasion of the approval by the board of directors of the making of a new loan, inquire of any person, or examine any book, record or report with the view to ascertaining whether or not there were on hand available funds to the extent of 15% of the immediate demand liabilities of the Roseville Trust Company?

182. If your answer to the 181st interrogatory is "yes" state when you made such inquiry or examination, of whom you inquired, or what book, record or report you examined, what proposed new loan was the occasion of such inquiry or examination, and what you learned therefrom.

183. If your answer to the 181st and 182nd interrogatories show that in any instance or instances you did make such inquiry or examination, and learned that the available funds amounted to less than 15% of the immediate demand liabilities, state whether such proposed new loan was disapproved on that account or any other account, and the reasons for such disapproval (if it was disapproved) or (if said proposed loan was approved) whether you per-

sonally protested or made any attempt to prevent the making of such loan in each such instance, and when.

184. While you were a director of the Roseville Trust Company was there at any time any supervision of the transactions or operations of Raymond E. Smith by expert accountants or experienced bank officers?

185. If your answer to the 184th interrogatory is "yes" state what supervision there was, by whom, and when.

186. While you were a director of the Roseville Trust Company was any effort made by the board of directors to learn the business methods and practices of other banks?

187. If your answer to the 186th interrogatory is "yes" state what efforts were made, what was learned, and what application, if any, was made of the knowledge.

188. While you were a director of the Roseville Trust Company was any inquiry made by the board of directors or any one on its behalf of any of the tellers or other employees (independently of Raymond E. Smith) with a view to learning whether or not the banking routine and bookkeeping methods were such as properly to safeguard the institution?

189. If your answer to the 188th interrogatory is "yes" state what inquiry was made, and from whom.

190. If your answer to the 188th interrogatory is "yes" state what information or advice was elicited by such inquiry.

191. After the receipt of the letter of May 14th, 1909 from the commissioner of banking

and insurance was any investigation made by the board or any member thereof or any person in its behalf respecting the character and associates of Raymond E. Smith, his sources of income, his outside business connections, or his previous history?

192. If your answer to the 191st interrogatory is "yes" state what inquiry was made, who made it, what was learned.

193. Did you attend meetings of the board of directors of the Roseville Trust Company during the first five months of the year 1913?

194. At such meetings did Raymond E. Smith report to the directors the aggregate of the deposits in said Roseville Trust Company?

195. Did the total amount of such deposits as reported at said meeting from time to time by Raymond E. Smith during the first part of the year 1913, show a progressive decline?

196. Did Raymond E. Smith at said directors' meetings during the first five months of the year 1913 report the number of depositors?

197. Did such number of depositors as reported by Raymond E. Smith show a progressive increase during the early part of the year 1913?

198. If your answers to interrogatories 194 to 197 inclusive show that the total amount of deposits as reported by Raymond E. Smith was during that period decreasing, and the number of depositors increasing, state whether you made any inquiry or investigation for the purpose of explaining why the aggregate of deposit should be apparently decreasing at the same time that the number of depositors was increasing?

Interrogatories.

199. If your answer to the 198th interrogatory is "yes" state what the inquiry or investigation consisted of, and what you learned as a result thereof.

200. Were you a member of the examining committee for the year 1912?

201. Did the examining committee make an examination of the books, records and affairs of the Roseville Trust Company as of the 11th day of April, 1912?

202. If your answer to the 201st interrogatory is "yes" state what the examination consisted of.

203. If your answer to the 201st interrogatory is "yes" state whether any measures were taken to confirm the correctness of the Roseville Trust Company's deposit balances in its depositary banks as shown on the books of the Roseville Trust Company.

204. If your answer to the 203rd interrogatory is "yes" state what measures were taken.

205. If you cannot identify in your memory the examination as of April 11th, 1912, answer the 201st to 204th interrogatories inclusive with respect to any examination by the examining committee during the year 1912 prior to the examination of December 14th, 1912.

206. Were any measures taken at any time by the board of directors to confirm or test the correctness of the Roseville Trust Company's deposit balances in its depositary banks as shown on the books of the Roseville Trust Company?

207. If your answer to the 206th interrogatory is "yes" state when such measures were taken.

Interrogatories.

208. If your answer to the 206th interrogatory is "yes" state what measures were taken in that regard.

209. Was it at any period of the Roseville Trust Company's existence a matter of regular practice or routine for the board of directors to examine or cause to be examined (independently of Raymond E. Smith) vouchers returned from depositary banks, and the stubs of such vouchers and to obtain statements from said depositary banks of the amount of the Roseville Trust Company's balance on deposit, and to obtain subsequent information with respect to items which were in transit between the Roseville Trust Company and its depositary banks at the time of said statements by depositary banks, or to do any of those things?

210. If your answer to the 209th interrogatory is "yes" state which of those measures were a matter of regular practice or routine of the Roseville Trust Company, and during what period and with what frequency they were taken.

211. Were any measures at any time taken by the board of directors of the Roseville Trust Company to confirm or test the accuracy of the amount of the teller's cash as shown on the books of the trust company or in its reports or as reported by Raymond E. Smith?

212. If your answer to the 211th interrogatory is "yes" state what measures were taken.

213. If your answer to the 211th interrogatory is "yes" state whether any such measures were taken as a matter of regular practice or routine.

214. If your answer to the 213th interrogatory is "yes" state during what period said

routine or practice existed, and with what frequency.

215. If your answer to the 211th interrogatory is "yes" state to what extent said measures were taken independently of Raymond E. Smith.

216. If your answer to the 211th interrogatory is "yes" state whether said Raymond E. Smith prior to the taking of any such measures had any knowledge, information or warning thereof.

217. In the course of the examinations made by the examining committee while you were a member of said committee did the committee examine the teller's proof book?

218. In the course of the examinations by the examining committee, while you were a member thereof did the committee examine the cash?

219. In the course of the examinations by the examining committee while you were a member thereof did the committee find included in the paying teller's cash any checks, charge slips or other papers or items other than actual cash?

220. If your answer to the 219th interrogatory is "yes" state, as nearly as you can remember, what you found other than cash, and what report did you make of the fact?

221. While Raymond E. Smith was in the employ of the Roseville Trust Company did he, so far as you then knew, have any independent estate or income besides the salary he received from the Roseville Trust Company?

222. If your answer to the 221st interrogatory is "yes" state what other independent estate and what income said Smith had during that period, and the source of your knowledge or information with respect thereto.

Interrogatories.

223. Do you know whether or not Raymond E. Smith borrowed the funds wherewith to pay his subscription to the capital stock of the Roseville Trust Company?

224. If your answer to the 223rd interrogatory is "yes" state whether or not Raymond E. Smith borrowed funds wherewith to pay his subscriptions to the capital stock of the Roseville Trust Company, when you first acquired the information, and from what source.

225. If your answer to the 223rd interrogatory shows that Raymond E. Smith did not borrow funds wherewith to pay his subscription to the capital stock of the Roseville Trust Company, state where and how he did procure said funds, to the best of your knowledge and belief.

226. State to the best of your recollection the nature, extent and results of the credit inquiry or investigation, if any, which was made prior to the approval by the board of directors, of the purchase of the bills or notes of each of the following borrowers: Scarlett, Miele and Bruno, International Tobacco Company, Morel.

227. State to the best of your recollection the nature, extent and results of any credit inquiry or investigation, if any, which was made subsequent to the original purchase of the bills or notes of each of said borrowers.

228. State to the best of your recollection the nature, extent and results of any efforts, if any, that were made by the board of directors to bring about the paying off or reduction in amount of the notes or bills of each of said borrowers, held by the Roseville Trust Company.

Interrogatories.

229. Was it the practice of the Roseville Trust Company during any period for Raymond E. Smith to make the postings in the general ledger of the Roseville Trust Company?

230. If your answer to the 229th interrogatory is "yes" state when you first knew that such was the fact.

231. If your answer to the 229th interrogatory is "yes" state what portion of the time of said Smith was, on the average, so consumed to the best of your knowledge.

232. If your answer to the 229th interrogatory is "yes" state whether you made any inquiry or investigation with a view to ascertaining why it was necessary for an active officer of the trust company to spend his time in making postings in the general ledger.

233. If your answer to the 232nd interrogatory is "yes" state what inquiry or investigation you made in that connection, when you made it, and what you learned thereby.

234. What circumstances prompted or occasioned the adoption of the board of directors' resolution of November 13, 1912, authorizing (among other things) the borrowing by Raymond E. Smith from time to time, in behalf of the Roseville Trust Company, of such sums of money, for such times and upon such terms as might seem advisable to him, and authorizing him for that purpose to pledge any of the bonds, checks, bills receivable or other securities or property of the Roseville Trust Company, and upon such terms as might seem advisable to him, and authorizing him to rediscount any of the bills receivable held by the Roseville Trust Com-

pany upon such terms and at such time or times as might seem advisable to him?

235. Who first suggested to the board of directors or to the executive committee the adoption of said resolution?

236. What was the purpose of such resolution as expressed by any person in your hearing, and by whom expressed?

237. What circumstances prompted or occasioned the appointment on or about October 10, 1910, of a special auditing committee to audit, among other things, the general ledger, as reported and approved at the directors' meeting of October 10, 1910?

238. What was the purpose of said action as expressed by any person in your hearing, and by whom expressed?

239. What circumstances prompted or occasioned the decision of the directors on May 13, 1913, to sell mortgages up to $25,000?

240. What was the purpose of said action as expressed by any person in your hearing, and by whom expressed?

241. Were the contents of Box 55 in the safe of the Roseville Trust Company ever inspected by the board of directors or by any one in their behalf (other than Raymond E. Smith)?

242. If your answer to the 241st interrogatory is "yes" state who inspected the contents of said box, and when?

243. If your answer to the 241st interrogatory is "yes" state whether the person or persons who inspected the contents of said box, informed any other person thereof, and, if so, who was thus informed?

Interrogatories.

244. If your answer to the 241st interrogatory is "yes" state to the best of your knowledge what was found in said box 55.

245. Were the contents of the desk of Raymond E. Smith in the Roseville Trust Company ever inspected by the board of directors or by any one in their behalf (other than Raymond E. Smith)?

246. If your answer to the 245th interrogatory is "yes" state who inspected the contents of the desk, and when.

247. If your answer to the 245th interrogatory is "yes" state whether the person or persons who inspected the contents of said desk informed any other person thereof, and, if so who was thus informed?

248. If your answer to the 245th interrogatory is "yes" state to the best of your knowledge what was found in said desk of Raymond E. Smith.

249. After the examining committee had made its examination as of the 11th day of April, 1912 did it report to the board of directors that it had reason to believe that any of the assets of the Roseville Trust Company were not of the value at which they appeared on the books and records of the trust company.

250. After the examining committee had made its examination as of the 11th day of April, 1912 did it make any recommendation to the board of directors against possible loss which might result from lack of supervision or independent check upon the operations of Raymond E. Smith?

251. If your answer to the 250th interrogatory is "yes" state what recommendations were

made in that connection, and what action, if any, was taken respecting same.

252. Did the director Bataille make written application as required by statute, for the purchase by the Roseville Trust Company of his bill or note in the amount of $1475 as approved by the board of directors on or about July 22, 1911?

253. Did the director Bataille make written application as required by statute, for the purchase by the Roseville Trust Company of his bill or note in the amount of $2500 as approved by the board of directors on or about October 18, 1911?

254. Did the director Keim make written application as required by statute, for the purchase by the Roseville Trust Company of his bill or note in the amount of $400 as approved by the board of directors on or about February 27, 1912?

255. Did the director Keim make written application as required by statute, for the purchase by the Roseville Trust Company of his bill or note in the amount of $60 as approved by the board of directors on or about June 25, 1912?

256. Did the director Krug make written application as required by statute, for the purchase by the Roseville Trust Company of his bill or note in the amount of $300 as approved by the board of directors on or about July 16, 1912?

257. State the nature and extent of your inquiry or investigation respecting the correctness of the facts and figures shown in the report to

the commissioner of banking and insurance as of the 4th day of June, 1913, signed by you.

258. Is it not a fact that the true aggregate amount of the Roseville Trust Company's deposits on June 4, 1913 was at least $200,000 more than stated in said report?

259. State the nature and extent of your inquiry or investigation respecting the correctness of the facts and figures shown in the report to the commissioner of banking and insurance as of the 4th day of April, 1913, signed by you.

260. Is it not a fact that the true aggregate amount of the Roseville Trust Company's deposits on April 4, 1913 was at least $200,000 more than stated in said report?

261. State the nature and extent of your inquiry or investigation respecting the correctness of the facts and figures shown in the report to the commissioner of banking and insurance as of the 26th day of November, 1912, signed by you.

262. Is it not a fact that the true aggregate amount of the Roseville Trust Company's deposits on November 26, 1912 was at least $200,000 more than stated in said report?

263. Did the special auditing committee appointed on or about October 10th, 1910 make an audit of the general ledger?

264. If your answer to the 263rd interrogatory is "yes" state to the best of your knowledge the result of their said audit of the general ledger.

265. If your answer to the 263rd interrogatory is "yes" state whether said special audit-

ing committee reported to the board of directors the result of their audit of the general ledger.

266. If your answer to the 265th interrogatory is "yes" state whether said report was spread upon the minutes of the board of directors.

267. After the receipt of the letter of May 14th, 1909 from the commissioner of banking and insurance, were any measures taken by the board of directors to safeguard the Roseville Trust Company against any loss which might be made possible by failure to provide an independent check upon and supervision of the operations of Raymond E. Smith?

268. If your answer to the 267th interrogatory is "yes" state as fully as you can recollect what measures were taken in that connection.

269. Was the sum of $11,000 credited to the individual deposit account of Edward D. Dunn on August 15th, 1912, the proceeds of a loan (or bill purchased)?

270a. Was it a deposit?

270. If your answer to the 269th interrogatory is "yes" state whether written application was made for said loan or purchase of bill.

271. If your answer to the 269th interrogatory is "yes" state whether said loan (or purchase of bill) was approved by the board of directors.

272. Did you on or about or shortly after said 15th day of August, 1912, withdraw from your individual demand deposit account in the Roseville Trust Company any item or items aggregating $2,763.56?

Interrogatories.

273. Did you on or about or shortly after said 15th day of August, 1912, withdraw from your individual demand deposit account in the Roseville Trust Company any item or items aggregating $5,872.04?

274. If your answers to the 272nd or 273rd interrogatories, or both, is "yes" state whether you had previous to such withdrawal or withdrawals made an actual deposit sufficient to cover same, or had procured the purchase by the Roseville Trust Company of your bills or notes of sufficient amount to cover same, or by what other means funds had been credited to your account sufficient to cover said withdrawals.

275. At the time your individual demand deposit passbook at the Roseville Trust Company was balanced on or about the 27th day of February, 1913, did there appear therein a credit item, without date, inserted between the last item of deposit previous to said balancing (which latter was $6,000, on February 27th, 1913) and the figure showing the total credits?

276. If your answer to the 275th interrogatory is "yes" state the character of the transaction represented by said inserted and undated credit (the amount being $5,000).

277. At the time your individual demand deposit passbook was balanced on or about the 27th day of February, 1913, did there appear traces of an erasure and change in the figure showing the balance?

278. At the time your individual demand deposit passbook was balanced on or about the 27th day of February, 1913, did there appear traces of an erasure and change in the figure showing the last total of credits?

Interrogatories.

279. If your answer to either the 277th or 278th interrogatory, or both, is "yes" state whether you made any inquiry or investigation for the purpose of learning the true explanation of said traces of erasure and change.

280. If your answer to either the 277th or 278th interrogatory, or both, is "yes" state what inquiry or investigation was made, what you learned, and what report, if any, you made with respect thereto.

281. Did you in the year 1909, at the house of the director Odell, have a conversation with a bank examiner named Appleton?

282. If your answer to the 281st interrogatory is "yes" state whether anyone else was present, and if so, who.

283. If your answer to the 281st interrogatory is "yes" state whether Raymond E. Smith was mentioned in that conversation.

284. If your answer to the 283rd interrogatory is "yes" state to your best recollection what was said with reference to Raymond E. Smith, and by whom.

285. If your answer to the 283rd interrogatory is "yes" state whether or not you repeated any part of said conversation, in so far as it referred to Raymond E. Smith, to any other director of the Roseville Trust Company or any other person.

286. If your answer to the 285th interrogatory is "yes" state to whom you repeated same, and when, in each instance, and the substance of what you repeated.

287. Did you at any time while you were a director of the Roseville Trust Company know

that the amount of the "past due paper" included among the Bank's assets exceeded $20,000?

288. If your answer to the 287th interrogatory is "yes" state at what times to the best of your recollection you knew that such was the fact.

289. Did you at any time while you were a director of the Roseville Trust Company know that the amount of the "past due paper" carried among the Bank's assets exceeded the sum of $80,000?

290. If your answer to the 289th interrogatory is "yes" state at what times to the best of your recollection you knew that such was the fact.

291. Did you, subsequent to the first day of December, 1912, at any time appraise mortgages or real estate described in mortgages, held by the Roseville Trust Company as collateral for loans or bills purchased?

292. If your answer to the 291st interrogatory is "yes" state to the best of your recollection at what time or times you made such appraisals.

293. If your answer to the 291st interrogatory is "yes" state whether or not you found as a result of such appraisal or appraisals that the value of any such mortgage was insufficient collateral for the loan or obligation secured thereby.

294. If your answer to the 293rd interrogatory is "yes" state in what instances you found such to be the fact, and the facts upon which you based the finding.

Interrogatories.

295. Did you at any time inquire of any of the tellers or other employees of the Roseville Trust Company, with a view to ascertaining whether Raymond E. Smith or any other employee was making any irregular entries, or allowing over drafts or excessive or irregular loans, or being unfaithful in any respect in the performance of his duty as treasurer?

296. If your answer to the 295th interrogatory is "yes" state what inquiry you made, when you made it, of whom, what you ascertained thereby, and what use you made of the information.

All of the defendants Harvey Mott, Emile C Bataille, William T. Benjamin, Harry W. Foster, Worthington H. Ingersoll, William F. Keim, George E. Krug, Charles C. Lurich, G. Rowland Munroe, John B. Scarlett, Raymond E. Smith and Edward D. Dunn are required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 104, 105, 106, 107, 108, 109, 110, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 267, 268, 287, 288, 289, 290, 295, 296.

The defendant George E. Krug is required to answer also the interrogatories numbered 13, 14, 15, 16, 17, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144,

Interrogatories.

145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 168, 217, 218, 219, 220.

The defendant Edward D. Dunn is required to answer also the interrogatories numbered 18, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102 103, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 200, 201, 202, 217, 218, 219, 220, 269, 270a, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 203, 204, 205.

The defendant Harry W. Foster is required to answer also the interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268.

The defendant Emile C. Bataille is required to answer also the interrogatories numbered 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41.

The defendant G. Rowland Munroe is required to answer also the interrogatories numbered 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 261, 262, 263, 264, 265, 266, 267, 268, 281, 282, 283, 284, 285, 286.

The defendant Harvey Mott is required to answer also the interrogatories numbered 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 259, 260, 291, 292, 293, 294.

The defendant Charles C. Lurich is required to answer also the interrogatories numbered 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 257, 258, 261, 262, 263, 264, 265, 266, 267, 268, 291, 292, 293, 294.

Interrogatories.

The defendant William T. Benjamin is required to answer also the interrogatories numbered 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 167, 200, 201, 202, 203, 204, 205, 217, 218, 219, 220.

Declare the truth of the several matters in the foregoing interrogatories inquired after, according to the best of your knowledge, remembrance, information and belief.

ROGER HINDS,
Solicitor for and of Counsel with Complainant.

Answer of Charles C. Lurich to Interrogatories.

IN CHANCERY OF NEW JERSEY.

Between	
GEORGE M. LA MONTE, as Commissioner of Banking and Insurance, etc., in behalf of and in the name of Roseville Trust Company, *Complainant,*	*On Bill.*
and	*Answer of Charles C. Lurich to Complainant's Interrogatories.*
HARVEY MOTT, and others, *Defendants.*	

Annexed hereto are the answers of Charles C. Lurich to the interrogatories exhibited to him by the complainant in the above entitled suit on the 9th day of March, 1917; the number appearing before any given answer is the number of the interrogatory to which the answer is directed.

OTTO A. STIEFEL,
Solicitor of Charles C. Lurich.

Question No. 1—No.
" " 3—No.
" " 5—No.
" " 7—No.
" " 9—No.
" " 11—Yes.
" " 12—Dates I cannot recall. Notes of Morris Kolodin, James H. Shackleton, S. Goldberg, C. M. Collamer and others. Amounts varied from $100.00 to perhaps $1,000.00, for com-

missions and insurance accounts and in real estate transactions. The notes of Kolodin were as high as $3500.00, the ones of Shackleton as high as $6000.00. No note was ever protested, all were ultimately paid, sometimes they were renewed at the full amount and other times they were substantially reduced or paid in full.

" " 81—Conducting a real estate and insurance business.

" " 82—Yes.

" " 83—Yes.

" " 84—Yes. Don't remember date.

" " 85—The statement itself is the best evidence of its contents and to that I refer; but subject to correction upon production of the statement, I answer according to my best present recollection: Yes. As I recall, it consisted of real estate, stock, personal real estate and stock in some Hat Mfg. Company. At that time according to statement and report of committee who investigated same he was in splendid financial condition.

" " 86—I knew of some of his real holdings as I had lists of same for sale and verified his ownership and the committee's re-

port by knowledge of frequent conveyances of same.

" " 87—Valuations regarding real estate were correct on comparison with values of properties of other parties owning properties in that section. As to the stock valuation I accepted the report from the committee and counsel who investigated it—according to my understanding.

" " 88—I don't remember. Loans made to him were on building lots, Ampere section of East Orange, our mortgage was a first mortgage. I believe it was he who subsequently got another small loan on some collateral, he hadn't a large line of credit according to my recollection of the accounts of the Bank. I was on committee of appraisal that appraised N. 18th Street, East Orange property that secured mortgage loan above mentioned.

" " 92—Yes.

" " 93—I inspected the property with two other directors, I stated what I had sold land for in that vicinity, what my opinion of its value was, because of the fact of the property consisted of vacant land with-

out income, upon my suggestion a loan was recommended of only one third of its value and I believe accepted by applicant.

" " 95—As I recall, in every case we did.

" " 96—Don't remember each or any one in particular.

" " 97—My recollection is that I did; don't remember when as to dates but usually when loan was applied for.

" " 98—Cannot recall each, I do remember inspecting the holdings of Edward D. Birkholz, I being one of a committee to do so.

" " 99—As I recall those mentioned in question #95, did include real estate, and in some instances mortgages. I was familiar with the assets of C. A. Morel, D. C. Newell, Casper J. Maier and Fannie N. Fisk's holdings.

" " 100—Yes. I did in some instances when on committee; during board of directors meetings my opinion as to real estate values was constantly given.

" " 101—I frequently offered Morel's, Newell's and Maier's properties for sale, hence I had full particulars at that time, the time and dates I don't remember.

" " 102—I inspected their holdings varified their ownership and compared values.

" " 103—My opinion did not coincide with theirs as to values in each case. I cannot remember any specific instance. But I do know there were such where some values were higher, we loaned according to our judgment and knowledge, not their statement or valuations.

" " 104—No. Not that I remember.

" " 155—I do not remember at this late day.

" " 156—Examining committee's custom was to make reports and recommendations. If there were shrinkage of values in bonds or investments I know they were charged off, the same applied to doubtful loans ordered charged off by Banking Department as worthless, which in some instances were afterwards paid in full and in others partly paid.

" " 157—It was their custom—whether they did or not on the date mentioned I don't recall.

" " 158—It was customary for reports to be spread on the minutes; can not remember with reference to particular report referred to; my belief is that said report was spread on minutes.

" " 159—I do not remember at this late day.

" " 160—I don't remember the contents of their report, but refer to the report itself in possession of complainant.

" " 161—I believe they did, as reports were always made by committees.

" " 162—I invariably made such motions, if no one else did, and believe it was done at this time, as on other occasions.

" " 163—I know their instructions were not to let it be known when they would examine accounts. I don't know and have no reason to believe anyone advised "Smith" when they intended to call.

" " 164—Not to my knowledge.

" " 165—No.

" " 166—Not to my knowledge.

" " 167—What transpired during examination I do not know.

" " 168—I don't know.

" " 169—Yes.

" " 170—From Mr. Jennings and Mr. Tompkins I frequently received information as to how money matters stood. The dates I don't recall; from their statements it always appeared that the Trust Co. was in good shape and had plenty of funds on hand.

New Jersey State Library

" " 171—Yes.

" " 172—Reports, submitted by secretary to the directors purported to be made up from accounts in the ledger and other books which very frequently were referred to in our presence; at times during the life of the Trust Co., it was represented that there was a decrease in cash; whereupon we would cease making new loans; just when I don't recall; I know at different times. In my presence I saw the President and Secretary go over accounts.

" " 173—I don't recall that we reached that condition; I know money was tight at times.

" " 174—Action was taken when money was "tight"; loans were rejected and others urged to reduce their lines and pay up.

" " 175—Yes.

" " 176—Don't know when; inquired of Smith and Jennings and Tompkins; received information in answer to inquirys.

" " 177—Transcript from ledger accounts submitted to directors at meetings, showed financial condition of Company.

" " 178—Reports, stated conditions from week to week. Don't know when.

" " 179—No.

" " 181—No—with respect to books and records; yes—with respect to reports.

" " 182—President and Secretary were my informants, they were in daily touch with the situation. I don't remember specific instances but know of reports. Odell would report to Board.

" " 184—Yes. Experts from Department of Banking and Insurance of N. J. and an examining committee selected from our own board of directors best fitted for this work, some were directors of other banks, other were familiar with clerical work.

" " 185—Harry Foster, Jas. B. Banister, Clinton McCord of the Penn. Mutual Life Ins. Co., Elmer K. Sexton of Board of Education of Newark, Wm. H. Benjamin of Banister Shoe Co., and George Krug, an architect. They made their inspection several months after the State Examiners called, the latter called at intervals once or twice a year; in the intervals our committees inspected. Messrs. Fairlie and Odell both constantly supervised transactions of bank; Mr. Odell treasurer of

H. B. Claflin & Company was at the bank at least every morning; Mr. Fairlie was active head of the Fairlie-Wilson Coal Company.

" " 186—Yes.

" " 187—Such directors as Wm. Fairlie, Wm. H. Banister, Jas. B. Banister, Harry Foster, Emile Bataille, who were directors in other banks stated methods of those institutions of safeguarding depositors interests. Some of our methods were improvements on methods of other banks. Regarding the purchase of bills, each director was given at each meeting a carbon copy of bills to be purchased. (He to reject or accept them according to information given by the investigators or if he personally knew anything for or against such bills or loans he then and there stated same). This copy gave the name of maker of note, of the endorser, collateral if any. Amount of loan, period of time whether, one, two, three or four months, average balance of borrower, total line of credit. If loan was not considered desirable, it was rejected; sometimes it was laid over

to the next meeting, because of insufficient knowledge, for future consideration and action. We also had an extra sheet which stated amount of funds in different banks, amount of deposit in the savings account, amount on deposit as of that date in commercial accounts, amount of bonds, amount of bonds and mortgages; other banks usually read the data from the minutes, whereas we had written data for comparison. Favorable comments were made to us by the Banking Department examiners regarding our methods.

" " 188—I recall that examining committees on occasions would report suggestions of Jennings and Tompkins as to improvement of detail in connection with bookkeeping—with reference to matters of convenience.

" " 189—As I recall, the chairman of examining committee, although I am not certain whether it were he or another of the committee.

" " 190—I don't recall details.

" " 191—A committee investigated the matter and a report was made which confirmed absolutely all

previous reports and information within the possession of the board; the only source of income of Smith with respect to which I ever had any knowledge or hint, as far as I can recall, was his salary as an officer of the Trust Company; I never heard of Smiths "outside business connections" referred to in the interrogatories. About one year after the bank commenced business I learned that Smith had bought a garage; I went to Smith and asked him with respect thereto and suggested that such course could not meet the approval of the board of directors; Smith told me that his father had some money and that the garage was purchased therewith,—and was a great bargain; from other sources I learned that this was the truth and also definitely ascertained subsesequently that the garage was sold by Smith's father at a handsome profit to a man named Lee, who still conducts the same.

" " 192—Mr. Munroe, I believe was one of a committee; I have forgotten who were the others; Munroe told me personally

that he interviewed Judge Thos. Davis of Orange, Judge Storrs, Isaac Schoenthal, then Surrogate of Essex County, Roth & Co. the owners of the Metropolitan Building; as Mr. Smith worked for years in the bank which was located in this building, the president of the bank was also interviewed by Mr. Munroe; all parties according to Munroe stated that he was honest and efficient and that we could get no better man for the place.

" " 193—Yes. I rarely missed a meeting (except when ill or because of enforced absence).

" " 194—Yes.

" " 195—The reports, which speak for themselves, according to my present recollection did not show a "progressive decline" in the total amount of the deposits referred to.

" " 196—Yes.

" " 197—Yes.

" " 198—Inquiry on this point was made in my hearing, ledger accounts were shown, the accounts opened were in small amounts, whereas withdrawals at this time were in large amounts. I recall several withdrawals at this time were by parties who purchased real estate through my office. I

think just at this time Claflin & Co. or McCreery who usually had large balances had drawn heavily on their accounts at this time. Reasons for shortage were apparently conclusive.

" " 199—President Odell and, I believe, Harry Foster, third vice-president made report. Result was Mr. Foster was engaged to spend several hours each day to relieve Mr. Smith so the latter could get in touch with delinquents on notes for personal interviews to urge payment or threaten suit; I am answering without the data being in my possession.

" " 206—Yes.

" " 207—Invariable custom; correspondence came to chairman of executive committee at his home.

" " 208—As I remember the examining committee communicated with the corresponding banks, I recall reports to that effect.

" " 209—Yes.—Yes. I heard about their having reconciled the items in transit also, which was reported to be quite a task.

" " 210—I believe both methods were in force; I recall criticism with respect to stubs and vouchers; as a result of Banking De-

partment criticism methods were improved.

" " 211—Yes.

" " 212—Committees from time to time were appointed to confirm tellers cash and examine into all assets of Trust Co.

" " 213—Yes, according to reports, they were.

" " 214—I don't recall how frequently —as to dates; but examinations were always made at least once during the periods intervening between the Banking Department's so called experts examinations. It was so planned that the examinations either by the Department or the committee took place every few months.

" " 215—To my knowledge, as reported, Mr. Smith was at his post. The directors would call unexpectedly and he, Mr. Smith, would hand them the books and give them full charge.

" " 216—No.

" " 221—Not to my knowledge.

" " 223—No.

" " 225—My information was that his father was in good circumstances and from that source he got the funds.

" " 226—As I recall the executive committee who reported on credits to Miele & Bruno had col-

lateral for loan made by the Board and I know that the loan was paid in full. International Tobacco Co.'s loan was on collateral which consisted of a consignment of Turkish tobacco appraised at more than double the loan granted and protected by insurance endorsed to the bank while in transit and in warehouse; loan was paid in full, a profit of $1500.00 was made on transaction. (This loan was criticized by Banking Dept.) Subsequent loans were of smaller amounts to this company which were reduced invariably in some amounts when they came due. Scarlett and Morel notes, I believe, were protected by collateral, to the best of my knowledge.

" " 227—Munroe made additional reports with respect to Scarlett and Morel (cannot remember more now).

" " 228—Collateral I believe was furnished by Mr. Scarlett; the nature I don't recall; I know some life insurance policy was assigned to the bank as beneficiary. Mr. Morel conveyed a certain house to the president of the bank in trust for the bank to cover his obligation.

" " 229—Do not know and cannot now remember whether I ever knew; I knew he showed complete familiarity with all the books and explained everything at directors meetings with absolute candor and clarity.

" " 234—I believe it was brought about by heavy withdrawals being made unexpectedly by the Claflin Co., whose large balance would dwindle to most nothing at times. It was to take care of such emergencies during the absence of the president of the bank, so Mr. Smith could then be in a position to arrange to raise the necessary funds, required to have available according to law. I don't remember any criticism regarding this action by the banking department whose examiners read the minutes and action by the board.

" " 235—I don't remember; minutes must show.

" " 236—Can not remember at this late day.

" " 237—I don't remember.

" " 238—I don't remember anything special about this or who made the motion.

" " 239—Having had applications for the purchase of mortgages from persons who had confidence in our business abilities, it was deemed advisable to sell mortgages to accommodate the applicants and in turn reloan the money again on bond and mortgage to other borrowers; this would popularize our institution. I believe I was responsible for this action as it was a business method followed by the Fidelity Trust Co.—not a bad institution to copy from and get ideas.

" " 240—To create new business, following ideas of largest bank in the state.

" " 241—I don't know; I wouldn't suppose we had such right, unless it were a box of our own.

" " 242—I don't know.

" " 245—" " "

" " 249—I do not know now and at this late date.

" " 252—I believe he did.

" " 253—My recollection is that he did.

" " 254—" " " " " " "

" " 255—I recall there was some discussion about the $60.00 application in writing and it was furnished.

" " 256—My recollection is he did; that in all cases directors did

so to my knowledge as the law required it.

" " 257—I attested President Odell's signature as being his, signed in my presence. As far as its contents were concerned, I relied upon the high character and reputation of Mr. Odell, believing however that by attesting the same I was not certifying to anything beyond its due and proper execution.

" " 258—I don't know.

" " 261—Report to my understanding was made up from the accounts of the bank; the president who signed and swore to its correctness I saw looking over reports, talking over reports to secretary Smith and at times looking at ledger accounts before signing same. I simply was called upon to sign as a witness as I was the nearest director within reach of the bank.

" " 262—I don't know.

" " 263—I don't remember at this late date

" " 265—" " " " " " " "

" " 266—" " " " " " " "

" " 267—" " " " " " " "

" " 268—" " " " " " " "

" " 287—" " " " " " " "

" " 289—I don't concede the fact to be as stated; in any event I cannot recall that $80,000 was

carried as stated; my best recollection is that, if true, the fact was not known to me.

" " 291—Yes.

" " 292—I don't remember the times; but I did inspect with other directors property in Newark, Oranges, Ampere and Kearny, at different times.

" " 293—No.

" " 294—No instances.

" " 295—No; there was no apparent reason for making such inquiry—if I had had any reason for asking such questions, would have made inquiry.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Charles C. Lurich being duly sworn according to law on his oath says:

That the foregoing answers to interrogatories exhibited to him by the complainant in the above entitled cause on the 9th day of March 1917, are true to the best of his knowledge, information and belief; that the number appearing before any given one of the foregoing answers is the number of the corresponding interrogatory to which such answer is directed.

CHARLES C. LURICH.

Sworn and subscribed to before
me this 3rd day of April 1917

JAMES R. MULLIGAN,
Master in Chancery of New Jersey.

Answer of Edward D. Dunn to Interrogatories.

IN CHANCERY OF NEW JERSEY.

Between	
ROSEVILLE TRUST COMPANY (La Monte, Commissioner), *Complainant,*	*On Bill, etc.*
and	*Answer of Defendant Dunn to Interrogatories.*
HARVEY MOTT, *et al.,* *Defendants.*	

STATE OF NEW JERSEY, COUNTY OF HUDSON. } *ss.*

EDWARD D. DUNN, of full age, being duly sworn according to law on his oath, says:

I am one of the defendants in the above entitled cause and make the following answers to the interrogatories exhibited to me on behalf of the complainant in said cause, pursuant to rule 84 of the Court of Chancery.

Answer to interrogatory No. 1:
Yes.

Answer to interrogatory No. 2:
During the summer of 1911.

Answer to interrogatory No. 3:
No.

Answer to interrogatory No. 5:
No.

Answer to interrogatory No. 7:
No.

Answer to interrogatory No. 9:
Yes.

Answer to interrogatory No. 10:
I kept my car at the Oakland garage.

Answer to interrogatory No. 11:

Yes.

Answer to interrogatory No. 12:

In April, 1913, I borrowed $10,000 on note of John H. Dunn & Sons, a corporation, with my endorsement. The note was renewed in August, 1913, and was paid in December, 1913, after the bank closed.

Answer to interrogatory No. 18:

I made an application in writing when I applied with said note for the loan and the same with the renewal. Both were approved.

Answer to interrogatory No. 81:

Architect. I was also in the real estate business.

Answer to interrogatory No. 82:

Yes.

Answer to interrogatory No. 83:

Not while I was a director.

Answer to interrogatory No. 88:

Not that I have any knowledge of.

Answer to interrogatory No. 92:

No.

Answer to interrogatory No. 95:

Not that I have any knowledge of.

Answer to interrogatory No. 100:

No.

Answer to interrogatory No. 104:

No.

Answer to interrogatory No. 111:

I was out of town at that time, but on my return I learned that an examination had been made in December.

Answer to interrogatory No. 113:

I was not present at the examination in December.

Answer of Edward D. Dunn to Interrogatories.

Answer to interrogatory No. 114:
I was not present at the examination in December.

Answer to interrogatories Nos. 115 to 125 inclusive:
I was out of town when the examination in December, 1912, was made.

Answer to interrogatory No. 126:
Two.

Answer to interrogatory No. 155:
Not to my knowledge.

Answer to interrogatory No. 157:
I do not know.

Answer to interrogatory No. 159:
I do not recall.

Answer to interrogatory No. 161:
I do not recall.

Answer to interrogatory No. 163:
Not to my knowledge.

Answer to interrogatory No. 164:
Not to my knowledge.

Answer to interrogatory No. 165:
No.

Answer to interrogatory No. 166:
No.

Answer to interrogatory No. 167:
I was not present at said examination and so do not know.

Answer to interrogatory No. 168:
I was not present at said examination and so do not know.

Answer to interrogatory No. 169:
Yes.

Answer to interrogatory No. 170:
The directors talked this matter over at their meetings.

Answer to interrogatory No. 171:

Yes.

Answer to interrogatory No. 172:

I examined the statement of the bank every time it was issued.

Answer to interrogatory No. 173:

No.

Answer to interrogatory No. 175:

No.

Answer to interrogatory No. 177:

Yes.

Answer to interrogatory No. 178:

I examined the statements issued by the officers of the company whenever issued.

Answer to interrogatory No. 179:

Yes; in the spring and summer of 1913.

Answer to interrogatory No. 180:

I sent cash for deposit.

Answer to interrogatory No. 181:

Yes.

Answer to interrogatory No. 182:

I talked the matter over at directors' meetings with other directors.

Answer to interrogatory No. 184:

Yes.

Answer to interrogatory No. 185:

By the State Banking Department.

Answer to interrogatory No. 186:

Not to my knowledge.

Answer to interrogatory No. 188:

Not that I recall.

Answer to interrogatory No. 191:

I was not a director at the time mentioned, and so do not know.

Answer to interrogatory No. 193:

Yes.

Answer to interrogatory No. 194:

Yes.

Answer to interrogatory No. 195:

Yes.

Answer to interrogatory No. 196:

Yes.

Answer to interrogatory No. 197:

Yes.

Answer to interrogatory No. 198:

Yes.

Answer to interrogatory No. 199:

On inquiry at the board of directors' meeting at which the reports were made I learned that the general stringent money conditions at that time necessitated many customers who usually had large balances drawing more money than they had been in the habit of doing and in consequence their balances were lower. I also learned that many new accounts were household accounts and savings accounts of very small amounts.

Answer to interrogatory No. 200:

Yes.

Answer to interrogatory No. 201:

Yes.

Answer to interrogatory No. 202:

It consisted in the examining committee appearing at the Roseville Trust Company during regular business hours and taking possession of all the assets and records of said company, and carefully examining them and checking them up.

Answer to interrogatory No. 203:

Yes.

Answer to interrogatory No. 204:

All the depository banks were written to for a statement as of the date of the examination,

and their answers were compared and checked up with the figures of the examining committee.

Answer to interrogatory No. 206:

Yes.

Answer to interrogatory No. 207:

At the time of the examination.

Answer to interrogatory No. 208:

All the depository banks were written to for a statement as of the date of the examination.

Answer to interrogatory No. 209:

I do not know. I was a director for only the last 19 months of the bank's existence.

Answer to interrogatory No. 211:

Yes.

Answer to interrogatory No. 212:

The examining committee checked it.

Answer to interrogatory No. 213:

I do not know.

Answer to interrogatory No. 217:

Yes.

Answer to interrogatory No. 218:

Yes.

Answer to interrogatory No. 219:

Not to my knowledge.

Answer to interrogatory No. 221:

Yes.

Answer to interrogatory No. 222:

I understood his interest in the Oakland garage paid him a profit.

Answer to interrogatory No. 223:

No.

Answer to interrogatory No. 226:

These purchases were made before I became a director.

Answer to interrogatory No. 227:

See answer to No. 226.

Answer of Edward D. Dunn to Interrogatories.

Answer to interrogatory No. 228:
See answer to No. 226.
Answer to interrogatory No. 229:
Not to my knowledge.
Answer to interrogatory No. 234:
I was not at the meeting.
Answer to interrogatory No. 235:
I do not know.
Answer to interrogatory No. 237:
I was not a director at that time and do not know.
Answer to interrogatory No. 238:
I do not know.
Answer to interrogatory No. 239:
I was not at the meeting.
Answer to interrogatory No. 241:
Not to my knowledge.
Answer to interrogatory No. 245:
Not to my knowledge.
Answer to interrogatory No. 249:
I do not remember.
Answer to interrogatory No. 250:
I do not remember.
Answer to interrogatory No. 252:
I was not a director at that time and do not know.
Answer to interrogatory No. 253:
I was not a director at that time.
Answer to interrogatory No. 254:
I do not remember.
Answer to interrogatory No. 255:
I do not remember.
Answer to interrogatory No. 256:
I do not remember.
Answer to interrogatory No. 267:
I was not a director at that time and do not know.

Answer to interrogatory No. 269:

No.

Answer to interrogatory No. 270a:

No.

Answer to interrogatory No. 272:

No.

Answer to interrogatory No. 273:

No.

Answer to interrogatories Nos. 275 to 278, inclusive:

I cannot answer these interrogatories because the pass book is not in my possession. I believe it is in the possession of the complainants or their representatives.

Answer to interrogatory No. 287:

No.

Answer to interrogatory No. 295:

No.

EDWARD D. DUNN.

Subscribed and sworn to before me at Jersey City, N. J., this April 3, A. D. 1917:

DAVID A. NEWTON,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between GEORGE M. LA MONTE, as Commissioner of Banking and Insurance, etc., in behalf and in the name of ROSEVILLE TRUST COMPANY, *Complainant,* *and* HARVEY MOTT, *et als.*, *Defendants.*	*On Bill.* *Answers of William T. Benjamin to Interrogatories Proposed by the Complainant.*

The defendant William T. Benjamin makes the following answers to the said interrogatories, the numbers of the answers corresponding to the number of the interrogatory.

1. Yes.
2. As near as I can recollect it was about a year before the bank closed.
3. I heard that he was interested in the Company, but didn't know to what extent.
4. I do not recall when I first heard of it.
5. I did not.
6. See answer to #5.
7. No, I did not.
8. See answer to #7.
9. No, I did not.
10. See answer to #9.
11. Yes.
12. To the best of my recollection I borrowed One Thousand Dollars at two different times and paid both loans in full.

104. I did not. I never introduced any borrowers whatsoever.

105. See answer to #104.

106. " " " "

107. " " " "

108. " " " "

109. See answer to #104.

110. " " " "

111. About that time an examination was made by an Examining Committee appointed by the Board of Directors at a regular meeting, of which committee Elmer K. Sexton was the chairman and I with James B. Banister, Clinton F. McCord and Edward D. Dunn formed the rest of the committee.

112. I have no means of knowing those dates. I don't remember. My general impression is that we had a meeting of that committee at the end of the first term, which would be in June, and the last of the year, in December of each year.

113. I cannot now recall what steps were taken at the examination of that date as distinguished from other examinations.

114. I did different things at different examinations, sometimes I checked up the securities with another of the committee and at other times checked up the cash with another of the committee.

115. I do not, at this time, recall.

116. No.

117. I do not, at this time, recall.

118. I did not examine them.

119. I don't know. I did not help in that part of the examination and cannot at this

time speak with certainty of what was done by others.

120. No.

121. See answer to 119.

122. I did not.

123. See answer to #119.

124. No.

125. The above answers apply to the examinations of the committee while I was a member. I do not now recall the details of any particular examination.

126. To the best of my recollection we made an examination twice each year that I was a member.

155. Yes, if I recollect right. We questioned the value of the collateral that was offered by the International Tobacco Company—the concern that Foster was the head of, and we made a demand as an examining committee for a reduction of their loan. We also insisted that paper of J. B. Scarlett be reduced. There were possibly others but I don't recall them at present nor do I recall at which examination or examinations the above was done.

156. The reports will undoubtedly show what was done. I do not recall.

157. I don't recall what was done on this particular date, but it was the custom of the Examining Committee while I was on it to render a report in writing.

158. That was the custom. I cannot say as to what was done on this particular occasion because I have no recollection as to that particular occasion.

159. I have no recollection as to the particulars of the report of the Examining Committee of the examination made as of May 21st, 1913.

160. Same as answer to #159.

161. I have no recollection as to this particular examination, but it was the custom for the Examining Committee to present a written report.

162. I have no recollection as to this particular report, but that was the custom of the Board of Directors.

163. No. Not to my recollection. The custom of making these examinations was to come there without notifying anybody as to any examination, and so far as I know no notice was ever given to Smith of any examination by the Examining Committee.

164. Same answer as before.

165. See answer to #163.

166. So far as I know he did not.

167. My recollection is that Smith was about the bank when the examinations were being made, but I do not recollect what transpired at this particular examination.

168. Same answer as #167.

169. At each meeting of the Board of Directors a statement of the assets and liabilities was presented and read. To the best of my recollection each of such statements showed that the available funds on hand were at least 15% of the immediate demand liabilities, and I have no recollection of having made any inquiry further than this.

170. See answer to #169.
171. I do not now recall having done so.
172. See answer to #171.
173. I do not now recall having learned so.
174. See answer to #173.
175. I do not now recall having done so.
176. See answer to #175.
177. I do not now recall having done so.
178. See answer to #177.
179. I do not remember that I ever learned that.
180. See answer to #179.
181. I have no recollection now of having done so.
182. See answer to #181.
183. See answer to #181.
184. The Department of Banking and Insurance made an examination of the banks affairs in each year, to the best of my recollection, from the time it was incorporated until it ceased doing business. The President, William P. Odell, was, as I have always understood, the general manager of the finances of Claflin & Company and experienced in financial affairs, and was in active supervision of the transactions and operations of Raymond E. Smith. Several members of the Executive Committee were also men of very considerable experience in financial matters and the Executive Committee with the President was in active supervision of the transactions and operations of Raymond E. Smith.
185. See answer to 184.
186. That was all worked out by the holding committee. This was a committee formed before the bank was organized

and before the bank was gotten into operation this committee had it all mapped out and all planned.

187. I was not on the committee and cannot say.

188. I cannot say what was done by the other directors, but I did not ask the tellers or other employees whether or not the banking routine and bookkeeping methods were such as to properly safeguard the Institution.

189. See answer to #188.

190. " " " "

191. Yes the executive committtee took it up and went to Orange where he formerly was, and inquired of people who had been working with him up there, and he was very highly recommended by influential men up there—men who had been connected with him in a business way and they thought he was as safe a man as they could get. That matter was gone into quite thoroughly at that time and the reports came in so good that the men thought they were in safe hands.

192. See answer to #191.

193. I did.

194. At each of the meetings of the directors during all the time that I was a director, a statement was prepared by the secretary and placed in the hands of the President and presented to the Board. I have no recollection of the particular items of that statement, nor of anything about the statements of the year 1913 which distinguished them from any of the other years.

195. I don't remember that they did.
196. See answer to #194.
197. I have no recollection on the subject.
198. See answer to #197 and 194.
199. See answer to 197 and 194.
200. To the best of my recollection, I was.
201. Not that I recollect.
202. I don't recall that an examination was made as to that date. I cannot recall the dates of the various examinations which were conducted while I was on the Examining Committee, but recall that they took place about twice a year and my recollection is that they occurred in June and December of each year.
203. See answer to 201.
204. " " " "
205. In the examinations made by the Examining Committee while I was a member, Mr. Sexton outlined the work of the difference members of the committee and himself verified the results. That was a part of his work. He always wrote to these banks personally and got the replies direct to himself.
206. Same answer as #205.
207. " " " "
208. " " " "
209. I do not now recall that it was.
210. See answer to 209.
211. The Examining Committee confirmed the accuracy of the amount of the Treasurer's cash, as shown on the books of the Trust Company and as reported by Raymond E. Smith at the date of each

examination. I personally had no part in any other test.

212. See answer to #211.

213. " " " "

214. " " " "

215. The verifying of the cash insofar as I had any part in it was taken entirely independent of Raymond E. Smith.

216. The practice of the Examining Committee was to make their examination without any information from Raymond E. Smith and as far as I know he did not have any prior knowledge of such examination.

217. While I was a member of the Executive Committee, I never undertook nor was I asked to examine any of the books.

218. Yes.

219. Not when I had anything to do with the examination of the cash, nor at any time so far as I know or am informed.

220. See answer to #219.

221. I have no personal knowledge on the subject.

222. See answer to #221.

223. I don't know.

224. See answer to #223.

225. I knew nothing whatever about it.

226. To the best of my recollection these loans were made by the executive committee and I do not now recall that any investigation was made by the board independently of the executive committee. There was quite a discussion as to Scarlett's loan after the loan was made. They required of him a deposit of his policy of life insurance to protect the

Company. I think at the next meeting after the first loan was made.

227. The Examining Committee made it at times of various borrowers. Just who they were now I can't recollect. I knew Scarlett was one and there were others whose names were called to the attention of the Board by the Examining Committee, but just who they were I don't recall.

228. In regard to the Scarlett loan they did make a special effort to have him reduce his loan, also as to others, but I do not at this time recall the details of the efforts made in these particular cases.

229. I don't know.

230. See answer to #229.

231. " " " "

232. " " " "

233. " " " "

234. I don't recollect that the Board ever authorized to that effect. I have no recollection of such a resolution coming before the Board or of voting on it. I don't remember that any transaction of that kind ever took place.

235. See 234.

236. I don't recall that I ever heard such a resolution mentioned by anybody or at any time.

237. I don't remember that. I don't remember any special committee.

238. See answer to 237.

239. I cannot recall at this time what the circumstance was. I don't remember it. I don't remember that there was any

such resolution passed. Not by the Board. The Executive Committee might have passed some resolution of that kind.

240. I don't recall having heard anything about it.

241. I don't now recall that. I never heard of box 55.

242. See answer to 241.

243. See answer to #241.

244. " " " "

245. Not to my knowledge.

246. See answer to 245.

247. " " " "

248. " " " "

249. I have no particular recollection of an examination at that time.

250. Same answer as #249.

251. " " " "

252. I don't remember.

253. I don't remember.

254. I don't remember that transaction. I don't remember its coming before the Board of Directors.

255. I have no recollection of the matter.

256. I have no recollection in regard to it.

267. At the meeting when the letter of the Commissioner was considered a report was made by the President on behalf of the Executive Committee who had investigated the matter and the gentlemen who investigated in regard to Mr. Smith's previous connections, character and associates, to the effect that he bore the best reputation both as to his personal integrity and as to his ability as a banking officer, and the Committee rec-

ommended that Mr. Smith should be retained for the reason that there was nothing connected with the transaction which indicated any moral turpitude on the secretary's part. He acknowledged that he had made a mistake and would undoubtedly on that very account be more careful in the future, and in view of all the circumstances the Company's affairs were as safe in his hands as they would be in those of anybody else, and the recommendation of the Executive Committee was concurred in by the Board and the supervision of Smith was left in their hands as theretofore.

268. Same answer as 267.

287. I have no recollection that such was the case.

288. See answer to 287.

289. I have no recollection that such was the case.

290. See answer to 289.

295. I did not. I had no suspicion that he was.

296. See answer to 295.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

WILLIAM T. BENJAMIN, being duly sworn on his oath deposes and says: the above are answers to interrogatories submitted to me by the complainant in this cause; that the numbers of the answers correspond to the numbers of the interrogatories; that the above answers are made to the best of my present knowledge, information and belief.

Sworn and subscribed to before
me this day of 1917.

Cross Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

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

Complainant,

and

HARVEY MOTT, CHARLES C. LURICH, GEORGE E. KRUG, EDWARD D. DUNN, WILLIAM T. BENJAMIN, WILLIAM F. KEIM, HARRY W. FOSTER, EMILE C. BATAILLE, G. ROWLAND MUNROE, JOHN B. SCARLETT, WORTHINGTON H. INGERSOLL and RAYMOND E. SMITH,

Defendants.

On Bill, etc.

Cross-Notice of Appeal.

The complainant, above-named, hereby appeals from the final decree made in this Court in the above-stated cause on December 31, 1919, in so far as said final decree fails and omits to adjudge that the defendant Edward D. Dunn, while a director of the Roseville Trust Company, had notice that Raymond E. Smith was unworthy of trust and confidence, and thereafter permitted him to have control of the funds and property of said Trust Company without sufficient check, supervision and restraint; and in so far as said final decree fails and omits to adjudge that by

reason of the negligent acts on the part of said Edward D. Dunn, as well as the other directors, said Edward D. Dunn, as well as the other directors, became and is liable to complainant for at least $200,000.00 and in so far as said final decree fails and omits to adjudge, order and decree that said Edward D. Dunn pay to complainant the said sum of $200,000.00 together with the costs as taxed and the counsel fee of $5,000 as therein allowed—to the Court of Errors and Appeals in the last resort in all causes.

ROGER HINDS,
Salicitor for and of Counsel with Complainant.

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

ROGER HINDS,
Of Counsel with Complainant.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
GEORGE M. LA MONTE, as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of ROSEVILLE TRUST COMPANY, *Complainant-Appellant,*	*On Appeal from the Court of Chancery.*
and	
EDWARD D. DUNN, *Defendant-Respondent.*	*Petition of Appeal.*

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

The petition of George M. La Monte as Commissioner of Banking & Insurance of the State of New Jersey in behalf of and in the name of Roseville Trust Company, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 31st day of December in the year 1919, filed in said Court of February 19th in the year 1920, wherein the said George M. La Monte, your petitioner, as Commissioner as above stated was complainant, and the above named Edward D. Dunn was defendant, and in which also Harvey Mott, Charles C. Lurich, William T. Benjamin, William F. Keim, G. Rowland Munroe, George E. Krug, Edward D. Dunn,

Harry W. Foster, Emile C. Bataille, John B. Scarlett, Worthington H. Ingersoll and Raymond E. Smith also were defendants; and your petitioner finds himself aggrieved in this respect, to wit:

That said decree declares that the Roseville Trust Company, above named, suffered losses to the approximate amount of $575,000 by reason of the misappropriation and misapplication of its funds and property by its secretary and treasurer the aforsaid Raymond E. Smith, and that the other defendants above named (not however, including the said respondent Edward D. Dunn) had notice that said defendant Raymond E. Smith was unworthy of trust and confidence, but nevertheless retained said Smith in his office of secretary and treasurer of said Roseville Trust Company and thereafter permitted him to have control of the funds and property of said trust company without sufficient check, supervision and restraint; and also declares that by reason of the said negligent acts on the part of said defendants, said defendants (not however, including the said respondent Edward D. Dunn) became and are liable to complainant for $400,000, parcel of the said losses aggregating $575,000 (except as to the defendant Emile C. Bataille, who became liable for the sum of $46,701.84, only); and that said final decree also orders, adjudges and decrees that said defendants (not however including the respondent Edward D. Dunn) shall within ten days after service upon them or their respective solicitors, of a copy of this decree pay to the said complainant or his successor or duly authorized agent or deputy, for and in behalf of said Roseville Trust Company, the sums afore-

said, together with interest thereon from the date of said decree, together with the costs as taxed and the counsel fee as "hereinafter allowed" and that in default thereof an execution issue according to the rules and practice of this Court; and also orders, adjudges and decrees that the complainant be and is allowed and granted a counsel fee of $5,000 in said decree set forth.

And your petitioner humbly appeals from those parts of the decree which, in decreeing as aforesaid, fails and omits to include the respondent Edward D. Dunn, as defendant, as being and becoming liable for at least the sum of $200,000, parcel of the said losses aggregating $575,000 and for the costs and counsel fee as aforesaid, for that the Chancellor should have declared in said decree that the said defendant-respondent Edward D. Dunn, while director of the Roseville Trust Company, had notice, as well as said other directors, that the defendant Raymond E. Smith was unworthy of trust and confidence, but nevertheless retained said Smith in his office of secretary and treasurer of said Roseville Trust Company, and thereafter permitted him to have control of the funds and property of said Trust Company without sufficient check, supervision and restraint and should have adjudged that by reason of said negligent acts on the part of said defendant-respondent Edward D. Dunn he, as well as said other directors, became and was liable to the petitioner as complainant for at least $200,000, parcel of the said losses aggregating $575,000, suffered by said Roseville Trust Company by reason of the misappropriation and misapplication of its funds and property by its secre-

tary and treasurer the defendant Raymond E. Smith, and should have adjudged also that said respondent Edward D. Dunn, as defendant, should within ten days after service upon him or his solicitors of a copy of said decree, pay to the said complainant or his successor or duly authorized agent or deputy for and in behalf of said Roseville Trust Company, the said sum of $200,000 together with interest upon said sum from the date of said decree, together with the costs as taxed and the counsel fee of $5,000 as aforesaid.

And your petitioner therefore prays that the said defendant-respondent, Edward D. Dunn, may answer this petition of appeal; and that the said decree of the Chancellor may in the particulars aforesaid, be reversed, set aside and for nothing holden.

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

ROGER HINDS,
Solicitor for and of Counsel with the Complainant-Appellant.

Copy served on Collins & Corbin at 5:25 P. M. January 17th, 1921, and received admission of service on original.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

GEORGE M. LA MONTE, as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of ROSEVILLE TRUST COMPANY,
Complainant-Appellant,
and
EDWARD D. DUNN,
Defendant-Respondent.

On Appeal from the Court of Chancery.

Answer to Petition of Appeal.

The answer of Edward D. Dunn, the above-named respondent, to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters and things which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree bearing date December 31, 1919, was on February 19, 1920, filed in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree in respect of the matters complained of in said petition of appeal is agreeable to equity, and he prays that the same may be affirmed, so far forth as concerns the matters complained of in said petition of appeal, with costs to be adjudged to this respondent.

COLLINS & CORBIN,
Solicitors for and of Counsel with said Respondent.

Answer of William F. Keim to Interrogatories.

IN CHANCERY OF NEW JERSEY.

ROSEVILLE TRUST COMPANY, *Complainant,* *vs.* HARVEY MOTT and others, *Defendants.*	*On Bill, etc.* *Answer of Defendant* WILLIAM F. KEIM *to Interrogatories.*

To ROGER HINDS, Esquire, Solicitor of Complainant.

Sir:

TAKE NOTICE that the following are the answers to so many of the interrogatories heretofore served upon William F. Keim, one of the defendants in the above-entitled cause, as require answers thereto.

Number 1: No.

Number 2: No.

Number 3: No.

Number 5: No.

Number 7: No.

Number 9: No.

Number 11: Yes.

Number 12: I borrowed $400 from the Roseville Trust Company in 1911 or 1912, as nearly as I can now recall. I also had a note made by William N. Bailey to my order discounted in said Trust Company, both of which notes were paid by me.

Number 104: No.

Number 155: I am not able to answer this question without refreshing my memory, by records which are not now in my possession.

Number 157: I do not now recall.

Number 159: I am not able to answer this question without refreshing my memory by records which are not now in my possession.

Number 161: I am not able to answer this question without refreshing my memory by records which are not now in my possession.

Number 163: No, not to my knowledge.

Number 164: No, not to my knowledge.

Number 165: No, not to my knowledge.

Number 166: No, not to my knowledge.

Number 167: I do not know.

Number 168: I do not know.

Number 169: I did not.

Number 171: I may have looked over some of the reports of the Committees, but I did not examine any of the books or record.

Number 172: I do not recall what the report showed.

Number 173: No.

Number 175: I did not.

Number 177: No.

Number 179: No.

Number 181: No.

Number 184: The only persons who I now recall had any supervision of such transactions or operations were the various bank committees and officials and the officials of the Banking Department of New Jersey.

Number 186: I believe there was.

Number 187: I do not now recall.

Number 188: Personally I did not. I do not know about the other directors.

Number 191: I believe there was.

Number 192: As I now recall Mr. Odell, Mr. Foster and Mr. Fairlie or Mr. Monroe were appointed a committee to investigate, and as I now

remember their report to the Board was favorable to Mr. Smith.

Number 193: I do not now recall definitely the minutes of the company will show.

Number 194: I do not now recall.

Number 195: I do not now recall.

Number 196: I do not now recall.

Number 197: I do not now recall.

Number 206: I do not now recall.

Number 209: I do not now recall.

Number 211: I do not now recall of any such action being taken by the Board, except through its examining committee.

Number 213: I presume they were.

Number 214: I cannot now state this definitely.

Number 216: I do not know.

Number 221: Not to my definite knowledge.

Number 223: No.

Number 225: I don't know.

Number 226: As I now remember these matters were all passed upon by the executive committee and referred to the Board of Directors, who probably relied on the report of its executive committee. I personally made no independent investigation.

Number 227: I do not now recall, except in a general way, that these matters were discussed by the Board of Directors, and acting upon the report of the executive committee, and those members acquainted with the above parties, loans were made to the above parties.

Number 228: I do not now recall specifically just what efforts were made, but I remember that Smith was directed by the Board on several occasions to either have these loans paid off or

materially reduced, especially the loan of Scarlett.

Number 229: I do not know.

Number 234: I do not now recall.

Number 235: I do not now recall.

Number 236: I do not now recall.

Number 237: I do not now recall.

Number 238: I do not now remember.

Number 239: I do not now recall.

Number 240: I do not now recall.

Number 241: They were not inspected by me. I do not know whether they were inspected by any other person.

Number 245: Not to my knowledge.

Number 249: I do not now recall definitely that report.

Number 250: I do not now remember.

Number 252: I do not remember.

Number 253: I do not remember.

Number 254: I did.

Number 255: I did.

Number 256: I do not know.

Number 267: Not to my present recollection.

Number 287: I do not now recall.

Number 289: I did not.

Number 295: I did not.

Dated March 16, 1917.

Yours, &c.,

SCOTT GERMAN,
Solicitor of Defendant,
William F. Keim.

Answer of William F. Keim to Interrogatories.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

WILLIAM F. KEIM, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am one of the defendants named in the foregoing entitled cause.

2. That the answers to the interrogatories heretofore served upon me, and the statements therein made are true to the best of my knowledge as I verily believe.

WILLIAM F. KEIM.

Subscribed and sworn to before me
this 16th day of March, 1917.

SELICK J. MINDES,
Master in Chancery of New Jersey.

Service of the within answer of defendant William F. Keim to interrogatories is hereby acknowledged this 17 day of March, 1917.

ROGER HINDS,
Solicitor of Complainant.

IN CHANCERY OF NEW JERSEY.

Between

GEORGE M. LA MONTE, as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of Roseville Trust Company of Newark, New Jersey,
Complainant,

and

HARVEY MOTT, *et als.,*
Defendants.

On Bill, &c.

Answers to Interrogatories of Harvey Mott.

The following are answers of Harvey Mott to the interrogatories served upon him by the complainant in the above entitled cause:

Answer to Interrogatory No. 1. Yes.

Answer to Interrogatory No. 2. Soon after he began, but I do not recall date.

Answer to Interrogatory No. 3. No.

Answer to Interrogatory No. 5. No.

Answer to Interrogatory No. 7. No.

Answer to Interrogatory No. 9. No.

Answer to Interrogatory No. 11. I obtained one loan which I paid. My wife made several which she paid.

Answer to Interrogatory No. 12. My loan was for $3500. on first mortgage, 122 Park Avenue, East Orange. Mrs. Mott's loans were always secured by mortgages and all told might have been about $40,000. and they were all paid.

Answer to Interrogatory No. 81. I was not in business, but assisted my wife in real estate investments.

Answer to Interrogatory No. 82. Yes.

Answer to Interrogatory No. 83. It was so stated at Board meetings, but I was not on Executive Committee.

Answer to Interrogatory No. 84. I did not see it.

Answer to Interrogatory No. 87. Do not now recall.

Answer to Interrogatory No. 88. Do not now recall.

Answer to Interrogatory Nos. 89, 90 and 91. See answer to No. 88.

Answer to Interrogatory No. 92. Yes.

Answer to Interrogatory No. 93. Regular appraisal of real estate on which loan was made.

Answer to Interrogatory No. 94. Yes.

Answer to Interrogatory No. 95. Do not now recall, but I was not on Executive Committee and did not pass on these loans.

Answer to Interrogatory No. 104. Not that I recall. The Company never lost a dollar on any transaction which I had with it or which any borrower who may have been introduced by me, had with it.

Answer to Interrogatory No. 154. Do not now recall.

Answer to Interrogatory No. 155. There were securities from time to time marked off on the suggestion of the examiners.

Answer to Interrogatory No. 156. Do not now recall.

Answer to Interrogatory No. 157. Their reports were made in writing and read at the Board meetings. I do not specifically recollect this particular report, but as I remember, the reports were on motion ordered filed.

Answer to Interrogatory No. 159. Not that I recall except possibly some small note which was overdue for which an explanation was given. Nothing was reported to indicate anything wrong with the Company.

Answer to Interrogatory Nos. 161 and 162. See answer to Nos. 158 and 159.

Answer to Interrogatory No. 163. I did not and I cannot say as to the others.

Answer to Interrogatory No. 164. See answer to 163.

Answer to Interrogatory Nos. 165, 166, 167 and 168. Not to my knowledge.

Answer to Interrogatory Nos. 169 and 170. These matters at nearly every meeting were discussed by the Board and I received what I believed to be reliable information without special inquiry therefor. I would have received no different information by inquiry as my questions were answered through the transactions of the Board meetings.

Answer to Interrogatory No. 171. I was not an officer or member of the examining committee, but attended practically every meeting of the board and these were the very things which came up for discussion, investigation and report.

Answer to Interrogatory No. 172. My information was obtained from Board meetings, officers, examining committee, etc., and I never learned or knew available funds fell below fifteen per cent.

Answer to Interrogatory Nos. 173 and 174. Not until the bank closed.

Answer to Interrogatory Nos. 175, 176, 177 and 178. See answers to Nos. 169 to 172 inclusive.

Answer to Interrogatory No. 179. No.

Answer to Interrogatory No. 181. Yes.

Answer to Interrogatory No. 182. At the meetings of Executive Committee during the short period I was a member. This was fully discussed whenever the subject came up and if the reports of officers indicated there was not the proper amount on hand, the loans were refused.

Answer to Interrogatory No. 183. If the funds were not on hand the loans were always rejected, as I understood and believed. In a number of cases I personally objected to proposed loans and they were not made. For example, loans to Morrell, Burkholz and others.

Answer to Interrogatory No. 184. Yes.

Answer to Interrogatory No. 185. Regular examination by examining committee and by State Banking Examiners.

Answer to Interrogatory No. 186. Yes.

Answer to Interrogatory No. 187. Methods of different banks frequently discussed by Board and what seemed good practice we followed.

Answer to Interrogatory No. 188. Banking Examiners and examining committee.

Answer to Interrogatory No. 189. See answer to No. 188.

Answer to Interrogatory No. 190. The reports indicated everything was all right.

Answer to Interrogatory No. 191. Yes.

Answer to Interrogatory No. 192. My recollection is that Messrs. and Odell made careful inquiry and reported everything was all right.

Answer to Interrogatory No. 193. Yes.

Answer to Interrogatory No. 194. Yes.

Answer to Interrogatory No. 195. Not that I recall.

Answer to Interrogatory No. 196. Yes.

Answer to Interrogatory No. 197. That is my recollection.

Answer to Interrogatory No. 198. I made no special inquiry except for discussions at Board meetings and reports of officers and committees.

Answer to Interrogatory No. 199. See Answer to Interrogatory No. 198.

Answer to Interrogatory No. 205. Yes.

Answer to Interrogatory No. 207. The matter was put in the hands of President Odell by action of the Board.

Answer to Interrogatory N. 208. See answer to Interrogatory No. 207.

Answer to Interrogatory No. 209. As I recall, this was done by examining committee.

Answer to Interrogatory No. 210. As I recall, this was a regular practice during all the time I was a member.

Answer to Interrogatory No. 211. Yes.

Answer to Interrogatory No. 212. Referred to Examining Committee.

Answer to Interrogatory No. 213. Yes.

Answer to Interrogatory No. 214. Regular examination of committee and reports by them read to Board. The minutes should show the frequency.

Answer to Interrogatory No. 215. Examining committee worked independently of Smith as I always understood.

Answer to Interrogatory No. 216. Not that I know of.

Answer to Interrogatory No. 219. I was never a member.

Answer to Interrogatory No. 220. See answer to Interrogatory No. 219.

Answer to Interrogatory No. 221. I was always informed and believed Smith to be a man of means.

Answer to Interrogatory No. 222. He had considerable stock in the bank, a house in East Orange and I always heard him spoken of as well off.

Answer to Interrogatory No. 223. No.

Answer to Interrogatory No. 225. I always heard he was a man of means and so believed.

Answer to Interrogatory No. 225. As to Scarlett, there was only one loan to Scarlett and that had been made before I knew of it. As to Miele and Bruno, the application was turned down by the Board except for a small personal loan made while I was not a member of the Executive Committee. As to International Tobacco Company, the loans were discussed fully with Foster. As to Morrell the loan was made by Smith or the Executive Committee, but I protested against the man and gave my reasons.

Answer to Interrogatory No. 228. No result as the committee seemed to think the loan all right.

Answer to Interrogatory No. 229. Not that I know of.

Answer to Interrogatory No. 234. My recollection of this is that it was all discussed and set forth in the minutes and I should need to refer to them to answer.

Answer to Interrogatory No. 235. I do not recall except that it was not I.

Answer to Interrogatory No. 236. See answer to Interrogatory No. 234.

Answer to Interrogatory No. 237. Do not now recall.

Answer to Interrogatory No. 238. See answer to Interrogatory No. 237.

Answer to Interrogatory No. 239. We discussed conditions and decided we could do better with the money on commercial paper. I understood and was informed that money was scarce.

Answer to Interrogatory No. 240. See answer to Interrogatory No. 239.

Answer to Interrogatory No. 241. Not that I know of and I did not know anything of box 55.

Answer to Interrogatory Nos. 242, 243 and 244. See answer to Interrogatory No. 241.

Answer to Interrogatory Nos. 245, 246, 247 and 248. I do not now recall.

Answer to Interrogatory Nos. 249 and 250. No.

Answer to Interrogatory No. 252. I was not then on the Executive Committee and do not know.

Answer to Interrogatory No. 253. See answer to Interrogatory No. 252.

Answer to Interrogatory No. 254. I was so informed by Dr. Keim.

Answer to Interrogatory No. 255. See answer to Interrogatory No. 254.

Answer to Interrogatory No. 256. I do not recall any such note.

Answer to Interrogatory No. 257. Do not now recall.

Answer to Interrogatory No. 258. I have heard so since, but did not know it at the time.

Answer to Interrogatory No. 261. Do not now recall.

Answer to Interrogatory No. 262. Do not now recall.

Answer to Interrogatory No. 267. The Board had demanded the resignation of Smith and he

tendered it and it was accepted. The matter was further discussed and later it was unanimously voted to reinstate him after he had made a full statement which was thoroughly discussed by the Board.

Answer to Interrogatory No. 268. Regular banking method of examination.

Answer to Interrogatory No. 287. No.

Answer to Interrogatory No. 289. No.

Answer to Interrogatory No. 291. Yes.

Answer to Interrogatory No. 292. There were many of them and I cannot specify now.

Answer to Interrogatory No. 293. No, and the bank lost no money on any transaction where I made the appraisal.

Answer to Interrogatory No. 295. No.

Solicitor of Defendant,
Harvey Mott.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Harvey Mott, of full age, being duly sworn according to law, deposes and says: I have read the foregoing answers to interrogatories in the above entitled cause and I know said answers to be true of my own knowledge except to the matters therein stated upon information and belief, and as to those matters I believe them to be true.

Subscribed and sworn to before me
this 3rd day of April, A. D., 1917.

Answer of G. Rowland Munroe to Interrogatories.

IN CHANCERY OF NEW JERSEY.

ROSEVILLE TRUST COMPANY, *Complainant,* *and* HARVEY MOTT, *et als.*, *Defendants.*	*Answers to Interrogatories of* G. ROWLAND MUNROE.

The defendant, G. Rowland Munroe, answering the interrogatories exhibited to him by the Complainant, replies as follows to the interrogatories numbered as set forth below:

"1." Yes.

"2." I do not recall. Shortly after he became so engaged, I judge.

"3." I knew he was a stockholder, director and an officer.

"4." From his first connection with the Company.

"5." No. I understood, however, that the Home Ice and Products Company had arranged to buy a controlling interest in the Dunellen Coal and Supply Company, as an outlet for its ice at retail.

"6." I was informed at the time the arrangement I refer to in my last answer was made.

"7." No, I never heard of that connection if it existed.

"9." I had personal dealings with the Home Ice and Products Company. None other that I recall, except the Portland Ice Company, which the Home Ice and Products Company was formed to purchase and succeed.

"10." With Mr. F. W. Holbrook and Mr. Smith I purchased the Portland Ice Company and I believe I drew the papers incorporating the Home Ice and Products Company, and up to June, 1912, when I went abroad for the summer, I was attorney for the latter company, though I did not always serve in that capacity.

"11" and "12." As I recall, there was one note discounted for the Home Ice and Products Company for $5,000., secured by a contract for ice already harvested, and contracted to be sold to one Drake, of Newark.

On another occasion a mortgage held, as I recall, by a Mrs. Matches was assigned to the Roseville Trust Company. This mortgage covered 78 Ninth avenue, East Orange, which property belonged to my mother's estate. The mortgage was shortly thereafter re-assigned, as I recall it, to a Mrs. Kelly.

Aside from these transactions and a note of one Jane A. Curtiss, which is later referred to herein, I do not recall any other transactions such as are referred to in this question.

"42." I know Mr. Scarlett was having some financial stringency.

"43." I do not recall the date. It was some months after the Roseville Trust Company purchased Mr. Scarlett's note for $10,000, I think it was.

"44." I did not, so far as I now recall.

"45." It is possible I may have drawn some papers for Mr. Smith, as I very occasionally did, but I do not recall any such transaction.

"47." I do not recall any such paper or papers.

"52." I had an interest to the extent of 10 shares, as I recall it. I do not recall the total amount of stock.

"53." No, I think not. My office associate, Thomas H. Eason, was a director.

"54." No, Mr. Eason was a nominal officer but really had no voice in the management at any time. I was frequently consulted in its affairs in its early history, but less and less frequently, until in the early summer of 1912 I had but very little touch with its affairs. Mr. Eason represented my interest rather than his own, but only in a nominal capacity.

"55." See reply to "11" and "12" above. I do not recall any other transaction.

"56." Same reply as to "55" above.

"57." As a member of the Executive Committee of the Roseville Trust Company I joined in the statement of Mr. Smith as to the ice and Drake contract referred to above. Mr. Drake was known personally to several of the committee, as I recall—certainly Mr. Fairlie. I do not recall anything further that I did in the matter. It was a very safe and proper transaction, as I considered and still consider.

"58." Not until long after this time and after all my connection with it ceased.

"59." I do not recall any more definitely than last above stated. I knew little, and that only in a general way, of its affairs and judged it had good assets for all its liabilities but was trying to do too many things at once.

"60." I knew of no occasion or need so to do. I do not recall that the Roseville Trust Company had any notes or other commercial paper of this company, other than the note secured by the Drake contract, and that note, so far as

I then knew or know now, was paid.

"63." I was.

"64." I was at all times a director of the Postcraft Company until its failure. Part of the time I was its President. I do not recall the date. I also acted as attorney when needed in that capacity.

"65." Yes.

"66." A note to said Company by one Jane A. Curtiss was purchased.

"67." As I recall it, I introduced the president, Mr. J. F. Burke, to Mr. Smith, and Mr. Burke presented the note to Mr. Smith for purchase. I remember when the matter was presented to the Executive Committee I stated my connection with the Postcraft Company, my knowledge of Mrs. Curtiss, and stated my opinion that both were allright. Mrs. Curtiss and the Postcraft Company both were known to others of the committee and were both favorably considered, especially Mrs. Curtiss.

"68." I considered that it was. It had exclusive sales-rights East of the Mississippi River for a stamp affixing machine, which was generally regarded as a very valuable contract and privilege.

"69." See answer preceding.

"70." It was not the endorsement but the note of Jane A. Curtiss, as I recall it. She furnished a statement with the note, showing, as I recall it, property, real estate or mortgages in Newark and vicinity, worth $60,000. or $65,000. or thereabouts. Her note was deemed by the committee "as good as gold."

"71." Yes.

"72." Already answered, to the best of my recollection.

"73." Yes. We all understood that and that her husband was Vice-President of the Postcraft Company.

"74." I do not now recall. I think she did, on the original note, but I am not certain.

"75." Yes.

"76." No. That was done by Mr. Curtiss, representing his wife. He gave her check in reduction of the amount of the first note and for interest, and a new note for the balance in renewal. The transaction was with Mr. Smith by Mr. Curtiss, direct.

"77." Yes—either I did or Mr. Smith.

"78." The Executive committee, at least all present at the meeting referred to above, were informed. In fact Mr. Farlie, Mr. W. J. Banister and others, as I recall, knew it, knew Mrs. Curtiss, had known her before her marriage to Mr. Curtiss, and all thought most highly of her and her financial standing. Mrs. Fairlie, as I recall it, served with Mrs. Curtiss on the Board of Directors of the Job Haines Home for the Aged.

"79." Mrs. Curtiss was a stockholder in the Postcraft Company and in Curtiss and Reichhelm Company, a Western company owning the patents and manufacturing the machines. She was largely interested. The proceeds of the note, as I recall it, were regarded as loaned by Mrs. Curtiss to the Postcraft Company in order that the funds might be forwarded to the western company on account. I regarded that Mrs. Curtiss was receiving very direct and valuable benefits from the proceeds of the note but I do not now recall whether the proceeds passed through her hands or not.

"80." The transaction was explained as above at the said Executive Committee meeting.

"104." I have given in detail all the specific instances I now recall, though there were doubtless others, as I was constantly seeking to secure and securing both deposits and loans for the Trust Company.

"155." I do not now recall any facts about the examination or report to which you refer in this question or in the questions following through that numbered "168." I was never on an examining committee of the Trust Company. I recall various reports of such committees. I trusted fully the ability and character and carefullness of their members and believed, and still believe, they did their conscientious duty as they understood it. They reported their examinations in considerable detail, and their suggestions were received with respect and, as I recall, acted upon with care.

"169." I did not. Reports were regularly made to the Executive Committee and Directors indicating that such was the case and I had no slightest reason to doubt it and did not doubt it.

"171." No.

"173." No.

"175." No.

"177." No.

"179." No.

"181." No.

"184." I believed so at the time.

"185." By the Bank examiners of the Department of Banking and Insurance of New Jersey.

"186." I had some experience as a director of the City Trust Company and of the American National Bank. Mr. Bataille had served on other bank boards, as had Mr. Fairlie and possibly others of our Board. Mr. Smith had long served

in Orange—he came of a family of bankers. We frequently spoke of how other banking institutions did this or that. Mr. Odell brought suggestions from New York banks a number of times.

"187." I do not now recall the details of these suggestions.

"188." Not that I am aware of. I had supposed that the Department of Banking and Insurance would advise, from their wide observation and presumed expert knowledge of such matters, as to such matters.

"191." Not so far as I know. I had already satisfied myself as to his character and previous history, and had fully reported to the Board of Directors what my investigation showed. I am not yet aware that at that time he had any outside business connections and there was nothing to suggest that his associates were not entirely desirable. His private income from his position was adequate and beyond that we were not concerned.

"193." Yes.

"194." Yes.

"195." I do not recall.

"196." Yes.

"197." I believe it did, practically always.

"198." I recall that there was comment at the Executive Committee meetings a number of times on the matter when there was a decrease in the aggregate of deposits,—in fact that Mr. Smith himself referred to it and explained it to my personal satisfaction.

"206." I understood that the examining committee always made direct inquiry of the depository banks and so checked up the statements of Mr. Smith as to the amounts with them to the

credit of the Roseville Trust Company. I knew of no variation from this rule.

"207." See reply to "206."

"208." See reply to "206."

"209." I so understood, though the action of examining committees of the Board.

"210." See reply to "209."

"211." I understood that the examining committee, composed of able, experienced, careful, conscientious business men, covered all such items on their examinations.

"212." See answer to "211."

"213." See answer to "211."

"214." See answer to "211." At least once in each six months.

"215." Not being a member of any of the examining committees I had no definite information on this point, but presumed, and still presume, that all proper precautions in this regard were observed.

"216." I do not know. I presume not.

"221." I knew he had some real estate in Orange, and heard him say from time to time that his manager of the garage and automobile business was meeting with great financial success. Further than that I had no information.

"222." See reply to "221."

"223." I had no detailed information on the subject.

"224." Mr. Smith mentioned the fact that he was borrowing some money to buy some of the stock he originally bought, as he took more than he had expected. I did not know how much he borrowed or where.

"226." As to Scarlett—Mr. Scarlett was the holder of a considerable amount of the Trust Company's stock—50 shares I think. He had

been active in some considerable and, as I understood, very successful real estate developments in Vailsburg and Belleville. He was still a large stockholder in the company controlling the latter development.

As I recall it, Mr. Scarlett requested the Trust Company to take over a loan of $10,000. which he had had with an Orange Bank, and which was secured by stock in the Belleville company. The facts I have stated above were presented and discussed at the meeting of the Executive Committee by Mr. Odell, who had, together with Mr. Smith, accepted this loan, as Mr. Scarlett was in immediate need of the funds owing to an unexpected call from the Orange Bank, and as the Committee knew Mr. Scarlett, of course, and knew these facts, the decision of the President and Secretary and Treasurer was approved. So far as I yet know, the action was a proper one, as conditions were at that time.

Miele and Bruno for some months, or several years, had a line of credit. They were steady and honest and business-like in handling their credit. They sometimes were a little slow in getting their money, as sewer contractors are apt to be, but they were apparently honest and successful. We had reports from them by Mr. Smith, from time to time, but when a large line of credit was asked for, in anticipation, at the time they took a big contract for a Baltimore sewer, after full discussion their proposal was unanimously declined by the Executive Committee, including Mr. Smith. After that I do not recall that they asked for or received any but incidental credit. The big notes which appeared after Mr. Smith's arrest were entirely unknown to me and, I am sure, to all the Board save Mr. Smith.

The International Tobacco Company started business most auspiciously. Their early orders were large and seemed destined to be much larger. Mr. Foster gave, verbally and in writing, full and favorable reports of the various endorsers, and as I recall, the credit reporting companies verified the statements as to the leading man or men. The money borrowed was, as I now remember, to be used mostly for machinery and special equipment.

Charles A. Morel for some years was very successful. He seemed to have uninterrupted good fortune until, like many another contractor-builder at that time, he spread his investments too far and too thin. He had a fine line of credit with the Union National Bank and we agreed to give him, within certain reasonable limits, similar credit. He agreed to keep a certain amount on deposit in a time account, he bought a certain amount of the Trust Company shares, he gave us, as did Mr. Scarlett, life insurance as additional collateral. He was known to most members of the committee and Board, and was highly regarded. We received written reports or statements from him, from time to time, and they showed liberal equities.

"227." After the original purchase of the notes in each of these cases, except Miele and Bruno, where the notes being concealed no action was taken, frequent reports were had, when it became apparent that there was financial stringency. A number of reports as to Mr. Scarlett were had from him, from credit companies, from those who had knowledge of the hat manufactories with which he became involved, etc. It was found that he was involved with other banks and that

they, too, were carrying him along, hoping for better developments.

The same method was followed with the International Tobacco Company. Small reductions were received, larger ones urged, developments anxiously followed, but it was evident that undue pressure would only make matters worse.

When it became evident that Mr. Morel's anchor was dragging, new statements were sought from time to time, a mortgage or a deed given on the house in Seventh Street, and all else done that seemed to promise any relief.

"228." See replies to two previous questions.

"229." I believe it was. I had no definite knowledge of the fact, however.

"230." There was never any suggestion by anyone, Bank Examiners included, that he should not do so. He always did it, so far as I know.

"231." I have no idea.

"232." I gave it no thought.

"234." The need for considerable sums of money to meet drafts of the Claflin or McCreary accounts, at times when we had not always received our returns from our collections on their accounts, was the reason given for the extension of authority to Mr. Smith to act alone. The matter was fully and carefully discussed at the executive committee meeting and the action was assented to by all. The need was also felt for funds to meet the demands of our customers, at a time when our general deposits were not equal to this demand.

"235." Mr. Smith, in a general way, outlined the situation and need, and the action was the result of the conference.

"236." I think no one person—Mr. Smith, Mr. Fairlie, Mr. Odell, Mr. William J. Banister,

—I think all made suggestions, but I am not clear that one more than another framed the resolution.

"237." I do not recall.

"239." The need for more liquid assets. This action did not meet my personal approval and I spoke on behalf of the mortgage securities, but I was in the minority.

"240." I do not remember who suggested the idea but the approval seemed quite general. Money was needed to supply our customers' current needs, Mr. Smith said.

"241." I did not know such a box existed.

"245." I think not. I think it was kept shut —locked, when Mr. Smith was not at it or near by. It was in an open place and properly was kept shut. It never occurred to me there was any occasion to pry into any officer's desk.

"249." I do not recall.

"250." I do not recall.

"252." My recollection is that he did.

"253." My recollection is that he did.

"254." I am satisfied that he did.

"255." I am satisfied that he did.

"256." I believe he did.

"261." I do not now recall.

"262." This is the first time I ever heard such a thing suggested. I do not know.

"263." I presume it did, but do not know.

"267." I know that the other officers, Mr. Odell and Mr. Fairlie, kept as careful check as they knew how, though none of the Board anticipated any further trouble, I am sure.

"268." I do not recall any special details.

"281." I did.

"282." Mr. Odell.

"283." He was.

"284." Mr. Appleton repeated to me, at Mr. Odell's request, what he had already told Mr. Odell, viz:—that Mr. Smith had stated to him that he, Smith, had made an advance to a Mr. Nonnes on his note, without reporting the fact to the Executive Committee or Board, or entering it in the books of the Trust Company.

"285." This was all stated to the full committee and later to the full Board by Mr. Smith himself. I talked the matter over with various members of the Board but do not recall now with whom. It was fully discussed in the Board.

"286." See reply to "285."

"287." I do not now recall. I know at one time we had a considerable amount of overdue paper, which we hoped to realize upon, and had not therefore written off. We also had a special fund accumulating and accumulated to take care of possible losses.

"289." I did not.

"295." I did not. Had I suspected such a thing I should not have proceeded in this way to get information, but I never had any slightest suspicion of this nature.

Answer of G. Rowland Munroe to Interrogatories.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

G. ROWLAND MUNROE, of full age, being duly sworn on his oath according to law, deposes and says that his answers above set forth to the interrogatories exhibited to him by the Complainant are full and true, according to his best present personal knowledge and belief.

G. ROWLAND MUNROE.

Subscribed and sworn to
before me, this 28th day
of March, 1917.

Amendments to Bill of Complaint.

Filed April, 1917.

IN CHANCERY OF NEW JERSEY.

Between

GEORGE M. LA MONTE, as Commissioner, etc., in behalf of and in the name of ROSEVILLE TRUST COMPANY,
Complainant,

and

HARVEY MOTT, *et al.*,
Defendants.

On Bill.

Amendments to Bill of Complaint.

1. The bill of complaint herein at pages 4, 5 and 6 thereof, pursuant to permission granted at the hearing (at page 3 of the record) is hereby amended so as to allege:

That defendant Harry W. Foster was elected a director of the Roseville Trust Company on November 20th, 1908, duly made and filed oath as such according to law, entered forthwith upon his duties, and being re-elected from time to time continued to act and serve as such director continuously until August 14th, 1913.

2. The bill of complaint herein, at page 5 thereof, pursuant to permission granted at the hearing (at page 8 of the record) is hereby amended so as to correct the misspelling of the name of the defendant to read "William F. Keim" instead of "William F. Klein."

3. The bill of complaint herein at page 27 thereof, pursuant to permission granted at the

hearing (at page 47 of the record) is hereby amended so as to allege:

That the defendant William T. Benjamin was a member of the examining committee on May 21st, 1913, and served as such on the occasion described on pages 27 and 28 of the bill.

4. The bill of complaint herein is hereby amended pursuant to permission granted at the hearing (at pages 72, 73 and 74 of the record) by adding the following allegation:

That on or about the 11th day of April, 1912, the said directors through an examining committee of said directors chosen by them, consisting of Elmer K. Sexton, William T. Benjamin and Edward D. Dunn, made or pretended to make as required by law, an examination of the books of the Roseville Trust Company as of said 11th day of April, 1912; that in order to make such examination properly and intelligently, it was necessary to examine the general ledger and the two ledgers containing the individual demand deposit accounts, known as individual demand ledger No. 1 and individual demand ledger No. 2, together with the cash book, the paying teller's proof books and the vouchers and statements of the several correspondent banks of deposit; that said examining committee failed to examine said books, statements or vouchers, or any of the same, and failed to make an intelligent or proper examination as of said date. That on the date of said examination there existed upon the face of the said general ledger the grossest and most palpable of false and fraudulent entries, including discrepancies in the daily trial balance for April 11th, 1912, the day as of which said examination was made. The aggregate of deposits as of said April 11th, 1912, as shown in

said individual department ledger No. 2 was Thirty thousand ($30,000.) Dollars greater than the corresponding balance as shown in said general ledger. And by an obvious arithmetical error in addition and substraction the debits and credits to said account were falsely extended upon the face of said general ledger as of said April 11th, 1912, in the amount of Fifty thousand ($50,000.) Dollars. The debits, credits and balances as of said April 11th, 1912 on the face of said general ledger in the bills purchased account, and in the accounts with Irving National Bank, Union National Bank, and other correspondent banks were false, as said accountant would readily have ascertained by comparison of said entries with cash book and with the statements and vouchers of said correspondent banks. On said April 11th, 1912, checks on said Irving National Bank and said Union National Bank had been drawn by said Raymond E. Smith, and the amounts thereof had not been deducted from the deposit balance in said general ledger. It was impossible to ascertain the correct balance in correspondent banks without inquiring from said banks as to checks and drafts upon said correspondent banks drawn by said Roseville Trust Company on or prior to the examination date, and presented and paid thereafter. Said inquiry was required by the necessities of the case, by custom and practice in such matters and by ordinary caution. That said examining committee on the occasion of said examination as on other occasions totally failed to make such inquiries; and accordingly failed to discover that on or shortly prior to said examination date checks had been drawn upon said correspondent banks which had not been presented or paid on

said examination date and were not entered in the books of the Roseville Trust Company nor deducted from the balance as of said examination date as shown in the books of said Roseville Trust Company or as reported by said correspondent banks. That if said examining committee had made the said inquiry, which it was their natural and reasonable duty to make, they would easily have discovered said discrepancies in the accounts of said correspondent banks. That if they had performed their natural and reasonable duty to compare the entries in the ledger with the corresponding entries in the cash book, teller's proof books and individual deposit ledgers of said Trust Company on said examination date, they would have discovered other gross frauds. The discovery of these and other instances of defalcation on or about said date would have resulted in the removal of said Smith and would have effectively prevented any further losses and would have led to the recovery of the larger portion of the losses already incurred; as a matter of fact said Smith continued to embezzle, misapply and improperly divert the funds of said Roseville Trust Company after said occasion, resulting in an additional loss of upwards of $300,000 to said Roseville Trust Company; that the said report of said examining committee indicated on its face that proper care had not been employed in making said examination; that said report was duly presented to and approved and accepted by said directors at a meeting of the Board of Directors held on or about June 12, 1912, that said examining committee did not on said date report to the Board giving in detail all items included

in the assets of the Trust Company which they had reason to believe were not of the value at which they appeared on the books and records of the Trust Company, and giving the value in their judgment of each of said items; nor did said directors cause such report to be recorded in the minute book of said company; that if said examining committee on said date had performed its duty and exercised its judgment with respect to the value of each of the so-called bills purchased or promissory notes they would have ascertained that a large number of same were either worthless or of far less value than their face value, or the value at which they were carried upon the books of said Roseville Trust Company, many of the same having been unreasonably renewed and demonstrated to be of impossible of collection and many of same having been previously criticised by the Banking Department as unsuitable to carry as assets at face value; that said examining committee did not ascertain whether the capital stock of said trust Company had been impaired by reason of losses sustained through bad debts, defalcations, falsifications of records or otherwise.

ROGER HINDS,
Solicitor of and of Counsel for Complainant,
No. 22 Midland Ave.,
East Orange, New Jersey.

5767

NEW JERSEY

Court of Errors and Appeals.

Between

GEORGE LAMONTE, as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of ROSEVILLE TRUST COMPANY,
Complainant-Respondent,

and

HARVEY MOTT, CHARLES C. LURICH and GEORGE E. KRUG,
Defendants-Respondents.

EDWARD D. DUNN,
Defendant-Appellant.

WILLIAM T. BENJAMIN, WILLIAM F. KEIM, HARRY W. FOSTER, EMILE C. BATAILLE, G. ROWLAND MONROE, JOHN B. SCARLETT, WORTHINGTON H. INGERSOLL and RAYMOND E. SMITH,
Defendants-Respondents.

No. 53.

March Term, 1921.

On Appeal of Edward D. Dunn from decree in Chancery.

PETITION FOR RE-HEARING.

To the New Jersey Court of Errors and Appeals:

The humble petition of Edward D. Dunn, the appellant, respectfully shows that:

1—The appeal in this case brought up from the Court of Chancery, that part of a final decree holding Edward D. Dunn liable for losses, if any, sus-

ville Trust Company contrary to Section 7 of the Trust Company Act, and contrary to the by-laws of the Roseville Trust Company.

2—The appeal was argued before this Court at the March term, 1921, with two other appeals in the same cause; and judgment of affirmance was announced on October 17, 1921, on the opinion below. A dissenting opinion as to the appellant Dunn was filed by Mr. Justice Minturn and concurred in by Mr. Justice Parker and Judges Heppenheimer and Gardner. The record has not yet been remitted to the Court of Chancery. Decree of affirmance was entered November 14, 1921.

3—A re-hearing is respectfully prayed for by the appellant on the grounds and for the reasons below stated. Under the opinion and decree below, "Mr. Dunn is liable for loans made contrary to the by-laws and the statute after he became a director, if any loss resulted therefrom, for the reasons heretofore mentioned" (Opinion case, page 216). The reasons mentioned in the earlier part of Vice Chancellor Stevens[illegible]'s opinion are:

(a) That the directors of the Roseville Trust Company disregarded Section 7 of the Trust Company Act, providing that no Trust Company created under the act should have power to discount commercial paper or to make loans upon bills, notes or other evidences of debt, except to a municipality, unless secured by mortgage or other securities; and

(b) That the directors of the Roseville Trust Company disregarded Section 17 of its by-laws, in that while the executive committee authorized some of the loans most of them were made not by it or the President, but by the Treasurer Smith.

The proof in the Court below shows that the practice of the directors in making loans by way of purchase of commercial paper had not been criticized or objected to by the State Banking Department during the entire life of the trust company, a period of about five years; and that the practice of the company to issue a treasurer's check for each note purchased had been discontinued on the recommendation of the Bank Department's examiner, who advised the treasurer to discontinue the drawing of the treasurer's check for each note and to credit the customer direct, just as is done in National Banks (case page 866, line 20).

There was no claim by complainant in the Court below, or in this Court, that the directors were *ipso facto* liable for discounting bills or notes. In their brief on this appeal, which is marked with the letter "C," they say (page 12), "We are frank to admit that we do not regard the business of discounting as so wrongful in the case of the trust company that the directors become *ipso facto* insurers of every loan so made."

The effect of the affirmance of the decree below, is to make the defendant Dunn an insurer of every loan made without security.

The point on which we ground this petition for a rehearing is that the defendant Dunn should not be held liable for the violation of the statute, because he in good faith believed that the trust company had the power to purchase bills and notes in the way it did and that his misconception of the Trust Company Act was an excusable mistake.

This point was not made by counsel for appellant on the argument, first, because of the above

quoted statement in respondents' brief and, second because counsel for this appellant based their principal argument on the contention that neither the statute nor the by-laws had been violated by this appellant.

This question of excusable mistake as applied to bank directors, was discussed at length by Chancellor McGill in Williams vs. McKay, 46 N. J. Eq., 25, at pages 56 and following. That case involved a savings bank the charter of which (P. L. 1869, page 177) in Section 10 limited investments to certain classes of securities and to bond and mortgage. The directors lent money on mere personal security and it was contended that their belief that they might invest upon mere personal security was the result of an honest and careful but mistaken construction of the charter. The opinion (at page 60) recognizes that an excusable mistake in the meaning of a charter will relieve a bank director from liability. The Chancellor said:

> "A mistaken interpretation of a charter's provisions may be adopted by a director without the least doubt as to its correctness, in which case nothing indicates the desirability of counsel's advice; but where there is uncertainty or dougt as to the propriety of the construction, proper care, I think, should require resort to skilled assistance. An excusable mistake in the meaning of a law is one which occurs after all means of information that suggest themselves to a man of ordinary care and prudence have been exhausted. *Hodges v. New England Screw Co.*, 1 R. I., 312."

The Chancellor, however, held that under the circumstances of the case, the institution being a savings bank and not a bank with capital, ordinary prudence demanded that the directors should not have engaged in the discount business. He said:

> "If we should admit that the provisions of the charter were examined, and that their language was miscontrued, I cannot, even then, believe that the defendants could have entered upon an extensive and systematic discount business without some misgivings and doubt. Such a practice was foreign to the custom among institutions of the kind they managed, and, beyond all doubt, was not only imprudent, but reckless. The object of a savings bank is stated by Judge Green, in *Hannon v. Williams,* 7 Stew. Eq. 258, to be 'to receive and safely invest the savings of mechanics, laborers, servants, minors and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality.' The deposits of such an institution constitute its resources. No capital, as in the case of a bank of deposit and discount, stands between the depositors and loss. The loss must fall directly upon the deposits, or upon the earnings of those deposits, to which the depositors are entitled. The failure of a bank of this character entails

> suffering, produces distrust and discourages industry and frugality. It would be most impolitic and unwise legislation that would permit a savings bank to lend upon precarious securities. These considerations are in the minds of all men, and hence a discount business, conducted by a savings bank, without capital, is considered imprudent and dangerous, and is almost unheard of. In view of this common knowledge and consideration, it appears to be improbable that the defendants could, even under a *bona fide* misunderstanding of the language of the charter, have entered upon this precarious business withotu misgivings that should have led to an inquiry that would have disclosed the true meaning of the law."

In *Gerhard v. Welsh,* 80 N. J. Eq., 203, *Williams v. McKay* was cited by this Court with approval.

The Roseville Trust Company, of course, was not a savings bank but had capital to stand between the depositors and loss. It is common knowledge that Trust Companies purchase bills and notes and follow the same practice with regard to the method of purchasing such paper, as was followed in the Roseville Trust Company. Indeed, the reports of the Banking Department that are in evidence in this cause, and the letters from the Banking Commissioner show that the purchase of these bills and notes was considered a legitimate function of Trust Companies.

In Section 6 of the Trust Company Act (Comp. Stat. 5657) it is provided that every Trust Com-

pany incorporated under the act shall have power *inter alia* "(10) to purchase, invest in and sell stocks, promissory notes, bills of exchange and other securities * * *." The transactions were described as "bills purchased" on the books of the Company. Dunn's conception of the Act was that the practice of purchasing bills and notes came within the permission of Section 6 and not within the prohibition of Section 7 of the Trust Company Act. Furthermore, this interpretation of the law was adopted by him without the least doubt as to its correctness. The banking department was not challenging the practice and it is common knowledge that similar institutions were indulging in similar practices, that is in making loans by purchasing notes without security.

It now appears that this appellant was mistaken as to the law. That the statute was obscure and its meaning far from plain, is obvious from the fact that the Vice Chancellor'se opinion was filed on June 10th, 1919, and the legislature made haste to pass a supplement to the Trust Company Act giving Trust Companies the power to discount bills and notes and to carry on the business of banking by buying, selling and loaning upon promissory notes and other evidences of debt. The supplement is Chapter 27 of the Laws of 1920 and was approved on March 22, 1920.

So far as the defendant Dunn is concerned, it is submitted that this misconstruction of the statute presents a clear case of excusable mistake. He entered the directorate in the fourth year of the Bank's existence, and found that the Trust Company was purchasing bills and notes and that the practice had continued for four years without criticism by the Banking Department. The counsel

for the Bank was a member of its Board of Directors and did not criticize or challenge the practice. These two means of information are those which would normally suggest themselves to a director.

It is, therefore, submitted that Mr. Dunn's misconception of the statute was an excusable mistake in the meaning of a law which occurred after the means of information that suggest themselves to a man of ordinary care and prudence had been exhausted.

Inasmuch as the foregoing views were not by the briefs or arguments presented for the consideration of this Court, the appellant humbly prays the retention of the record and a re-hearing of the cause before decree be entered.

All of which is respectfully submitted this 18th day of November, 1921.

EDWARD D. DUNN, Appellant.
By George S. Hobart, David A. Newton,
Of Counsel with the Petitioner.

A

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN George N. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey in behalf of and in the name of ROSEVILLE TRUST COMPANY, Complainant-appellant, *and* EDWARD D. DUNN, Defendant-respondent.	On Cross-appeal from Chancery.

BRIEF FOR CROSS-APPELLANT.

Introduction.

The complainant, suing in behalf of Roseville Trust Company in liquidation under the provisions of Chapter 171 of the Laws of 1913, has appealed from the final decree made in the Court of Chancery on December 31st, 1919, in so far as said decree fails to adjudge the defendant-respondent Edward D. Dunn liable to complainant for at least $200,000 by reason of his negligent acts as such director.

The said final decree (p. 220) adjudges ten of the directors—but not including respondent—liable in the sum of $400,000 for their negligent acts; and also adjudges said directors, including respondent, liable for such losses, if any, as were suffered by the Trust Company upon loans unlawfully granted or permitted by them, the amount to be ascertained by a Master appointed by said decree.

The defendant Dunn has himself appealed from so much of the decree, as above mentioned, as adjudges him liable for the losses, if any, upon unlawful loans (p. 11); and the defendants Mott, Lurich, Benjamin, Keim and Munroe have appealed from the decree in so far as it adjudges them liable both for their negligence and for unlawful loans (p. 1).

The parties have arranged to argue the three appeals at the same time, with the Court's approval, and to use the same State of the Case, comprising three large volumes, and possibly a supplement.

Complainant on this cross-appeal contends that the defendant Dunn should be held answerable for his negligent acts, like the other directors, to the extent of at least $200,000—which is the sole subject of this brief, the other two appeals being briefed separately by complainant as respondent therein.

In order to avoid confusion we are marking complainant's three briefs, respecting the three appeals, "A", "B" and "C."

The Facts.

The Roseville Trust Company started business in 1908 with a *paid-in* capital of $100,000 and a *paid-in* surplus of $50,000. When the Commis-

Specification of Grounds of Appeal.

Appellant alleges in his petition of appeal that the decree is erroneous in the following respect:

In that said decree fails and omits to include the respondent Edward D. Dunn, as defendant, as being and becoming liable for at least the sum of $200,000, parcel of losses aggregating $575,000, and for costs as taxed and a counsel fee of $5,000, for that the Chancellor should have declared in said decree that the said defendant-respondent Edward D. Dunn, while director of the Roseville Trust Company, had notice, as well as said other directors, that the defendant Raymond E. Smith was unworthy of trust and confidence, but nevertheless retained said Smith in his office of secretary and treasurer of said Roseville Trust Company, and permitted him to have control of the funds and property of said Trust Company without sufficient check, supervision and restraint, and should have adjudged that by reason of said negligent acts on the part of said defendant-respondent Edward D. Dunn, he, as well as said other directors, became and was liable to the petitioner as complainant for at least $200,000.

Appellant will accordingly show, on this appeal, that the directors, including respondent, were actionably negligent in retaining Smith in office and permitting him to have control of the Trust Company's funds and property without sufficient check, supervision and restraint, in view of the fact that in the books and records of the Trust Company, and in Smith's conduct and methods, during respondent's incumbency as director, the directors (including respondent) had notice that Smith was unworthy of trust and confidence, which matters it was respondent's duty to know, as a director, and as a member of the examining committee, not only in connection with examinations, statutory reports, and dividends, but generally, as a director.

sioner of Banking and Insurance took possession on August 14, 1913, the entire capital, surplus and undivided profits were wiped out, together with a large part of the deposits.

Respondent has not questioned the fact that while he was a director an enormous loss resulted to the Roseville Trust Company; nor has he questioned the accuracy of our figures respecting that loss. His effort is to shift the blame from himself.

Since we shall have to consider the facts in considerable detail in the course of the argument, we shall present them here in their broader aspects, without exhaustive references to the record.

The respondent Dunn became a director on January 9, 1912. He is an architect by profession, and was in 1912 and 1913 engaged in that occupation in the city of Newark, where the Roseville Trust Company was situated (p. 415).

We should perhaps explain here briefly what will be fully discussed on the other appeals, that the Trust Company had already been in operation for three years when respondent joined its board of directors; that the Banking Department had warned the directors in 1909 of the untrustworthiness of the treasurer Raymond E. Smith; that despite this warning, fully recorded in the minutes, the directors had retained Smith in office; and that Smith had already abstracted a substantial sum from the Trust Company, and commenced his falsification of the books, before respondent joined the board.

It was the so-called "Nones incident" which had revealed Smith's untrustworthy character. In February, 1909, Smith had, without authority, loaned $2,350 to one Chas. A. Nones, a stock broker, and suppressed the required book entries, leaving a shortage. When discovery was inevitable, Smith confessed to the bank examiner, and

offered to resign; but the directors retained him in office, despite the protest of the Commissioner of Banking.

Respondent states that until after the trust company was closed he knew nothing of the Banking Department's warning against Smith, in June, 1909.

But we shall show that respondent at least knew that the board of directors had abdicated their function to Smith and continued to entrust to Smith unsupervised powers to an extent which would have been highly improper even if he had not been found unworthy of any trust.

Smith had been given complete charge of the controlling book of the institution, without independent check, viz.: the general ledger, from which alone the condition of the institution could be ascertained without a complete audit.

To Smith was committed unlimited and unsupervised control and disposal of all the reserve funds in various depositary banks. He was permitted to draw on these banks without countersignature, and after June, 1912, there was no independent reconciliation of the accounts except the infrequent and incomplete inspection of the examining committee.

He was soon given the entire handling of the trust company's discount business, conducted under the misleading head of "bills purchased," and this became the principal business of the trust company. Such action as the directors and executive committee took respecting these transactions was uniformly taken *after* the depositors' money had already been loaned (p. 202).

Despite the express provisions of statute, and of their own by-laws, the directors completely failed to appraise these "assets" at the required intervals, or to see to it that their examining com-

mittee did so (p. 214, l. 40). Even loans which had been expressly criticised by the Banking Department and had been nevertheless repeatedly renewed, were passed by in silence on the occasions when it was the duty of the examining committee and of the directors to report their true value. Needless to say, many of these loans eventually resulted in a total loss.

Smith became known in the neighborhood as a man who was willing to interest himself in affairs outside of the trust company. He conducted a garage and automobile business under the trade name of Oakland Motor Sales Company, and became a factor in an out-of-town enterprise known as Home Ice and Products Company (p. 871) in which defendant Munroe was also interested, a connection which eventually resulted in a loss to the trust company exceeding $50,000. Another enterprise in which Mr. Smith was personally involved was the Intercity Land and Securities Company, whose irregular transactions with the trust company cost it upwards of $26,000 (p. 871).

Smith became "popular" in the neighborhood and rapidly acquired "friends." These friends must at an early date have discovered Smith's weaknesses, for it became his habit as to a large number of them to cause their checks upon the trust company to be freely honored when they had no funds on deposit, and in many instances had not even opened accounts with the trust company. These operations were frequent and continuous during the last year and a half of the trust company's existence (the period of Dunn's connection as a director), and resulted in a loss of over $117,000 (p. 78). Smith's methods of concealing these frauds became increasingly crude and easy of discovery, as it became more and more apparent to him that the directors trusted him

blindly, and had abdicated their own functions to him. The details of his methods we shall consider hereafter.

While it is elementary that directors are bound to keep informed as to the condition of their institution, the law makes this duty especially emphatic on the occasions of declaring dividends and making official reports to the Banking Department. Yet, even on these occasions the directors made no effort to ascertain the true facts, but relied upon statements furnished them by Smith himself. Even on the occasions of periodic examinations, whose methods were known to all the directors, they took Smith's own word, unchallenged, as to the existence and amount of important assets, and failed to discover frauds which even the most casual inspection of the books would have revealed. They even permitted Smith to make changes in the footings and balances in the general ledger during the very progress of the examination (p. 808).

A host of Smith's outside "friends" knew of his frauds. His fellow-employees knew of them. They were blazoned upon the books. They were reflected in an anomalous and serious apparent shrinkage of deposits (accompanied by *increase* of daily deposits and number of depositors). But the directors continued their blind reliance on Smith. They were unwilling personally to supervise his management of the bank, and yet they failed to provide such supervision by those who were willing and competent to do so.

Statutory reports were made and published upon the basis of figures submitted by Smith himself, without verification by the directors. These reports contained serious discrepancies with the general ledger itself (pp. 810 to 834). They included in the assets at full value doubtful loans previously criticized by the department.

These reports falsely stated the "cash" in detail, and the "cash items" (as such), differing seriously from the tellers' proofbooks, in which books alone such information could be found. Even on report dates the tellers' proof-books showed obviously unlawful accumulations of "cash items" (pp. 828, 832).

Relying on statements furnished by Smith, the directors declared dividends impairing capital, and made loans when the reserves were depleted. (p. 215.)

Successive examining committees, on one of which respondent served, made no pretense of examining the trust company's books and failed to detect errors in footings, and to prevent Smith's changing of figures during the actual course of the examination.

In reviewing the facts we should point out that the situation was entirely different from the situation in banks where the executive functions are divided between two or more active officers; where the directors have provided for the keeping of the general ledger and the reconcilement of the correspondent accounts by employees other than the officers to whom the control is entrusted; or where a thorough audit is made by expert accountants at intervals.

In such cases, including all but the smaller institutions, there is not the same duty on the part of the directors to inform themselves at first hand as to the contents of the subordinate books and records, though even in such banks, the directors are properly chargeable with knowledge of general and continued fraudulent conditions shown by the *controlling* ledger.

In the case at bar, the directors chose to permit the sole active executive officer to keep the general ledger (this is unusual, p. 875, l. 30); and to

permit the man who drew upon the correspondent banks (without countersignature) to do his own reconciling (after June, 1912); and they chose to do their own examining, instead of having a periodical professional audit. In the case at bar, we shall contend that all the directors were chargeable with knowledge of the corrupt conditions from the time they became continuously manifest on the books.

Now let us consider more especially the facts as they affect the respondent personally.

Roseville is a section of the city of Newark, possessing somewhat the character of a separate community, and most of the directors lived in the neighborhood. The trust company itself may fairly be characterized as a neighborhood institution.

Respondent became acquainted with Smith when respondent opened his deposit account in 1910. In 1911 respondent began to do business at a garage conducted by Smith (p. 417). When he first opened his account he was conducting his office at home and as occasions arose for him to make deposits or draw money for pay-rolls, he went to the trust company in person and on some of those occasions saw Smith. He borrowed $1,000 from the trust company in 1910 and saw Smith on that occasion (p. 418). Smith asked respondent to be a candidate for director and he was elected in January, 1912, and reelected in January, 1913.

Respondent was elected to the examining committee the day he was elected to the board of directors (p. 419). Respondent testified that he never read the minutes as of dates prior to his election (p. 419). Respondent served on the examining committee which made an examination as of April 11th, 1912. Since this was the only bank examination that he ever took part in, his recol-

lection of the facts with regard to it was clear and he testified concerning this examination at considerable length (pp. 420 to 423). Respondent testified that he arrived at the bank shortly after 3 o'clock and met there the other members of the committee, including Mr. Sexton, the chairman. Mr. Sexton announced to the employees that he had come for the purpose of an examination and said he wanted to take charge of all of the assets and material at the bank for that purpose.

Mr. Sexton decided to have respondent examine the so-called "bills purchased," or unsecured notes, and brought respondent a large bundle of notes of various amounts ranging from $5 up to $5,000, and making a total of about $500,000. Mr. Sexton asked if respondent had had experience and understood how notes should be made out, dated, endorsed, etc., and respondent said he had, and that he thought he could qualify as an expert (p. 1260); so Mr. Sexton told respondent to examine the notes, which respondent proceeded to do, comparing them with figures on a typewritten list brought to him by Mr. Sexton.

Respondent checked off each note with the list and verified the amounts, dates and endorsements. Then he added up the list and confirmed the footing (of the list).

Respondent was experienced with real estate matters, including buying and mortgaging property, and Mr. Sexton also assigned to respondent the inspection of the real estate bonds and mortgages of the institution. Respondent went over each of these, and the accompanying insurance policies and found everything correct. It was between seven and eight o'clock in the evening before he had finished this work.

Respondent does not know who counted the cash (p. 422). He did not look inside a single book nor ask for any (p. 423).

Though familiar with the cash book in his own business and financial experience, he did not ask to see the cash book. He did not examine the general ledger either at that time or at any other time.

Not only did respondent not perform any footing himself, but did not recall that any member of the committee made any footing of the assets or liabilities in his presence (pp. 1261-1262), and never made any inquiry respecting the matter.

Respondent was not asked to examine, and did not examine, into the financial solvency of the makers or endorsers of the notes and knew of no one on the committee who did (p. 424).

A week or ten days after the date of the examination, the committee met again at the vault of the Fidelity Trust Company where the Roseville Trust Company kept some of its papers, and there compared the stocks and bonds with certain figures from the books (p. 425).

The committee also went over some letters that one member had received in answer to inquiries made of the depositary banks which respondent said tallied with the figures on the books.

Respondent did not see the figures in the Trust Company's books, with which the replies from the depositary banks were compared. He merely assumed that they were taken from the books. He does not recall that these replies stated anything further than the fact that the depositary banks had on deposit on April 11th, so much money to the credit of the Trust Company (p. 427).

This closed the examination (p. 425).

As a matter of fact, on the very date of the examination there was a large shortage, involving several of the different classifications of assets and liabilities which, as we shall show, would have

been discovered if ordinary care had been employed in making the examination. We shall discuss each of these discrepancies in detail at a later page. It will suffice here to say that they included the following:

(1) Shortages in the Trust Company's accounts with the Irving National Bank and the Union National Bank, both of which would have been discovered by inquiring of those banks respecting items which were in transit on the examination date, instead of merely confirming the balance on that date.

(2) A shortage in the "bills purchased" account which would have been discovered by comparing the total of the actual instruments with the reported balance in the general ledger; of which fraudulent condition there was plain warning on the face of the general ledger in the presence of substantial false debits and credits as of the examination date, not appearing in the cash book.

(3) A shortage in the account of the individual checking deposits (M to Z) which could have been discovered by a comparison of the total of the balances shown in the individual ledger with the balance for this ledger in the general ledger; of which fraudulent condition a plain warning appeared on the face of the general ledger in an obvious arithmetical error in addition and subtraction respecting the debits and credits to that account as of the examination day.

(4) The presence in the Trust Company, among the so-called "bills purchased" of numerous notes which had been previously criticized by the banking department and others whose total or partial worthlessness could have been ascertained by ordinary inquiry,

which subsequently resulted in loss, and which it was the statutory duty of the committee to appraise and report.

The accumulated shortage on the books of the Trust Company up to January 9, 1912, when respondent became a director, was $10,000 (pp. 1025, 1026).

The accumulated book shortage up to April 11th, 1912, the date of the examination in which respondent participated, was $54,000 (pp. 1035 to 1038). The accumulated book shortage up to August 14th, 1913 when the Trust Company was taken over by the Commissioner of Banking was $312,580.63 (p. 1064).

The total of Smith's abstractions, appearing on the face of the general ledger, and occurring *after* the April examination was therefore over $250,000, a loss would positively have been avoided if the April examination had exposed Smith's manipulations.

In addition to the stealings represented by manipulations of the books of the Trust Company, there were other abstractions by Smith from cash deposits to the savings accounts, which did not involve any internal inconsistencies in the books and records of the Trust Company but could have been discovered only by examination of the depositors' passbooks. These were in addition to the book shortage above-mentioned and amounted to a total of $88,283.78 at the time the Trust Company closed its doors.

The total of these abstractions occurring *after* the April examination was $40,601.06, which loss also would have been avoided if Smith had been exposed and removed as a result of the examination of April 11th, 1912.

The total, then, of Smith's abstractions after April 11th, 1912 was over $290,000.

The steadily increasing shortage was always manifest upon the books. One day the "trial balance" in the general ledger would be $100,000 or $200,000 out of footing; the next day equally monstrous arithmetical absurdities would appear in the "extensions" in the general ledger. The deposits as shown in the general ledger were seldom in accordance with the total shown in the individual deposit ledgers, within $100,000. Enormous discrepancies existed daily between the cash book and the general ledger.

Except on examination dates, the "cash" (as reported in the general ledger) consisted to a large extent of worthless "cash items" (checks paid but not charged), which irregular condition was truthfully recorded each day in the tellers' proof-books.

In addition to the losses from actual abstractions or stealings, the Trust Company suffered a loss of $181,603.94 from the total or partial depreciation of its so-called "bills purchased" or commercial paper. To the extent that these losses occurred in connection with loans which were unlawfully made or permitted by the directors, the decree has already adjudged the respondent to be liable, leaving the amount to be ascertained by a Master.

Informal Summary of Argument.

Respondent in 1912 was twenty-eight years of age, of good education, and considerable experience in business and financial affairs. We believe that Vice-Chancellor Stevens over-emphasized his "youth and experience." But, in any event, this would not excuse him.

He cannot be held for losses which occurred prior to his becoming a director, but with ordi-

nary care he would have learned very quickly of the character of Smith, and would have prevented all subsequent losses. To this extent his liability is no different from that of the other directors.

Respondent learned as soon as he joined the board that the directors were not accustomed to employ expert accountants to audit the books, but relied on their own examining committee. This fact alone required especial alertness on the part of the examining committee, and required the directors as a whole to make sure that the *method* used by the committee was adequate.

Respondent learned immediately that an unusual degree of power was committed to the Treasurer.

It is not customary for the controlling officer to have exclusive charge of the controlling ledger (p. 875, l. 30), nor is it safe practice. If this was not improper *per se,* it at least placed the directors under a peculiar duty to see to it that the controlling ledger (general ledger) was faithfully kept, and to know in a general way what it showed.

We assert confidently that the frauds appearing almost daily on the face of the general ledger were so gross that a layman would have learned of them if he had consulted the ledger. But not even the examining committee did so. Respondent, though a member of the committee, never looked at a single book.

Smith's stealings, for the most part, could not have been accomplished if some other employee had been kept in charge of the general ledger, as had originally been the practice.

Assuming it was not improper *per se* to allow Smith to draw, without counter-signature, on all the correspondent banks, it was actionably negligent to permit him to keep the general ledger un-

der such circumstances, because the general ledger is the book of original entry with respect to the depositary accounts. It was, moreover, actionably negligent on the part of the directors, including respondent, to approve the practice of the examining committee to accept without verification Smith's own statement as to the existence of and amount of "items in transit" on the examination date; and to fail (after June, 1912, p. 625) to provide for the monthly reconciliation of these accounts by some other employee.

The statute required the examining committee to appraise the assets, and all the directors were culpable in approving reports which showed that this was not done, though the institution was loaded down with worthless paper, much of which had already been criticized by the banking department. Respondent was especially culpable because his especial work on the examining committee was to examine the "bills purchased" in which he claimed to be an expert. He made no examination as to the *value* of the notes (p. 424).

The directors for their information as to the assets and liabilities of the bank, depended exclusively upon weekly typewritten statements prepared by Smith. They relied upon these in declaring dividends and in making and publishing their statutory reports.

Yet these statements enormously understated the deposits, and did not agree even with the general ledger. They also under-stated the dubious "cash items" though these worthless assets were truthfully set forth, and totalled, each day in the paying tellers' proof-book, which was the only book where they appeared.

Moreover, these statements and reports, as all the directors knew, carried at face value promissory notes, to a large aggregate, which had been

officially criticized, which the examining had failed to appraise, and which shortly afterwards resulted in enormous loss.

Even if respondent never heard of the Nones incident, his ignorance of the blatant frauds which were continuing for a year and a half under his eyes, was the result of his negligence, for which he is answerable.

POINT I.

Respondent is liable for losses resulting from his failure to perform his statutory duty on April 11th, 1912, to report and mark down depreciated loans.

Section 14 of the Trust Company Law requires that the examining committee:

> "* * * shall after each examination faithfully report to the board, giving in detail all the items included in the assets of the trust company, which they have reason to believe are not of the value at which they appear on the books and records of the company, and giving the value, in their judgment of each of said items; and the board shall cause said report to be recorded in the minute books of the company."

The "bills purchased" were especially assigned to respondent, when chairman Sexton divided up the details of the work of the examination. In fact, respondent claimed especial expertness in these matters.

But neither respondent nor any other member of the committee, nor the committee as a whole, made any report respecting the value of the loans

or any recommendation as to marking down any of them upon the books.

Yet the "bills purchased" on April 11th, 1912, already included a large number of loans which only a year later proved to be utterly worthless, and which on April 11th, 1912, must have appeared greatly depreciated in value.

Several of these loans were expressly criticized by the banking department in its letters to the Trust Company, which were recorded in the minutes.

In Point VI of our brief "C" we discuss in detail the loans of Scarlett, Federici, Morel, Miele and Bruno, Curtis, Ingersoll, and International Tobacco Company, only a few of the loans in the bank in April, 1912, which resulted in loss.

Even if respondent had not been on the committee at all, he would have been responsible for the committee's failure to comply with the law, because as a director he would have learned promptly that the committee made no report whatsoever in this important matter, and should have required the committee to perform its duty.

> "The duty to charge off assets which have become worthless * * * is that of the board as an entity".
>
> *Chesebrough* v. *Woodward,* 195 Fed. 881 (approved 221 Fed. 912; affirmed 244 U. S. 72).

And even if respondent were not familiar with the statute and with the by-laws of the Trust Company he would not be excused from the consequences of failing to perform his duty. But he testified that he not only had considerable experience with commercial paper, but had read the by-laws. Section 22 of the by-laws refers particularly to Section 14 of the Trust Company Law re-

quiring the committee to report respecting the depreciation of loans.

There is precise authority in this state for respondent's liability in this connection:

> "Not only did this committee entirely neglect to examine the bank's books, but it examination of the securities was a mere perfunctory performance of that duty. It was, habitually, a mere comparison of a bundle of papers with a list of the securities supposed to be owned by the bank. Both the bundle and the list were produced by the secretary. The examination consisted in checking off the papers on the list as they were called off. No inquiry appears to have been made as to the character or value of the security * * *"
>
> *Williams* v. *McKay*, 46 N. J. Eq. 25, 38, 39.

If the learned Judge who wrote the above had been actually summarizing the work of our respondent Dunn, as described by his own testimony, the likeness could not have been more faithful.

Not only would much of the loss on worthless paper, but the entire subsequent loss from abstractions (over $290,000) would have been avoided if respondent on April 11, 1912, had performed his statutory duty under Section 14 of the Trust Company Law.

As we show elsewhere in this brief, the manipulations of Smith involved, inextricably, the "bills purchased", the principal asset of the Trust Company, which respondent failed to examine and report upon. If respondent had performed his duty and made any reasonable inquiry into these loans, the result would necessarily have been to call the attention of the entire board to a scandalous condition and to have uncovered the irregu-

larities upon the books in connection with these loans and in connection with the deposit accounts of the borrowers.

Another effect would have been to exhibit to the banking department and to the public, a correct statement of the value of the Trust Company's chief asset, in connection with the reports which the directors were required to make to the department, and to publish, which we consider elsewhere in this brief.

On respondent's own admissions, he made absolutely no effort to comply with his duty to determine the value of the more than $500,000 worth of notes which it was his duty to examine, even though he claimed to be more than ordinarily expert in such matters.

POINT II.

Respondent was actionably negligent in not consulting the general ledger in the examination of April 11, 1912.

On April 11, 1912, there existed obvious false entries in the general ledger, not only on the very page which the examining committee were obliged to inspect, but under the examination date itself (pp. 1035 to 1037).

It will be observed that the entries for the general ledger comprise four columns for each day's work, the first column at the left stating as to each of the general accounts of the bank the aggregate of debits for that day, the second column, the aggregate of credits for the day. The third and fourth columns are balances, and together comprise a complete summarized statement of the condition of the institution at the close of that

particular day—in other words, a "trial balance." The third column, technically labeled "Dr.," or debit, includes only assets. The fourth column, technically labeled "Cr.," or credit, of course includes only liabilities. The footings of the two balance columns should be exactly the same. Otherwise the general ledger would be "out of balance." The balance in any account on any particular day is the result of a simple arithmetical operation based on the balance of the preceding day. If it be an asset (or debit) account the total debits for the day (first column at the left) are added to the balance for the preceding day, and the credits subtracted, the result being the balance on the given day. If the account be a liability (or credit) the credits for the day are added and the debits subtracted from the balance of the preceding day in order to arrive at the balance for the day in question.

If they perform their duty, the examining committee make their examination of the assets and liabilities of the trust company *from the original sources* and prepare their own trial balance. They consult the general ledger for the purpose of comparisons. They inspect and list the physical assets (stocks, bonds, notes, etc.), count the cash, and reconcile and verify the balances in the several correspondent banks. These would comprise the assets, which they should list for themselves. They next ascertain the bank's liabilities by consulting the individual deposit ledgers and other subordinate books of the bank, and the resulting column of liabilities should tally with the assets, as actually found, making due allowance for capital stock, surplus and undivided profits, which are, for bookkeeping purposes, included in the asset or debit column. Such a paper would comprise a "trial balance" or statement of condition pre-

pared at first-hand by the committee itself. It would then of course be natural and appropriate to compare this with the trial balance as shown in the general ledger, and the two should be identical.

There is some indication that early in the history of the Trust Company such "trial balances" were actually prepared by the commitee, but it also appears that this work was not performed in the years 1912 and 1913, during which time they merely verified or purported to verify the figures as already set down in the general ledger by such first-hand investigations as they actually made.

In either case it was necessary for them to consult the general ledger, in one case to determine whether their own "trial balance" tallied with that in the general ledger, and in the latter case in order to arrive at any trial balance whatsoever.

As we have already shown, the entries in the general ledger, as of the examination date, were not and could not have been made until after the close of business, and hence after the arrival of the committee. It was therefore possible for Smith to write down in the general ledger such figures as of the examination date as best suited the emergency. In view of the committee's duty to examine the assets and liabilities of the trust company from the original sources, the only purpose of consulting the general ledger was for the purpose of comparison. But there could be no usefulness in comparing their own figures with any mere arbitrary or *unrelated* set of balances which Smith might find expedient to write down. The whole value of comparing their results with the general ledger lay in the fact that the general ledger was the *controlling book* of the trust company, and the balances written therein *after the arrival* of the committee were of no sig-

nificance unless they "connected up" by appropriate debits and credits, with the figures of the preceding day (which latter Smith cannot be presumed to have made in contemplation of the committee's examination).

In order, therefore, to make a comparison between the committee's figures and the books(generally) of the trust company, it was necessary for them to examine not only the *balances* in the general ledger, but also the *debits* and *credits* as of the examination date (all of which were made after the commitee's arrival).

Not only did the logic of the situation require the committee to inspect the general ledger figures made after their arrival, but it was the *natural* thing for them to do, since all these figures must have been directly under the eyes of anyone who inspected the balances.

The respondent Dunn testified that he had never even looked inside the general ledger (p. 423).

Since the general ledger concisely summarizes the daily operations of the trust company and also shows its condition at the close of each business day, we believe that on the occasion of each examination the directors should have inspected not only the entries for that particular day, but should have verified the entries since the date of the last examination. This would not have involved any expert knowledge. It could have been done either by one of the committee or by any clerk or bookkeeper (other than Smith, who kept the ledger). At the very least the committee should have made a general inspection of the work in the active accounts, such as deposits and correspondent banks. If they had done so they could not have failed to observe the frauds described in the prepared statement of Edward F. Cloran (pp. 1036 to 1037).

In *Campbell* v. *Watson* Vice-Chancellor Pitney said (p. 416):

> "If a man feels that he has not sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry or refuse to act."

On another page Vice-Chancellor Pitney, in the same opinion, approves the contention made by the complainant in that case, that the examining committee were

> "entitled to use a clerk acting under their immediate supervision or if necessary might employ an expert accountant not an employe of the bank" (p. 414).

At pages 779 to 787 and at pages 837 and 838 of the record is Smith's own testimony, with the general ledger in front of him, as to how he attempted to cover up his shortages on April 11, 1912. The manipulations were bald. They involved obvious mistakes of addition and subtraction on the *face* of the ledger, in the columns for that very date.

But respondent did not consult the general ledger, even when examining the trust company.

POINT III.

Respondent, as director, is charged with knowledge of what the books plainly showed, even apart from his duties as member of the examining committee.

Respondent was negligent in performing his duties on the committee. But his responsibility by no means depends on that malfeasance alone.

While a director is perhaps not chargeable with notice of a single, isolated transaction, merely because entered upon the books, he is by overwhelming authority bound to know of a general and long-continued condition of fraud and corruption, when evidenced by the books. There can be no question about this.

The following is quoted from the case of *McDonald* v. *Rankin,* 7 Montreal L. R. (S. C.) 44:

> "Besides the Liability Ledger the directors had also for their information the discount book, the deposit book, the weekly statement book and the monthly statement book. These are the books that the directors should have consulted, and not Mr. Rennie's memos., which have all disappeared, and not one of which could be produced. If they have been misled by Rennie on this subject, and the evidence of Struthers tends to confirm the statement of Sir Francis and of the defendant, it is by reason of an excess of confidence in Rennie, their employee, and negligence and lack of care on their own part. * * * * The Bank Act gives directors the right at all times to examine the books and accounts of the bank, because they are administrators, and because they cannot get a clear understanding of them otherwise, whilst this right of examining the accounts of persons who transact business with the bank is refused to shareholders (Sec. 5). If the directors omit to do it they fail in their duty and if damage results from it to the shareholders who compose the bank they are answerable for it. Otherwise their responsibility would be illusory. The defendant says: I had nothing to do with the management, it is the business of the president and vice-president. * * * In all banks, he says, there must be a sole head who is charged with all the details of administration; sometimes it is the president, as is the general rule in America, at other times it is a manager chosen by the directors.

"I understand this theory perfectly; the directors may divide the work and responsibility among themselves, but towards the shareholders and the public they always remain responsible as administrators. Their responsibilty may be more or less according to circumstances; some might even escape the responsibility of acts in which they had no share if they had managed with skill and care and if they had been taken advantage of, but the administrators of a bank could never free themselves of their responsibility as mandatories by abandoning the management of the bank to an employee or to one of the directors. * * *

"The defendant declares that he has never gone behind the counter, that he has examined nothing personally, neither the cash box nor the accounts. * * * The defendant had confidence in the president and in the manager, to whom he has virtually abandoned the administration of affairs, which he had undertaken to manage himself together with the other directors; * * * he cannot escape from the consequences of his conduct; he is responsible civilly for the bad administration of those to whom he has delegated it.

"If it were otherwise, there would not be any responsibility anywhere, and it would be better to abolish the directors and entrust the management to one or two men whom the shareholders would choose themselves and from whom they would require the necessary guarantees. * * *

"Thanks to the reports prepared by the directors and to the fine dividends voted by them and paid twice a year, the shareholders reelected the same clever financiers to manage and administer their capital, up to the moment when they learned that the whole was lost in a frightful cataclysm. Then the directors protest that they are not responsible, accuse the employees of malversation, and claim that they were not administrators but simply a consulting committee for their em-

ployee Rennie when he should wish to consult with them.

"I have therefore not the slightest hesitation in declaring the directors of the Consolidated Bank guilty of negligence and carelessness, and in holding them jointly and severally responsible for the losses suffered by bad management of the affairs of the bank."

The authorities are unanimous in holding directors responsible for conditions which are plainly reflected in the books.

This principle applies especially with respect to small banks where large powers are entrusted to a single managing officer. It is even more emphatically applicable in the case at bar because of Smith's control both of the funds *and the strategic book.*

The principle has been universally applied.

"The supervision of the directors over the business of the bank should have been such as would have enabled them at all times to know its general financial condition, and to check or prevent imprudent or dishonest conduct by the president or cashier. They had the means of knowing, and they were bound to know, the amount and value of the paper and securities held by the bank. They were also bound to know the character and habits of the men they had placed and kept in charge of the bank as its president and cashier. There could be no excuse for their failure to examine the books of the bank, and for their ignorance of the manner in which its business was conducted."

Coddington et al. v. *Canaday,* 157 Ind. 243, (at p. 259); 61 N. E., 567.

"Ignorance of any fact in the bank's affairs which it is their (the directors') duty to know can never be set up by them in de-

fense or exculpation for any act which the existence of that fact should have prohibited."

Morse on Banking, Section 128, p. 272.

"It is the duty of a director to know the condition of his bank and to see that its affairs are honestly and properly managed."

Ellis v. *Mercantile Co.,* 103 Miss., 560, 577.

"It is the duty of directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know and which they have the means of knowing."

Seale v. *Baker,* 70 Tex., 283.

In *Cunningham* v. *Shellman,* 164 Ky., 584; 175 S. W., 1045, the directors

" * * * did not do anything to correct the conditions that were bringing the bank to ruin, because they did not know of these conditions."

In spite of their lack of knowledge they were none the less held liable for their violation of the statute.

"It is the duty of bank directors to use ordinary diligence and acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank and which would have

come to their knowledge except for their gross neglect and inattention."

United Society v. *Underwood,* 72 Ky., (9 Bush) 609, 621.

" * * * the defendant was ignorant of the insolvency of the bank because he wilfully (wilfully in the sense of intentionally) neglected the means whereby he could or might have ascertained its condition * * * ; or his lack of knowledge arose from the fact that his unfamiliarity with business methods was so pronounced that he could not have ascertained its true condition, had he made an examination into its affairs, but would have been obliged to depend (as he did) upon statements of its solvency made to him by those who had active management of its affairs. A person cannot, upon such a pretext, escape the natural and necessary consequences of his own voluntary act which, in this case, clearly amount to criminal negligence."

McClure v. *The People,* 27 Col. 358.

"The doctrine is stated by Thompson on corporations, Section 5308, to be: 'It is a sound view, at least in so far as the question respects the rights of *third parties,* that the directors of a corporation are in law conclusively presumed to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason for this is that it is *their duty* to know these things in the exercise of their official functions. This doctrine is said to be one founded in *public policy,* essential to the safety of third parties in their dealings with corporations, and to the protection of the stockholders interested in the welfare and safe management of corporations."

Hall v. *Henderson,* 126 Ala. 449-495 (at page 493).

~~POINT IV~~

Respondent, as director, is responsible for the mishandling of the examinations of December, 1912, and May, 1913.

Respondent though a member of the examining committee on December 14, 1912, and May 21, 1913, was not able to take part in the examination.

But he had learned of the inadequate methods employed and had the same knowledge of the reports of those later examinations that the other directors had; so that his liability is the same as that of the other directors. In our brief "B" we discuss fully the inadequateness and disastrous consequences of the work of the two later examinations.

Respondent assumed the risk of entrusting unheard-of power to one man. } Point IV

Respondent testified that he did not learn of the Banking Department's warning as to Smith until after the bank closed its doors. If he had been curious to know more about the record of the man to whom such wide powers were entrusted, without supervision, he would have found the whole story of the Nones incident in the minute book; or any of the directors would have told him.

But our present purpose is to show that the unrestricted power that was entrusted to Smith was not warranted, even on the assumption that Smith's record was spotless; and this was of course something that respondent knew all about, from the day he became director.

The directors were not justified in giving Smith unlimited power to draw funds on depositaries without countersignature.

> "So numerous have been the defalcations and dishonest abstractions of money by employees of high grade, who had by years of right living and acting earned the confidence of their employers that it has become well-nigh a maxim with such institutions to, so to speak, trust nobody beyond what is necessary to the practical business of the bank * * * ."
>
> *Campbell* v. *Watson* (*supra*), (p. 409).

An exceedingly important asset of the Roseville Trust Company was its reserve fund in depositary banks. With the single exception of the cash itself, this was the institution's most liquid asset; the asset most easily convertible and negotiable. The person or persons recognized by the correspondent banks as being authorized to draw upon these funds could within half an hour effectively abstract or misapply the entire reserve of the trust company, aggregating normally upwards of $100,000. In fact, it might be said that these funds with correspondents were even *more* easily open to illicit handling than the cash itself, because the cash was physically in the custody and under the observation of several different persons, and the bookkeeping respecting the cash did not lend itself so readily to manipulation as did the several checking accounts.

The directors properly recognized that not even their president, a man of means and hitherto unblemished record, should be trusted with the sole custody of the institution's *securities*. They accordingly provided for their deposit in the vaults of another institution subject only to the joint access of at least *two* officers. And yet these se-

curities, comprising as they did mortgages, stocks and bonds, were not nearly as easy of conversion as the funds in the correspondent books.

Nor was it "necessary to the practical business of the bank" that all these funds should be subject to the check of a single officer. It was distinctly a neighborhood institution. All the officers and nearly all of the directors lived almost within hail of the trust company's office. Most of them had their business in the vicinity. The president dropped in nearly every morning, and often at other times of the day. Other officers were equally accessible. "The practical business of the bank" would certainly have not suffered if in addition to the signature of the treasurer, the countersignature of *one* of, say, three other readily available officers should be required. Certainly, if it were conceivable that the operations of the trust company would ever be interfered with by failure to get one of three different countersignatures, it could have been arranged that the treasurer should, in *one* checking account (to be replenished from the others when required), have the power of withdrawal upon his sole signature.

It cannot be seriously contended that there was any reason of necessity or even convenience for the treasurer to have this unlimited power with respect to *all* of the several depositaries.

Having culpably failed to provide for countersignature in drawing on correspondent banks, it was all the more incumbent upon the directors to provide a systematic and independent supervision of these accounts.

> " * * * it has become well-nigh a maxim * * * to subject the work of each one, from the highest to the lowest, to periodical investigation * * * . In all well conducted banks

> this matter of examining and reconciling the accounts with correspondent banks is usually done by the first bookkeeper, or other well advanced employe, *other than the man who keeps the account,* and is expected to be regularly and thoroughly done * * * . In all well managed banks this is done as far as practicable, and I feel compelled to say that I deem it bad management to intrust the checking up of accounts of the bank of deposit solely to the employe who draws and signs the check on that bank, * * * this could easily be done, as has been stated, by an examination of the monthly balance sheets and vouchers furnished by that bank and open to the inspection of the directors. Any concealment of either by the cashier would have led to suspicion and detection, quite as surely as the production of the balance sheets."
>
> *Campbell* v. *Watson,* 62 N. J. Eq. 396 (p. 409).

Respondent admits that except on the semi-annual occasions of committee examinations, there was not even a pretense of supervising Smith's handling of the depositary accounts (answers to interrogatories 206 to 210). Since as we shall point out later, these examinations always occurred near the middle of the month, they did not involve a checking up of the reconcilement statements as of the first of each month, which were sent in with the vouchers by the correspondent banks. *The sort of periodical and independent investigation which it was the directors' duty to make was wholly lacking.*

In the case at bar there was additional reason to provide an independent checking up of the accounts in the depositary banks in the fact that Smith himself kept the *general ledger* of the institution. This was the only book of the bank whose correct keeping would necessarily in-

volve a check upon the accounts with the corresponding banks. With Smith in charge of the general ledger, and having power to draw on the depositaries, there was hardly any limit to the frauds that were made possible to him. In fact, such a situation was practically an *invitation* to commit fraud and it is culpable negligence for directors to *invite* the commission of fraud even by employes of previous satisfactory record.

> "This lack of inspection must have struck him (the cashier) forcibly; for he came into the bank, as the proof shows, well recommended as an expert banking clerk from the Park Bank where he had served. It soon became evident to him that the directors had implicit confidence in him and were not disposed to overlook or inspect this part of his work. Here was a chance offered him to borrow money without security or danger of immediate detection, and he took advantage of it * * * ."

Campbell v. *Watson* (*supra*), (p. 419). See also *Lyons* v. *Corder,* 253 Mo., 539, 559, which is precisely in point.

Even the monthly reconcilement of these accounts by Smith's subordinate, Jennings, ceased in June, 1912 (p. 625), which it was each director's duty to know.

Nor was there any excuse for permitting the general ledger to be kept by the treasurer without independent or systematic supervision or check.

It is not customary to have the general ledger kept by the chief officer (p. 875).

The general ledger, as we have seen, is the controlling book of account. In it each day are sum-

marized and focused the results of all of the bank's transactions as gathered from the various books and records. It is by means of the general ledger that each of the books of account dovetails into all of the others. The man in charge of the general ledger has a comprehensive, bird's-eye view each day of the operations of the bank, and of the condition of the bank. If the general ledger is correctly kept it shows concisely not only the sum of the debits and credits in each general account, but the correct total of the bank's liabilities and the bank's assets at the close of each day—in other words, a daily trial balance.

It would be difficult, if not impossible, to conceal any large manipulations of other books of the trust company without prompt discovery by the clerk in charge of the general ledger.

Conversely, it would be relatively easy for an employe to manipulate one of the subordinate books and avoid immediate discovery if that employe was also in sole charge of the general ledger.

Smith, as will appear in greater detail hereafter, had not only unlimited power respecting the accounts with correspondent banks, but had almost unlimited power with respect to loaning the trust company's funds and borrowing in its behalf from other institutions. Whatever supervision there was in the two latter respects was supervision *after the fact,* where there was any at all. We are not now treating of Smith's power of management or control over the acts of other employes. We are pointing out the respects in which Smith had *personally exercised* power with respect to various operations of the trust company. We shall not attempt to enumerate them all, but his sole handling of the so-called "treasurer's check" account, and his very frequent "relieving" or "spelling" of the receiving teller, paying teller and other clerks in their several operations should be mentioned.

Whether or not it was proper for any one man to exercise such powers *personally* is a matter which we discuss elsewhere. Certainly, common sense dictates that the man who exercises such powers should not also have the exclusive keeping and supervision of the general ledger.

POINT V.

Respondent was actionably negligent in not verifying the "items in transit" on the examination date.

While the reconcilement of the accounts of the Trust Company with its correspondent banks was not one of the aspects of the examination of April 11, 1912, whose details were particularly assigned to the respondent Dunn, yet he testified that he and the other members of the committee all participated in this work to the extent of inspecting the letters from the several correspondent banks verifying the balances shown on their books as of the examination date, April 11th, 1912 (p. 425).

Respondent admits that no effort was made to verify Smith's unsupported entries setting forth alleged "items in transit," which formed a necessary part of the work of reconcilement, and which of course were in no way verified by the correspondents' reported balances as of the examination date itself.

This identical delinquency on the part of bank directors has already been the subject of adjudication in this State and elsewhere, as we shall point out at a later page.

If respondent and the other members of the examining committee, in connection with the examination as of April 11, 1912, had performed

their plain duty with respect to the verification of the reported items-in-transit, it would have discovered manipulations by Smith in connection with the accounts of both the Irving National Bank of New York and the Union National Bank. The huge subsequent stealings would have been avoided.

"Items in transit", as the phrase has been used in connection with the committee examinations, describes two different kinds of transactions, viz.:

1. Checks or drafts on the correspondent bank which had been drawn so recently before the examination that they had not yet been presented to the correspondent bank for payment and hence had not been deducted from the balance, as of the examination date, reported by the correspondent bank. Where such checks and drafts were correctly and promptly entered on the stub-book and other books of the Roseville Trust Company, the transactions were legitimate, and reduced to that extent the balance shown on the books of the Roseville Trust Company. But where such checks or drafts were not entered at all (or entered at a smaller figure) in the stub book or other books of the Roseville Trust Company, the transactions were fraudulent and were employed as an attempted method of concealing defalcations, as in *Campbell* v. *Watson* (*supra*), as in *Lyons* v. *Corder*, 253 Mo., 539, and as on the occasions of the committee examinations in the case at bar. These fraudulent transactions would have been discovered if the committee had ascertained from the correspondent bank what checks and drafts had been paid during the two or three days following the examination date.

2. The other type of "items in transit" were deposits which the Roseville Trust Company's books on the examination date showed to have been sent to the correspondent bank so recently

before the committee examination that they could not have reached the correspondent bank on the examination date and hence could not have been added to the balance, as of such date, reported by the correspondent bank. Where these deposits had actually been sent (as entered) the transactions were legitimate. But where these alleged deposits were either wholly non-existent, or were entered at larger figures than the actual figures, they were fraudulent and comprised a means which Smith employed in the attempt to conceal his defalcations (as was brought out by the Court itself at page 9 of the record). The true amounts (or total non-existence) of these fraudulent "deposit items in transit" would have been revealed if the examining committee had ascertained from the correspondent bank what deposits had actually been received by it during the two or three days succeeding the examination date.

Campbell v. *Watson* (*supra*) is authority for the rule that the amount of the important assets of balances in correspondent banks must be ascertained from the *original sources*. Vice-Chancellor Pitney said (p. 416):

> "To rely upon the books alone for that purpose is simply absurd. * * * The amount due from other banks must be ascertained * * * *ab extra* the books of the insolvent bank, and this could easily be done, as has been stated, by an examination of the monthly balance sheets and vouchers furnished by that bank (correspondent bank) and open to the inspection of the directors."

If there was any purpose at all in the attempted reconcilement by the examining committee of the accounts with the correspondence banks, its purpose was to make sure that the balances as entered by Smith in the general ledger were the balances

that in actual fact did exist. In other words, its purpose was to detect any manipulations of these accounts by the man who had the sole authority to draw upon them (if such manipulations existed).

But the examining committee *relied upon Smith's own statement* (without any verification from the original sources) as to the existence and amount of both varieties of the so-called "items-in-transit", which for convenient reference we may perhaps distinguish as "*draft* items in transit" and "*deposit* items in transit". As Chairman Sexton himself stated, referring to the apparent showing of "items in transit" from Smith's self-serving entries in the books (p. 1282): "*We had no cause for doubting its truth*".

So much for the essential vice of the committee's method of attempted reconcilement—or, rather, lack of method. Let us now analyze in detail what their method consisted of.

In the case at bar the directors did not examine the monthly reconcilement sheets or the vouchers. Since they selected for their several examinations, days other than the first of the month, and since reconcilement sheets and vouchers were regularly returned by the correspondent banks only on the first of each month, a reconcilement by means of a checking up of reconcilement sheets and vouchers as prescribed in *Campbell* v. *Watson* would have involved either of two operations, viz.: (1) a checking up of the reconcilement sheets and vouchers furnished by each correspondent bank at the first of the month, plus a verification of the checks and deposits since that date, or (2) procuring from each correspondent bank a *special* reconcilement sheet and vouchers as of the day of the examination, and a checking thereof by the directors. (In either case the result of course would be compared with the alleged balances as shown in

the general ledger). *The directors performed neither of these operations.* They neither procured special reconcilement sheets and vouchers as of the examination day, nor did they check up the last preceding sheets and vouchers and the intermediate operations. *They did not inspect any vouchers or reconcilement sheets at all.*

The investigation of these balances by the examining committee was so meagre as hardly to warrant the word "investigation". It consisted, at the best, of ascertaining from each correspondent bank the amount shown on its books as the balance on the examination day, and a comparison of this balance with the alleged balance shown on the general ledger, making allowance for deposits *alleged* to be on their way to the correspondent banks on the examination day (and hence not included in the correspondent's figure), and deducting only those checks *admitted* to have been drawn against the depositary up to the day of the examination (and not on that day as yet paid by the depositary bank).

The obvious vice of this so-called "reconcilement" is that checks may have been (and in fact were) drawn against the correspondent bank just before the examination date, and not entered at all on the Roseville Trust Company's books. Moreover, alleged deposits, reported to be "in transit" on the day of the examination may have been (and in fact were) wholly non-existent. Obviously this method of reconcilement would have no value whatsoever unless either the treasurer were, *by hypothesis,* honest, (dispensing with an important reason for the reconcilement), or unless the inquiry of the correspondent bank should *also* call for the amount of deposits received for a day or so after the examination date, and the amount of checks paid by the correspondent bank for a day or so af-

ter the examination date. *The defendants admit that this further inquiry was never made.* (It should be noted that it was not really necessary to make *two* separate inquiries. The additional information might have been asked for in the original letter. All that was actually asked for was the one figure representing the balance shown on the books of the correspondent bank on the examination day).

Mr. Sexton, who acted as chairman of the examining committee on the occasion of each and every examination, testified as follows (p. 1282):

> "Q. Then when you found on the books of the Roseville Trust Company a reported deposit made on the day of the examination with the Irving Bank which had not reached there when they closed their books as of the date of your examination you simply accepted that as proof that such deposits had been sent since it reconciled with your figures; is that correct? A. That is correct, *we had no cause for doubting its truth.*
>
> "Q. And so far as you know none of the other members of the committee made any such inquiry either, did they? A. Correct.
>
> "Q. And you would have known of it in all probability if they had, as the chairman? A. Yes."

It happens that this inadequate method of reconcilement was actually discussed by Vice-Chancellor Pitney in the case of *Campbell* v. *Watson.* The following is taken from the opinion (italics ours) (p. 414):

> "Mr. Van Camp, an examiner of the state banking department, made an examination of the insolvent bank in 1895, at which time the thefts were as yet comparatively small, which examination included, and the only one which did include, an *attempt* to verify the Park Bank balance. He proceeded in the way I

have indicated, by taking the balance from the insolvent bank and attempting by correspondence with the Park Bank to verify it, and did not discover any serious discrepancy; but he swears that the balance in the Park Bank must have been, in some way, manipulated by Valentine for the occasion. *He did not have or make use of copies of the items of the two accounts,* such as were, as we have seen, in the possession of the officers of the insolvent bank; and he swears that a *simple comparison of the items of the two accounts would undoubtedly have disclosed the thefts.* A careful examination of his evidence fails to satisfy me that, in the examination made after the peculations commenced, he made proper allowance in his work for the amount of drafts drawn by the insolvent bank not yet presented to the Park Bank. I am unable, therefore, to perceive anything diifficult in the task of comparing these accounts."

Vice-Chancellor Pitney characterizes the foregoing as "*the cursory and imperfect examination made by the banking department.*" Concerning this "cursory and imperfect examination" Vice-Chancellor Pitney said (p. 413):

"The case is quite different where the examination is undertaken by an officer of either the state or the national banking department. These gentlemen do not have the time, and do not attempt, and are not expected to attempt to compare the bank accounts of the bank under examination, item by item, in the mode above pointed out. All that they usually do, or all that they would do in the case in hand, in the absence of suspicion, would be to take a memorandum of the balance on a particular day on the books of the insolvent bank against the Park Bank, with a memorandum of the recent drafts drawn on the Park Bank and credited to it, and the items recently charged against the Park Bank, which they designate as items in transitu; then open a correspon-

> dence with the Park Bank, get its balance on the same day, and then add and subtract to and from that balance the proper items in transit, in order to get the true balance. If the result is an approximate agreement they are satisfied."

That is precisely the sort of "cursory and imperfect examination" that the examining committee made; that and nothing more.

But when the examining committee elected to proceed with their attempted reconcilement without having before them the reconcilement sheet of each correspondent bank and the vouchers themselves, they should certainly not have *taken for granted* the existence of the deposit items which according to *Smith's entries* were "in transit"; nor should they have *taken it for granted* that no other checks had recently been drawn upon the correspondent banks except those of which Smith had made entries.

Vice-Chancellor Pitney said in the *Campbell* case (p. 417):

> "For I hold that if for any reason no balance sheets had been produced to the examining committee it would have been their duty to call on the Park Bank for the same, and, if need be, make an examination of the books of that bank on their own account."

It should be here noted that Vice-Chancellor Pitney did not say that it would be enough merely to ascertain from the correspondent bank the *balance* shown on its books on the examination date. If the full reconcilement sheets *and vouchers* were not to be examined, it might even be necessary to examine the books of the correspondent bank. Obviously, the purpose of this measure would be to avoid thefts accomplished by means of checks recently drawn and not entered (as occurred in both

the *Campbell* case and in the case at bar) and to avoid the thefts concealed by claiming credit for deposit items "in transit" which were actually non-existent.

We have referred to instances only as of the dates of a committee examination. Innumerable other instances of this fraudulent practice occurred on other dates, and there is good authority for the contention that the directors were in duty bound to examine *each month* all the accounts on which Smith drew checks or drafts.

The case of *Lyons* v. *Corder*, 253 Mo. 539, cited above, is precisely in point. This case was recently decided by the highest court of Missouri, and the opinion quotes extensively from Vice-Chancellor Pitney's language in *Campbell* v. *Watson* (*supra*) respecting the directors' duty to examine reconcilement sheets and vouchers in order to ascertain the true balances on deposit with correspondent banks. The Lyons case is remarkably in point with the case at bar in that:

(1) One of the means by which he accomplished his embezzlements was drawing checks or drafts on correspondent banks whose amounts do not correspond with the stubs.

(2) These frauds could have immediately been discovered by an examination of the reconcilement sheets and vouchers.

(3) The directors were held liable for their failure to examine such sheets and vouchers.

The Court said (p. 559):

> "Applying the foregoing rules of law and statutory provision to the defendants under the facts shown by this record, it appears that during the time the defendant directors held their offices, the cashier of the Middleton

Bank, E. H. Lewis, was engaged in gambling deals with keepers of certain bucket-shops; that to get money for this purpose, he had appropriated the funds of the Middleton Bank by over-drafts of his personal account, amounting to over $6,000, and also by making fraudulent drafts upon two of its depositories —a bank in St. Louis and a bank in Kansas City; that in so doing it was his habit to note on the bank register book of the Middleton Bank, that a draft had been drawn upon one of these correspondents for a trifling or insignificant sum, and thereafter to fill out the draft for a sum in many cases involving thousands of dollars; that upon the payment of such drafts, the cashier would appropriate to himself the excess of the amount paid on such drafts over and above the amount which he falsely recorded on the books of the Middleton Bank. His misappropriation in this manner added to the amount of his overdrafts exceeded the amount for which the plaintiff obtained judgment in this case. The aggregate amount of his embezzlement by both methods is undisputed. The whole extent and nature of the wrongdoing of the cashier might have been discovered by the defendant directors if they had examined at their monthly meetings the state of his personal account and had also caused to be submitted to them or to a committee appointed by them, the monthly return statements, called 'reconcilement sheets', made to the Middleton Bank by its two correspondent banks in St. Louis and Kansas City, which showed the amount which such depositories had paid out during each month upon the drafts drawn upon them by the cashier of the Middleton Bank. It is conceded that no such examination was had or caused to be made by the defendant directors."

Mr. Cloran describes (p. 965) an instance of such fraudulent "*draft* items in transit" existing on the occasion of the April 11th, 1912, examina-

tion. Here Smith drew a check for $1000.69 on April 9th upon the Irving National Bank. This check was not entered on the books of the Roseville Trust Company until April 22nd, 1912, and hence had not been entered on April 11th, the date of the examination. It had not yet been presented for payment on April 11th, and hence had not been deducted from the balance as of that date, reported by the Irving National Bank. The Irving National Bank balance, as found by the committee on April 11th, 1912, was hence larger than the true balance, which they could have learned by ascertaining from the Irving National Bank what checks were paid during two or three days after the date of the examination. Curiously enough there existed on that date a false item *in favor* of the Irving National Bank, which the committee would also have discovered if it had performed its duty. This was a check for $403.60 which *appeared* to have been drawn on the Irving National Bank on March 29th, 1912, but which actually was not drawn until two months afterwards, on May 25th, 1912. On this same date there were similar discrepancies in the account of the Union National Bank (p. 966).

We believe that in saying (p. 214) that these discrepancies "might have been susceptible of explanation on grounds consistent with honesty", Vice-Chancellor Stevens misapprehended the evidence. If, for example, Smith's failure to enter the April 9th check until after the examination had been due to an honest mistake, it would have thrown the books *out of balance,* and disclosed its own existence.

Smith did the same thing with a Union National Bank check on the same occasion (p. 966).

Even if, conceivably, these irregularities could have been plausibly explained by Smith, an inves-

tigation would have been necessary which would have disclosed his other frauds. This species of fraud was fully inquired into by Vice-Chancellor Stevens himself when Raymond E. Smith was on the stand (p. 839 *et seq.*):

"Q. * * * Did it frequently occur that the general ledger showed balances in depository banks which were greater than the balances as they actually existed? A. Yes, sir.

"Q. Will you tell us what was your method in accomplishing that result, how you went about it? A. The method used was at the end of each month, or at the time of an examination, items in transit, that is, deposits sent from the Roseville Trust Company to other banks were of a fictitious amount, that is to say, the amounts were raised.

"Q. By that you mean that the items——

"THE COURT: Raised where? I do not understand.

"A. On the books of the Roseville Trust Company.

"Q. (By the Court.) If you sent, for instance, to the Union National Bank $1,000 you would put it on the books as $2,000? A. Yes, sir.

"Q. (By the Court.) That is what you mean? A. That is it, yes, sir.

"Q. Would or would not that discrepancy have appeared upon calling later for a statement of the vouchers which were then in transit?

"(Argument of counsel.)

"A. It would if it were done that way.

"Q. (By the Court.) Tell us how it was done. A. The deposits in the Union Bank were made by messenger oftentimes, and other deposits were made by mail at the close of business each day and would arrive in the Union National Bank and appear on their books the following day.

"Q. (By the Court.) How would it be possible to deceive anyone who made an examina-

tion if he made that examination two or three days after he had looked at your books? That is what I do not understand. A. Why, your Honor, if an examiner should come to the bank, or if the bank should be examined by a committee—today is the nineteenth, isn't it?

"Q. (By the Court.) Yes. A. The examiner would write out to the different banks for a statement showing the balance to the credit of the Roseville Trust Company in various institutions that they were doing business with; that statement would came back in the course of a few days from these banks, showing the business that had been transacted with that bank up to and including that date, and showing the balance as well. In order to prove the balance on the ledger of the Roseville Trust Company it is necessary to take the balance as shown in the Union National Bank, for instance, and add to that balance all items in transit, either from the Roseville Trust Company to the Union National Bank or from the Union National Bank to the Roseville Trust Company. Items in transit from the Roseville Trust Company to the Union National Bank would not appear on that statement but would appear in the proof of the balance on the book that we kept the account of the reconciliation of those bank accounts in, and unless there was a statement given or asked for from these corresponding banks showing the letters in transit had been received, which would be a day or two later than the balance as shown in their statement, there would be no check on items in transit.

"Q. (By the Court.) Well, then, what you would do would be to create a fictitious transit; you would say that you were going to make a deposit but you would never in fact make it, is that it? A. Except that it appeared so on the books of the Roseville Trust Company.

"Q. (By the Court.) You would put it on your books as a complete transaction so far as you were concerned? A. Yes, sir.

"Q. (By the Court.) But in point of fact if the thing to be deposited was a check you would not send the check? A. No, sir.

"Q. And if a second inquiry had been made of the depository bank and the depository bank had correctly reported what, if any, items were actually in transit at the time of the first statement the discrepancy would have been discovered, would it not? A. Yes, sir.

"Q. Did the examining committee at any time make such second inquiry of depository banks?

"(Argument of counsel.)

"Q. (Question read.)

"A. Not to my knowledge."

Mr. Cloran summed up the matter as follows (p. 1020, l. 41):

"The errors in the accounts with depositary banks could have been discovered by the process of getting a statement from the depositary banks and two or three days later finding out whether items, shown on the Roseville Trust Company's books to have been in-transit, had actually been received by the depositary bank. Such an examination would have disclosed to the committee that the accounts would not reconcile. My examination satisfies me that the methods pursued by Mr. Smith in his manipulations were such that at none of the three examinations referred to in the evidence would the bank accounts have been found to reconcile. Any ordinary business man, by following the methods necessary to check up and balance the usual individual or business checking account in any bank or trust company would have found that the accounts in these depositary banks would not reconcile or prove. The figures given by the depositary bank would not agree with the figures found in the Roseville books.

"My examination shows me that in all cases where figures have been changed on examination dates a false condition existed at the time

of the examinations which would have been apparent to any ordinary business man making a reasonably careful examination."

The chairman, Sexton, of the examining committee, testified as follows (p. 1288):

"Q. (By Mr. Fairlie.) In respect to checking up the accounts of the correspondent banks at the time the committee met again after the reports had been received from the correspondent banks, did you make it known to the members of the respective committees of which you were chairman and each of the members, the plan by which you were checking up those corresponding banks? A. Yes.

"Q. (By Mr. Fairlie.) Did they offer any criticism or suggestion which you did not follow? A. No."

The duty of examination was entrusted to the examining committee, and not to any particular member thereof. Division of the *work* was of course proper, but each member was under a duty to know how the examination was being conducted. How far the committeemen failed in this duty appears from their testimony. The defendant Benjamin testified as follows (pp. 352, 353):

"Q. Did your committee reconcile the bank accounts in depositary banks on the occasion of that examination?

"(Argument by counsel.)

"A. That matter was left in the hands of the chairman of the committee and he took charge of it.

"Q. You do not know whether the committee reconciled the bank accounts or not, do you? A. Personally, no.

"Q. You never did know, did you? A. No."

The respondent Dunn testified as follows (p. 427):

"Q. You saw those figures in the Trust Company's books did I understand you to tell Judge Collins? A. Oh, no, sir, I saw a memorandum of figures taken from the Trust Company's books, giving the banks.

"Q. How did you know they were taken from the Trust Company's books? A. Well, that is what I *assumed* they were.

"Q. You had assumed that? A. Yes, sir.

"Q. Now do you recall whether or not the reply from the depositary banks stated anything else than the fact that they had on deposit on April 11th so much money to the credit of the institution? A. No, sir, I do not so recall.

"Q. Would you say there was anything else in those replies but that? A. I do not recall."

That the committeemen were fully aware how meager and inadequate was the information which their chairman procured from the correspondent banks is indicated by Mr. Banister's testimony at page 539, as follows:

"I think on nearly every occasion Mr. Sexton showed the letters from the corresponding banks to the other members of the committee who were present at the time, but they couldn't all be there on each occasion."

Supporting the unqualified statement of Chairman Sexton that the examining committee did not verify from the original sources Smith's statements as to the existence and amount of items in transit, are the answers of the defendants to the 209th interrogatory:

"209. Was it at any period of the Roseville Trust Company's existence a matter of regular practice or routine for the board of directors to examine or cause to be examined (independently of Raymond E. Smith) vouchers returned from depositary banks and the

> stubs of such vouchers, and to obtain statements from said depositary banks of the amount of the Roseville Trust Company's balance on deposit, *and to obtain subsequent information with respect to items which were in transit between the Roseville Trust Company and its depositary banks at the time of said statements by depositary banks, or to do any of those things?"*

The answer of respondent Dunn, who took part in the examination of April 11th, 1912, was:

> "I do not know, I was director for only the last nineteen months of the bank's existence."

Yet the three examinations complained of all occurred during the last nineteen months, and the respondent Dunn served on one of these examining committees, that in April, 1912, and was a member of (although he did not participate) the examining committee for the December examination.

None of the other directors could say that they had ever heard that any such verification of items in transit had been made. They left it to the examining committee not only to execute the details of their task, but also to determine the method and scope of that all important function.

The question was not as to reconciling the items in transit, but as to verifying from the correspondent banks themselves their existence and amounts as reported by Raymond E. Smith. It, of course, furnished no element of assurance or safety to the Roseville Trust Company merely to perform the arithmetical operations necessary to reconcile the balance shown on the general ledger with the *balance* reported by the correspondent bank, by the appropriate additions and subtractions of supposed items in transit *as shown by Smith by his self-serving entries.*

POINT VI.

Respondent was negligent in not inspecting the cash book.

While the general ledger summarizes the operations of each banking day, and classifies them according to the several general accounts of the institution, it is not a book of original entry (except as to the balances with correspondent banks). The cash book, on the other hand, is a book of original entry which describes at first-hand all the day's transactions, though not classified as in the general ledger. In order to test the accuracy of the debits and credits to the general ledger as of the examination date, the committee would have had to consult the cash book. Since the general ledger shows the total operations of each day and the balances as of the *close of the day,* the entries could not be made until the end of the day's business. It was shown that the examining committee were wont to arrive in the afternoon, often before the close of banking hours, and always before the general ledger had been written up. The cash was immediately counted and the work of verification started. Since the entries in the cash book were made from time to time during the day as fast as the transactions occurred, it therefore could not be "doctored" to suit the exigencies of an examination, as could the general ledger, which was written up after the arrival of the committee.

The general ledger on April 11, 1912, differed from the cash book to the extent of $50,000 in the very account of "bills purchased" to which respondent was giving his especial attention (pp. 781 and 1035).

But respondent did not consult the cash book—though he is familiar with cash books in his own business (p. 423).

POINT VII.

The directors, including respondent, were negligent in not discovering and preventing the felonious payment in large amounts of uncharged checks of Smith's favored depositors.

While respondent was a director exceedingly large sums were loaned to such irresponsible adventurers as Armstrong, Scarlett and others by Raymond E. Smith, by permitting them to overdraw their accounts, (see for example Exhibits 594 and 595). There was a crude attempt at concealment by false charges or extensions (but sufficient to deceive only the most casual and superficial observer). The amounts of these uncharged checks in the aggregate were so large as to have a decidedly appreciable effect upon the trust company's condition as a whole. They were frequent, continuous, and of long duration, having started as early as 1911 in considerable volume. *Yet respondent pleads ignorance.*

The hollowness of such a defense is perhaps best shown by quoting from Chief Justice Beasley's opinion in the Court of Errors & Appeals in *Williams* v. *McKay,* 40 N. J. Eq., 189, at page :

> "These illegal loans run through a long period of years, and represent large sums of money, and it is perfectly obvious that it was the settled practice, in this business, to make them in this form, and it is consequently, an inference absolutely necessary, from

the facts, as presented, that the managers, as a body, knew of such practice. If during the long continuance of this practice, these officers never discovered its existence or knew that their president, from time to time, drew out of the bank, on his own checks and notes, these large sums of money, it seems to me that, prima facie, such want of knowledge would be, of itself, and until explained, very clear proof of gross negligence on their part. It does not seem to me that it was possible that these officials, if they faithfully discharged the functions of their office, could have failed to become acquainted with these transactions * * * ".

separate cases

"But were the directors guilty of any wrong-doing in not preventing the disbursing officers from honoring unauthorized checks? They had no actual knowledge of the negligent acts and their fault, if it exists at all, must consist in not preventing the continuance of acts, the existence of which they should have known had they properly discharged their duty. The board of directors of a banking corporation is the executive body thereof, and as such is vested with all of the powers required to be exercised in the management of its concern. It selects the active officers, and should supervise and control them in the discharge of their several duties. It should dictate the policy of the business and the course of dealing to be followed with the public whose money the institution receives and uses for profit and should know how funds entrusted to the corporation by stockholders and depositors are being handled by the officers, and keep the officers within the bounds of law and reasonably sound business policy. The idea seemingly so prevalent that directors may content themselves with the performance of no other functions than electing officers and declaring dividends, cannot be tolerated. Whether they are to be regarded as trustees of an express trust or as agents of the corporation and its constituent parts, their duty

> requires them to perform with reasonable care and diligence the functions pertaining to the general supervision and control of the business, and they cannot relieve themselves of this duty by delegating its performance to the bank officers. If the bank suffers loss through the misconduct of officers in matter which the directors should have known and controlled, the directors may be held liable regardless of their want of actual knowledge, for they will be presumed to know the things they should have known."
>
> *Daugherty* v. *Poundstone,* 120 Mo. App., 300, 307; 96 S. W., 728.

It will be remembered that after these checks had been paid, they were "held in the cash" until they had accumulated into a large aggregate, and then from time to time removed and their absence accounted for by a false charge to some other account. The presence in the cash of a large amount of these checks was itself highly irregular and a most suspicious circumstance to one learning of it. Yet the practice was continuous during the last two and a half years of the trust company's existence. The condition existed at all times except when, on examination dates or other infrequent occasions, the treasurer caused these worthless sheets of paper to be taken out, accounted for by false charges and physically deposited in "Box 55." For the details as to these "cash items," after they began to accumulate "in exceedingly heavy amounts," see the testimony of Cloran at pp. 951 *et seq.;* also statement 6 (Ex. C-1464) and statement 8 (Ex. C-1463).

While Smith was cautious enough to clear out these "cash items" on examination dates, he took no such pains on the dates when dividends were declared, or on the dates as of which reports were made to the banking department. In fact the in-

creasing boldness of Smith's operations is a most pointed commentary on the directors' lack of suspicion, as he saw it.

The directors were under a special duty to ascertain the bank's condition at the time of declaring a dividend. It is the director's duty to *know* the actual condition of the bank before declaring a dividend. But the breach of such duty may have more far-reaching consequences than merely to hold the directors liable for the amount of the dividend itself. It may happen, as it has happened in the case at bar, that if a proper investigation had been made on the occasion of declaring dividends, frauds would have been discovered with the result of preventing still further frauds. It is obvious on general principles that the measure of liability for such breach of duty is not merely the amount of dividends improperly declared, but the entire subsequent loss which would have been prevented by performance of the duty. On each of the dividend dates after the commencement of these frauds, the directors would have found a large sum of "cash items" in the cash, and would have found manipulations of the deposits. The directors declared dividends on March 13, 1912, for example, among other dates; and on that date the proof-books showed the presence of cash items in large amounts (Cloran, p. 960). On December 11, 1912, to take another instance when a dividend was declared, the "cash items," as shown by the paying teller's proof book, aggregated $2,462.47. On March 12th, 1913, when the directors declared another dividend, the "cash items" aggregated $3,218.09. On June 10th, 1913, a date when another dividend was declared by the directors, there was in the cash the enormous aggregate of $21,452.45 of these utterly worthless pieces of

paper, the mere presence of which would have disclosed the frauds—for not one of these checks would have been found charged to the appropriate account, though all had been paid. And, as we shall see, these same evidences existed on the dates of the several reports to the banking department, when also it was the directors' duty to see that the *actual* condition of the trust company was reported.

POINT VIII.

Respondent, as a director, being responsible for the false reports filed and published, is liable for losses proximately resulting therefrom.

Section 16 of the Trust Company Law requires the filing, twice each year, with the Commission of a verified report of condition showing in detail the resources and liabilities. This report is required to be published in the nearest local newspaper.

This statute is not peculiar to New Jersey. It is similar in its essentials to the federal statute governing national banks and is similar to statutes of many other states.

Those defendants whose signatures were affixed to the reports which were filed pursuant to the above-quoted statute repeatedly admitted that they made no independent investigation of the facts and figures contained therein, but relied entirely on the statements of the treasurer.

Mr. Odell stated that he did not verify the correctness of the information and had no means of knowing whether or not the report was correct, having full confidence in Smith's word.

The defendant Mott, before signing his name, merely asked Smith "if this was all right," and then signed his name, making no other investigation as to the correctness of the report.

The defendant Lurich did not even examine the statements set forth in the reports, and claims not even to have noticed the words "correct—attest." Though he signed similar reports at more or less frequent intervals for several years, he never looked at a single book for the purpose of verifying any of the information contained therein. So far as the contents were concerned, he "relied upon the high character and reputation of Mr. Odell" (answer to 257th interrogatory).

The defendant Foster said, respecting the reports that he signed, that he "inquired of Mr. Smith if the items and amounts had been gone over carefully, to be sure they were correct, as I was signing it on his assurance that the figures were correct" (answers to 257th and 259th interrogatories).

McDonald v. *Fremery,* 168 Cal., 189, dealt with such a statutory report.

Certain "loans and discounts" were carried in the report at book value instead of at their real value, which the directors should have known were greatly depreciated. The directors were held liable to plaintiff who had acted in reliance upon such report, and the Court said:

> "The reliance which plaintiff was entitled to place upon this report then was a reliance that the report was a true statement of the bank's financial condition and, not, as the court found, a mere transcript of the condition of the bank as shown by the bank's books."

The following is taken from *Thomas* v. *Taylor* 224 U. S., 73 (*supra*):

(p. 80)

> "'The defendants (plaintiffs in error here) are directors of the Citizens' National bank organized under the national bank law and doing business in the village of Saratoga Springs, N. Y. Prior to March 1, 1904, the Comptroller of the Currency informed the directors of the bank by letter that certain specific assets, amounting to $194,107.02, must be regarded as doubtful, and that immediate steps should be taken for their collection or removal from the bank. Of such letter the defendants had knowledge. On April 8, 1904, pursuant to a call from the Comptroller, a report of the condition of the bank at the close of business on March 28, 1904, made in regular form, verified by the cashier of the bank, and attested to be correct by each of the defendants, was published as required by law. In such report were included as a part of the resources of the bank the doubtful assets to which the attention of the defendants had been called by the comptroller. The report also stated that the capital stock of the bank was $100,000; that there was a surplus of $50,000 and that there were undivided profits of $13,456.75. * * *'

(p. 82)

> "There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the Comptroller of the Currency that $194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This 'was a direct warning to them,' as the trial court said, 'by the bank examiner and Comptorller that assets to nearly twice the amount of the capital stock

were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

Vice-Chancellor Pitney in the *Campbell* case said, in connection with the making and filing of these reports:

> "And just here is felt the force of the provision of the charter requiring the publication in the newspapers of quarterly statements showing the actual condition of the bank. *I hold that the words 'actual condition' mean something more than the condition shown by the books of the bank.* In my judgment, they mean that the statement shall show what actually exists in the way of assets, and that those assets bear, approximately at least, the value at which they are stated in the statement. Those statements are made and published for the benefit of the public, so that the dealers with the bank the depositors as well as bill holders, if any there be of the latter, may know what is the actual condition of the institution with which they are dealing; and it is the duty of the directors to use reasonable means of knowing that the statements so published are reasonably accurate and reliable."

Under the authorities there can be no question that directors are liable for the consequences of the publication of reports which ignore the impairment of assets due to Smith's embezzlements, in so far as they would have known of such embezzlements if they had *diligently* administered its affairs.

In the case at bar not only did the directors fail to make any first-hand investigation of the physical assets and liabilities of the bank, before attesting the reports to the banking department, as they are required to do by unanimous authority, but they failed even to make a comparison between the ready-made figures handed them by Smith, and the trial balance as shown in the general ledger. In numerous instances the report did not even agree with the general ledger, to say nothing of the actual facts, and if the directors had taken even the superficial precaution of consulting the general ledger or cash-book they would have detected the falsity of Smith's proffered statement and learned enough to make inevitable their exposure of his embezzlements and manipulations, so as to prevent further loss to the institution.

For example, on the report as of June 4th, 1913, attested by the defendants Lurich and Foster, the cash as shown on the general ledger is $35,652.31, while the cash as shown on the report is $51,-934.36. There is no indication that either figure has been changed. If the paying teller's proof-book had been consulted it would have been learned that $18,527.94 of this supposed "cash" was not *cash* at all but worthless "cash items" (checks fraudulently paid and not charged) (See Exhibit C, 1464).

On the same date the report shows deposits of approximately $100,000 less than the true aggregate of deposits in the individual ledgers (p. 900). Even these were of course understated, in that many deposits entered correctly in pass books were omitted or incorrectly entered in the individual ledgers.

On the same date the report indicates a liability for outstanding treasurer's checks of $274.-

83. If anyone had even taken the trouble to look at the general ledger on that date (to say nothing of the cash book and treasurer's check book) he would have found entered there a *debit* balance of $1725.17, an *asset,* obviously an impossible condition.

The prepared statements 10, 11 and 12 show that several of the earlier reports were also false, and to what extent.

The charge against the directors respecting the published reports, while Dunn was a director, includes the following:

1. Differences between the figures in the report and in the general ledger.

2. It was absolutely necessary to consult the teller's proof-book, in order to verify the cash (as of a past date) and such inspection would have revealed not only discrepancies in the reports, but also the existence of the fraudulent "cash items."

3. Included in the amount of "bills purchased" as set forth in the reports, were numerous loans which the directors actually knew had been criticised by the banking department.

4. During the last year the official reports (which were published, and hence known to all the directors) *understated* the trust company's deposits to an extent of from $100,000 to $200,000.

The director's negligence in failing to verify the correctness of the reports prepared by Smith resulted proximately in loss to the trust company, its stockholders and depositors.

While this is not an action in fraud by or in behalf of any stockholders who purchased stock

in reliance upon such false statements or by or in behalf of any depositors who entrusted their money to the institution in reliance thereon, the negligence of the directors with respect to these reports has a significance and importance beyond being a mere indication or evidence of a general negligent, indifferent disposition.

The statute and the well-recognized rules of law placed upon the directors a definite duty with respect to these statements. If they had performed this duty they would unavoidably have uncovered the embezzlements and frauds of the treasurer and would unavoidably have saved the institution from further losses. The measure of the loss directly resulting from their negligence with respect to any given report is the amount of new losses accruing after the date thereof.

Liability for the false reports falls upon all the directors, not merely those who attested the reports.

The statute requires these reports to be published, and they were published. All the directors must be presumed to have known in what way these reports were prepared. If they did not know, it was their duty to know. When each of these reports was published every director impliedly attested to its correctness, whether or not his name actually appeared as attesting it. In this way the directors held out to the department, to the depositors and to the public, that the assets and liabilities of the institution were thus and so. All the directors, including respondent, participated in the failure to supervise the treasurer. They all participated in accepting without question or verification his reports of the operation and condition of the trust company. They all

participated in entrusting to the treasurer a degree of personally-exercised power and control which would have been culpable negligence if his record had been spotless and was a wanton breach of duty in view of his proved record. All of the directors, including respondent, must then be answerable for relying upon the treasurer's figures as the basis of their formal reports and for permitting them to be relied upon for that purpose.

In the case of *Chesebrough* v. *Woodward,* 195 Fed., 881 (approved 221 Fed., 912; affirmed 244 U. S., 72), certain reports made by a national bank to the comptroller of the currency included at face value "loans and discounts" which were worthless and should have been charged off. The report of course was "attested" by only three of the directors, yet *all* were held liable to the plaintiff, who had relied upon the report, to his damage. The Court said:

> "(4) 7. In such a case as this, the making of the report, its attesting by the directors, and its publication do not constitute the underlying wrong. They make only the means of representation to plaintiff—the medium of necessary casual relation between wrong and damage. Under what is said to be the universal practice of national banks in making such reports, and under what the undisputed testimony shows to have been the regular practice in this bank, the making and publishing of the reports were the automatic results of the bookkeeping. Whatever the books and the daily statements showed the resources to be appeared as resources on the report. If a line of paper was carried at its face amoung the 'loans and discounts' on the books, it would normally appear at that same amount in every one of the five reports in each year. Both defendants knew this. It follows that it is not important whether each did or did not attest each report (except so

far as plaintiff's conclusion to buy might rest on the presence of a particular name at the foot of the report plaintiff saw). All directors who participate in and approve a long-continued carrying on the books, among the loans and discounts, of a line which they know is worthless, and in amount sufficient materially to affect the standing of the bank, are bound to know that under the practice prevailing in this bank such worthless paper will become an element of the published reports, and that these reports will in so far falsely represent to the public the bank's condition; and so, in a fair sense, such director permits the making of a report which is a violation of the act. Hence his primary duty here involved, and a breach of which causes a violation of the statute, is the duty to charge off assets which have become worthless.

"(5) 8. This duty to charge off is, it is true, that of the board as an entity; but, as above stated, when the duty is wholly unperformed by the board, an individual director who was engaged generally in the performance of his functions may, nevertheless, be individually liable because of his participation in the failure to act."

As we show elsewhere in this brief, the reports in the case at bar include at face value numerous loans which were, and were known to the directors to have been, worthless or greatly depreciated; so that to this extent the above cited case is exactly in point. But the facts in the case at bar comprise an even worse showing for the defendants at bar than existed in the *Chesbrough* case, because in that case the directors could at least truthfully say that the reports corresponded with the books. In the case at bar the reports were false even by comparison with the general ledger, and enormously false by comparison with what

the other books showed and by comparison with the actual fact.

In *Solomon* v. *Bates,* 118 N. C., 311; 24 S. E., 468, the Court said (p. 318):

> "Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they did not know to be true, as well as when they knew it to be false. *Hubbard* v. *Weare,* 70 Iowa, 678; *Huntington* v. *Attrell,* 118 N. Y., 365; S. C. 42 Hun, 459; 3 Thompson supra, sec. 4244. If bank directors do not manage the affairs and business of the bank according to the charter and by-laws and use ordinary diligence to supervise the conduct of their office and to understand the condition of the bank, and loss ensues, they are liable for all losses their misconduct may inflict, either upon stockholders or creditors. 1 *Morse on Banks,* sec. 138; 17 *Am. Eng. Enc.* 109, and cases cited. They are trustees for depositors, and can be held liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is in fact insolvent. 1 Morse supra sec. 130 (a). We adopt what is so well and forcibly said in *Delano* v. *Case* (*supra*): 'Ordinarily the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when entrusting to a bank their entire fortune to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty,—were under no obligation to take at least reasonable precautions to guard their money from itching fingers of dishonorable officials—they would certainly hesitate long before surrendering it upon such terms.' For false statements of the condition of the bank, published by authority of the directors, when they knew of the falsity or with reasonable care might have known it, the directors are personally liable. 1 *Morse* (*supra*), sec. 132, and cases

cited; *Bolles on Banks*, sec. 4; *Shea* v. *Mabry*, 1 Lea (Tenn.), 319; *Townsend* v. *Williams*, 117 N. C. 330."

In *Tate* v. *Bates*, 118 N. C., 287, the Court said (at page 308):

"* * * the directors are conclusively presumed to know the condition of the bank. *Hauser* v. *Tate*, 85 N. C., 81; *Morse on Banks*, sec. 137; *Finn* v. *Brown*, 142 U. S.; *United Society* v. *Underwood*, 9 Bush (Ky.) 609, and other cases cited in *Solomon* v. *Bates*, post, 322. If the directors did not know the bank was insolvent it was their duty to have known it. It was fraudulent in them to put forth official statements that the bank was solvent when they did not know it to be true, and they are liable to those who were deceived thereby into having dealings with the bank or making deposits therein for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be as to its condition the more secure they would be from any liability."

The same Court said in *Houston* v. *Thornton*, 122 N. C. 365, 372; 29 S. E. 82:

"There is no allegation or proof that these defendants were guilty of fraud or had actual knowledge of the frauds, or that they knew the representations in the published reports were fraudulent. On the contrary, the basis of the action is that these defendants were men of high character, who would not participate in or connive at fraud, and for that very reason when the reports of the bank were published, the plaintiff relying on the well-known character of these defendants, trusted implicitly to the correctness of such statements, and was misled, to her damage $1100, into buying the eleven shares of the capital stock of the bank, which were wholly worthless, and entailed liability on her be-

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sides. It is no answer to this to say that the defendants themselves were also misled as to the condition of the bank and suffered loss. They had opportunity to know the true condition of the bank. They ought to have known. It was their duty to know. They should not have permitted statements to go out upon their authority as to the condition of the bank which were untrue, and relying upon which the plaintiff was led into loss. It may be a hardship upon these defendants, but it would be a greater hardship upon the public and destructive of confidence in banks if directors of good character, whose names are useful in drawing patronage, are absolved from responsibility for fraudulent representations whereby the public are duped and defrauded, because such directors had no actual knowledge of the frauds, and did not participate in them. 'Ignorance will not excuse when they had means of knowledge.' *Shea* v. *Mabry,* Lea (Tenn.) 319, 342; *Seale* v. *Baker,* 70 Texas, 283, *United Society* v. *Underwood,* 9 Bush (Ky.) 609. Lord Erskine declared on a memorable occasion that 'Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons, when courts and juries are the teachers.' The courts hold that 'culpable negligence (in such matters) is in law equivalent to fraud' (*Shea* v. *Mabry* supra) and the surest guarantee against it is the verdict of a jury for the damages inflicted.''

In a leading case in our own jurisdiction the publishing of false reports was an important feature of an equity bill like our own. The Court said:

''The injury done by false reports to the creditors and stockholders is, that persons are led to give the bank credit, perhaps, to their ultimate loss, and that of the stockholders. The false reports work injury to the stockholders in another way also. They

not only disarm suspicion, but inspire them with confidence in the management of the affairs of the institution, and so induce them to keep the directors in office until the disaster comes and the bank is, perhaps, utterly ruined. They also avert the scrutiny of the comptroller of the currency."

Ackerman v. *Halsey,* 37 N. J. Equity, 356, 364.

POINT IX.

The directors are not excused by the bank examiners' failure to discover Smith's peculations.

There was only one examination by the Banking Department between July, 1910, and the closing of the institution in August, 1913, and that was the examination of October 26th, 1912. This respondent, therefore, upon undertaking his duties as a member of the examining committee in April, 1912, would have learned, if he had made any inquiry, that the examiners of the Department had not been in the institution for nearly two years.

There was, then, only *one* department examination which can furnish even a pretense of an excuse for the directors' own negligence. Let us examine into the merits of such an excuse. The excuse has two aspects:

(1) That the directors were entitled to *rely* upon the department's examination, which relieved them, to a certain extent, of their own responsibility, and (2) that it could not have been negligence for the directors to fail to discover frauds which expert examiners failed to discover.

Precisely the same argument was made in the minority opinion in *Lippitt* v. *Ashley,* 94 Atl. 995, at page 1013, to the effect that

> "successive banking commissioners, some seven or eight in number, covering the whole long period of years during which Converse's peculations continued, examined this bank twice a year, with the distinct purpose of discovering its condition, and found nothing wrong."

But the Court properly held the directors liable, saying at page 1002:

> *"The duty of supervision rests ultimately on the directors."*

In *Gibbons* v. *Anderson,* 80 Fed. 345, 351, the Court said:

> "I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticize his action."

The defendants have made no attempt to show in what condition the books were when Examiner Hardon visited the trust company on October 26, 1912. We presume the book shortage was absorbed in the accounts with correspondent banks. Concerning these, Vice-Chancellor Pitney said in *Campbell* v. *Watson,* page 413:

> "The case is quite different where the examination is undertaken by an officer of either the State or the national banking department. These gentlemen do not have the time and do not attempt, and are not expected to attempt to compare the bank accounts of the bank under examination, item by item, in the mode pointed out" (referring to the mode required of directors).

We hold no brief for Examiner Hardon. He is not on trial. If he were, it is possible that it would be found that he had been negligent, even despite the fact that there was required of him a less com-

prehensive standard of scrutiny than in the case of the directors. It is noteworthy that this was the only time Hardon examined the institution. Smith did not attempt to falsify the general ledger as long as Appleton was doing the examining. And as soon as Ferguson came, he was caught. But whatever Hardon's burden of blame may be, it was the *directors'* duty to be diligent, though others were negligent.

POINT X.

The affirmance by this court of so much of the Vice-Chancellor's decree as relieves the respondent Dunn, from liability for his negligence as a director of this banking institution, would amount to a radical departure from the established law of this state.

The cross appeal of the Trust Company when finally analyzed, involves this one proposition, which must be decided: Shall a director of a trust company be relieved from liability for his negligence while acting as a director of that institution because he is not a middle aged man, is not experienced in banking and because he has not been informed by the Commissioner of Banking that the sole active officer is untrustworthy, although being a director for twenty months he makes no effort to ascertain the character of the officer to whom is entrusted entire responsibility, although serving on an examining committee to which is delegated by law very important duties, he completely disregards that law in the performance of those duties, and although knowing, or in a position to learn, that no examination of the institu-

tion had been made for nearly two years by representatives of the Department, neither obtains assistance of a qualified accountant familiar with bookkeeping, nor himself, though familiar with bookkeeping in his own business, examines into any book of the Trust Company during the period of this examination? When it is recalled that the entire loss, with very small exception, occurred only during the incumbency of this respondent, and that this loss included an actual shortage on the books of upwards of $300,000, and an additional loss, due to worthless notes, of $181,000, a situation is presented requiring a showing by each director during that period of a scrupulous regard for the duties of his office and a showing of an honest and conscientious and intelligent effort by him to perform those duties.

It may be safely stated that no case is reported in the books in any jurisdiction where the officer who has wrecked the institution (corresponding to Smith) has exhibited the daring and boldness over an extended period in connection with his looting operations as comparable to that in the case at bar. Even if the appellant had not produced the detailed and exhaustive proof of the directors' gross negligence which has been presented in this case, the court would have been justified in holding the directors responsible for the losses, unless a complete disavowal of negligence had been made and proved by them, and unless they had by some affirmative proof shown that these extraordinary losses and the glaring boldness of the method with which they were perpetrated, had been accomplished in spite of their intelligent and conscientious care. We have referred to some of the numerous authorities in this State which have spoken on the subject of the standard of care required of directors in such institutions.

It is submitted that there is no other branch of the law in which the decisions of the courts of New Jersey have achieved equal prominence throughout the country, as that relating to the responsibility of directors of banking institutions for negligence in office. The State of New Jersey, unlike most of the States, including the adjoining State of New York, and unlike the Federal Government, has omitted to provide for any double liability on stockholders of banking institutions. For that reason depositors in the institutions of the State of New Jersey are *prima facie* at a disadvantage compared with the depositors in national banks operating in the State. For the State of New Jersey to increase that disadvantage by weakening the salutary rules governing the liability of directors of such institutions for negligence in office, would result in bringing home to the public generally that doing business with the institutions of the State of New Jersey involved a risk not taken in dealing with national banks. Moreover, even the Federal decisions governing the conduct of directors of national banks have been such as to impose rigorous penalties for negligence. It may be safely stated that an examination of all of the authorities which may be cited by the respondent from various jurisdictions, in which directors have been relieved of responsibilities for their negligence, will be found upon examination to be those in which either (a) the misconduct was a negligence trivial in comparison with that presented in the case at bar, or (b) instances in which the directors had some actual checks and balances upon the conduct of the institution, such as more than one active officer, or other devices tending to prevent the looting of the institution by an officer in uncontrolled management of the institution. If the respondent be allowed to go free from lia-

bility for his negligence in office solely for the reason that he did not happen to be a director in 1909, when the Nones episode was brought to the attention of the Board of Directors, it means that the accumulated proof presented to this court of the extraordinary delinquency of these directors has failed to reach a standard which New Jersey courts will hereafter regard as requisite to hold bank directors liable for negligence. Such a result would be most unfortunate to the community and operate in the end to the serious disadvantage of banking institutions themselves.

As we have elsewhere pointed out in our brief, we are asking for no burdensome rule and none under which any institution cannot be operated and managed.

The figure $200,000 which we mention as the amount for which respondent is liable is simply a round figure, far within the losses from abstraction occurring after he became a director.

POINT XI.

The decree should be modified so as to hold respondent Dunn liable for losses resulting from negligence to the extent of $200,000.

Respectfully submitted,

ROGER HINDS,
Solicitor for Appellant.

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

B

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
GEORGE M. LA MONTE, as Commissioner, etc., on behalf of ROSEVILLE TRUST COMPANY,
Complainant-Respondent,

and

HARVEY MOTT, CHARLES C. LURICH, WILLIAM T. BENJAMIN, WILLIAM F. KEIM and ROWLAND G. MUNROE,
Defendants-Appellants.

On appeal from Decree of the Court of Chancery.

BRIEF FOR COMPLAINANT-RESPONDENT.

Introduction.

This appeal is one of three which are to be argued together, from the decree in a suit against directors of the Roseville Trust Company.

Complainant is presenting three separate briefs: one as appellant on the appeal in which the defendant Dunn is respondent, one as respondent in the appeal in which Dunn is appellant—and this brief, answering Mr. Stiefel's brief for the

appellants Mott, Lurich, Benjamin, Keim, Munroe, whom the decree holds liable in the sum of $400,000 for their negligence, and for an additional sum, to be ascertained by a master, for permitting or making unlawful loans.

While the three appeals involve, for the most part, different questions of law, they necessarily overlap to a certain extent, both on the law and on the facts, and we shall therefore endeavor to avoid duplication, where practicable, by referring from one to the other.

In order to avoid confusion we are marking complainants' three briefs, "A," "B" and "C," respectively.

The Facts.

In our brief "A," we have presented a summary of the facts which, in a general way, will suffice for this particular appeal.

In addition, the facts respecting the following phases of the case will require special treatment in this brief:

(1) The Nones episode.

(2) The lack of new safeguards following the Nones episode.

(3) The committee's examination of December 14, 1912.

(4) The Committee's examination of May 21, 1913.

(5) The releasing of certain directors.

Since our argument respecting each of these phases will involve principally a discussion of the facts in detail, it will serve no useful purpose to repeat them here.

POINT I.

The Nones affair revealed Smith as utterly unworthy of trust or responsibility.

The facts as officially reported by the examiner, and concisely set forth in Commissioner Lewis' letter of May 14th, 1909 (p. 87), are fully supported by the books in evidence, and the accuracy of the examiner's statement of these facts was not questioned by any of the directors either at the time they acted thereon or at the trial of this suit. The following summary gives the essentials of the affair:

1. Prior to February 6th, 1909, Smith, in violation of the by-laws, had loaned his friend Charles A. Nones $2,500 of the trust company's money without reporting it to the board or executive committee, and unknown to any of the directors.

2. On February 6th, 1909, Smith, without any consideration moving to the trust company, drew a draft for $1,350 to the order of Charles A. Nones. Nones endorsed it to one Johns, said to be a stock broker.

3. Smith made no entry of this draft until February 13th, leaving in the meantime a *deficit* of $1,350 in the trust company's account with the New York State National Bank of Albany, on which the draft was drawn.

4. On February 13th Nones told Smith "that he could not pay the $1,350 as agreed, but that he *must have* another $1,000."

5. Smith then drew two checks on the Philadelphia National Bank—one for $1,350 and one for $1,000—handing Nones $1,000 in cash, and crediting the Albany bank with $1,350.

6. No credit for either of the checks on Philadelphia National Bank was made in the books of the trust company, leaving an outright shortage of $2,350.

7. Examiner Appleton of the banking department began an examination on March 12th, nearly a month later, and the shortage had not yet been remedied, or reported by Smith to anyone. On March 16th Smith confessed the matter to the examiner, evidently realizing that it must come out in the course of the examination.

8. Smith's confession, however, was limited to the particular transaction which was bound to be disclosed by the examination. On April 6th the examiner returned and made a further investigation disclosing that similar transactions had occurred in December and January, of which no mention had been made by Smith, those drafts also having found their way to "Johns," and no stub having been made thereof.

Nones, it should be observed, was himself a stock broker (Munroe, p. 1136). The directors had previously considered him as an applicant for loans, and at least one of them "did not seem to think as highly of Mr. Nones as Mr. Smith did" (Munroe, p. 1129), and some question was raised as to his "line."

In his so-called "confession," Smith was obviously making a virtue of a necessity. The complaint by the department's examiner apparently preceded the confession (Odell, pp. 240, 241, 293, 309; Keim, p. 1361).

The so-called "Nones incident" was the subject of consideration by this Court in its opinion recently delivered in the case of *Roseville Trust Co.* v. *National Surety Co.*

POINT II.

The directors were grossly negligent in retaining Smith after the Nones affair.

The Court will, of course, not be misled by the efforts of the appellants to dismiss the incident as involving nothing more serious than the making of the loan to Nones without the knowledge or authorization of the directors; though it may be observed that this alone would have involved wilful disobedience of a by-law essential to the safety of the trust company, and a furtive disposition to deceive and conceal. Moreover, the fact that these unauthorized "loans" had occurred on at least two prior occasions, indicated that Smith's failure to inform the directors and get their approval was no mere oversight or carelessness.

But the drawing, delivery and payment of the $1,350 draft of February 6th, 1909, without any entry thereof or consideration therefor was clearly a *wilful misapplication* of the trust company's funds, the fraudulent intent being additionally shown by the fact that no entry whatsoever was made until February 13th. This crime has been defined as follows:

> "* * * *wilful misapplication* of the funds, credits and money of the bank (is) where one * * * designedly and knowingly misapplies the property of the bank. It is not necessary that the party who misapplies should derive any benefit from the transaction."
>
> *U. S.* v. *Lee,* 12 Fed. 816, 818.

Nones' statement to Smith on February 13th "that he *must have* another thousand dollars," coupled with the fact that Smith forthwith handed him the money, plainly indicated that Nones

was in a position to dictate to Smith. Whether this was because Nones "knew too much" or because Smith was profiting by the transactions, was not directly shown—though both may be inferred. The important fact is that Nones could say to Smith, "I *must have* another thousand dollars," and then get the money. Certainly Commissioner Lewis was amply justified when he wrote (p. 90):

> "Taking the various matters together they seem to disprove the statement of Treasurer Smith that he had no interest in any of the transactions, and that they were all made out of friendship for Nones."

Smith next *wilfully misapplied* another thousand dollars. We use those words advisedly. He deliberately took $1,000 in cash of the trust company's funds and handed it to Nones without any consideration or even a note, and without the authorization, or even the knowledge of the directors. In order that the shortage (now $2,350) might be concentrated in one account, he drew two checks on the Philadelphia National Bank, one of them crediting off the previous shortage in the Albany account, and the other covering the new abstractions, leaving a single shortage in the account of the Philadelphia National Bank of $2,350. The fact that Smith *hoped* that Nones would make good this shortage, and the fact that Nones did subsequently do so (after the affair had been disclosed to the examiner) did not make the affair any less a wilful and fraudulent misapplication of funds.

If any of the directors had learned of similar conduct on the part of an employe in his own personal business, and had forgiven and retained that employe, we might, while questioning his judgment, applaud him for his noble impulse carried out at *his own* risk and sacrifice. But we see

only crass negligence and wilful breach of duty where a confessed embezzler is retained as custodian of the money of others, at the risk of others, and without the knowledge or consent of those others. If these directors felt that Smith should have "another chance", they shauld have arranged to give him his chance in some private business of their own where a relapse to his demonstrated evil tendencies would be at their own expense.

The facts of this affair were reported by Examiner Appleton to Munroe, Odell, Foster and other directors, and by them to most of the board, in the middle of March. Smith acknowledged the "sum total" of the facts and details, as subsequently set forth in the commissioner's letter (Odell, p.), and Odell had, previously to the receipt of said letter, reported these facts "many times" to the entire board of directors both individually and as a board (p. 316). But it was not until after the directors had been prodded by the letter of the commissioner, on May 14, 1909, that they took any official cognizance of the matter, and still another month elapsed before action was taken, on June 21st, 1909, unanimously refusing to accept the resignation of Mr. Smith as treasurer of the Roseville Trust Company.

It must have been obvious to the directors that the commissioner of banking regarded this matter as of grave importance, for he concluded his letter of May 14th, 1909, with the following (p. 99):

> "I desire you to submit this letter to every director of the Company, and advise me fully, in writing, of the action taken upon its contents. The letter should be signed by yourself and all of the other directors of the institution."

This will perhaps explain why Mr. Odell voted twice against the resolution refusing to accept Mr.

Smith's resignation and why he "felt that it wasn't just the thing to put him back again" (Odell, p. 292).

Indeed, the seriousness of the matter was again impressed upon each of the defendants when they were required to attach their signatures to the formal report of their action to the commissioner following the meeting (p. 328); and it was characteristic of the entire incident that it was apparently Raymond E. Smith himself who procured the several signatures to this paper (Odell, p. 328).

After he had learned of this remarkable action of the directors, Commissioner Lewis replied (p. 329):

> " * * * I emphatically disapprove of the decision of the board in the matter."

The detention of a bank officer in a responsible position after he has been found unfaithful or unreliable, is negligence of the grossest kind, and directors are unquestionably liable for all losses resulting from such action.

> *Rankin* v. *Cooper,* 149 Fed., 1010;
> *Williams* v. *Brady,* 221 Fed., 118;
> *Percy* v. *Millaudon,* 8 Mart. (N. S.), 68.

> " * * * Ker's position was one of trust and great importance. His own admission showed that he was not trustworthy for such employment, and it was gross negligence in the defendants not to discharge him, or place him in some position of less responsibility. *Scott* v. *National Bank,* 72 Pa. St., 471; *Third National Bank* v. *Boyd,* 44 Md., 47; *Cutting* v. *Marlor,* 78 N. Y., 454."

> *Prather* v. *Kean,* 29 Fed., 498, 502, affd. 137 U. S., 604.

The commissioner of banking and insurance is charged by law with the "inspection and *supervision*" of every trust company.

Trust Company Law, Section 21.

In his recital of facts and expression of opinion in the letter of May 14th, 1909, Commissioner Lewis was acting in his official capacity, in the performance of a statutory duty. He was acting in the light of facts carefully collected and conservatively presented by an expert examiner. His experience in such matters, and his access to banking data and expert advice gave his findings and conclusions actual as well as official weight. Compliance therewith would have been a matter of course. Disregard of them was, if not actually unlawful, certainly so unusual and unnatural as to require the most convincing of reasons.

In *Thomas* v. *Taylor,* 224 U. S. 73, Mr. Justice McKenna, speaking of those officers of the national banking system whose functions correspond almost exactly with those of the New Jersey Commissioner of Banking and his examiners, said (p. 82):

> "* * * disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

For the purpose of *saving the Roseville Trust Company from disaster* Commissioner Lewis in person warned the directors as follows (pp. 68, 71, 79):

> "The most serious matter is the use by the treasurer, Mr. Smith, of the company's funds,

> without the knowledge of the other officers or directors for the benefit of one of his friends. * * * No sufficient excuse can be offered by Mr. Smith for his action, which seems indefensible and deserving of the strongest condemnation. No confidence can be placed by this Department in any official who would be guilty of this sort of thing, nor does he seem worthy of the confidence of the directors of the institution. *He should be required to resign and cease his connection with the Company.* * * * I desire you to submit this letter to every director of the Company, and advise me fully in writing of the action taken upon its contents. The letter should be signed by yourself and all of the other directors of the institution."

The fact that the February 6th check, as well as the checks in December and January, had "all found their way to the above-mentioned Edward G. Johns, said to be a broker," and that the commissioner of banking regarded as "*disproved* * * * the statement of Treasurer Smith that he had no interest in any of the transactions * * *" was a plain warning that Smith might be engaged or participating in stock speculation, which is notoriously a poor adjunct to the occupation of bank officer.

Prather v. *King* (*supra*).

Directors have in many cases been held liable for retaining an officer after suspicious circumstances should have warned them of unfaithfulness. We have not found a single reported case where directors have been so reckless as to disregard an *official* warning supported by concisely detailed facts and specific and emphatic advice that the unfaithful officer be dispensed with.

If the retention of Smith after the Commissioner's letter was not a "violation of law"—to

use Mr. Justice McKenna's expression—it was certainly a reckless breach of duty for the consequences of which the directors are answerable.

The case of *Gibbons* v. *Anderson,* 80 Fed. 345, is so closely in point with the case at bar in the foregoing respect, and in many other important features, that we may perhaps be pardoned an extensive quotation from the opinion (at p. 347):

> "This is the result, not of a single fraud, nor of a group of contemporaneous frauds, practiced by Moore, but, as already stated, it is the consequence of malversation of the funds of the bank from about the beginning of its history. It is needless to go into detail. The books of the bank show that he was going deeper and deeper into the funds of the bank, and, under one cover or another, converted of its assets more than three times the amount of its capital stock. The defendants, who were directors all this time, say that they were ignorant of anything wrong in the affairs of the bank until their eyes were opened to the facts by its failure. Greenville is a small place, of only about 3,000 inhabitants, and the defendants reside there. The volume of the business of the bank was comparatively small,—certainly not so large but that the most cursory examination of the general features of its business by any one having ordinary business intelligence would have disclosed the truth. It is contended by the directors that they did not in fact know how Moore was carrying the substance out of it, and it is the more charitable view to take of their conduct to the extent that supine negligence is more easily excused than active fraud. There is in the record the testimony of witnesses stating that at the time of the failure of the bank these defendants declared that they trusted all to the president, and that they knew but little of the bank's affairs, relying as they did upon their confidence in the management. But what else can be said than that,

if they had notice of the facts, they were culpable, or that, if they did not know them, they were grossly negligent and inattentive to their duties? The testimony convinces me that the latter is the fact, and that *their negligence and lack of interest was so profound that not even the disclosures and the warning contained in the letter of the comptroller of October 14th, 1892, and which, pursuant to his request, was brought to their attention, aroused them from the stupor which beset them;* for the situation was in no wise redeemed, and grew steadily worse without the moving of a hand by the directors to save it. From the time of their election the board of directors seems to have slumbered over the affairs of the bank while its managing officer was plundering it of all that it owned, and much that belonged to others. Once in a while there seems to have been some faint consciousness, but nothing which indicates any activity. But they say, and have called witnesses to prove, that acting in accord with the usage and custom of national banks, and having called into the management a person in whom they had entire confidence, which was justified by his reputation, and committed the affairs of the bank to him, they were not bound to have doubt and distrust of his correct dealing until something occurred which should arouse suspicion. And this is their defense. The learned counsel for the defendants puts the question thus:

* * * * * *

> "'Or, in another form:
>
> "'Whether an individual director in a national bank is liable in his individual capacity for all losses occasioned by the mismanagement of the bank's affairs by a trusted officer through the neglect of the board of directors to meet and examine into the affairs of the bank.'

"These questions present in the most favorable light for the defendants what is un-

doubtedly the substance of the inquiry upon the facts which exist in this case, and which is, in short, this: whether the duty of the board of directors is discharged by the selection of officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officer, and relying upon his statements until some cause for suspicion attracts his attention. Section 9 of the National Banking Act, being Section 5147 of the Revised Statutes, provides that:

> "'Each director, when appointed or elected, shall take an oath that he will, so far as duty devolves on him, diligently and honestly administer the affairs of such association.'

"And by Section 5145 it is declared that the affairs of such association shall be managed by not less than five directors. The oath which the director is required to take, that he will diligently and honestly administer the affairs of such association, indicates the scope of his obligation. The management of the bank is cast upon the board of directors. The duty of managing and administering the affairs of the bank by the board of directors has been differently construed in decisions bearing upon this subject, but it is not necessary for me to analyze the cases, or to reconcile their apparent differences. Some of them have gone to a length which in my opinion is extremely dangerous to the public safety, and, if generally applied, would make these banking associations, which were designed to supply the people of the country with financial institutions hedged about with security on which their confidence might securely rest, the objects of doubt and distrust. The rule of decision by which my judgment in the present case must be guided is laid down in the case of *Briggs* v. *Spaulding,* 141 U. S. 132, 11 Sup. Ct. 924. Much of the discussion

in that case was devoted to the consideration of the special circumstances upon which rested the charges made against the several directors. Those circumstances have little or no resemblance to those of the present case, and not much aid is afforded by that part of the discussion; for, as the court in that case observed, each case must stand upon its own facts. The directors in that case were held to be excusable. One very important and noticeable difference between that case and this is in the fact that the question there was narrowed down to one fact, as to whether the defendants were fairly liable for not preventing loss, and by putting the bank into liquidation within ninety days after they became directors, the previous condition of the bank being admitted to have been good, whereas in the present case, the defendants' neglect runs through quite a number of years. But the court laid down certain general rules by which the obligation of directors of national banks is to be tested; that is to say, they declare what is the minimum of that obligation. Chief Justice Fuller, delivering the opinion of the court, said:

> 'We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision; nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention.'

"In my opinion, it does not meet the requirements of this statement of law that directors may confide the management of the operation of the bank to a trusted officer, and then repose upon their confidence in his right

conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well-known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply can be made by the official who has any reason for concealment. Again, what are the duties of the management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of those, his duties are conjoint with those of the board of directors. In large affairs it is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any

sudden or unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correaltive. On one side are those of an executive nature, which relate mainly to details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on the middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that count will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their board of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their

capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

"Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regard that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while defendants turned their heads away, and failed to give them the protection which a proper discharge of their duty would have afforded. The records of the board of directors make a sorry showing, when put in contrast with the financial his-

> tory of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates, where the fault of the others was not known to them, and they were helpless to prevent the consequence; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticize his action."

Appellant attaches great importance to the fact that in the leading case of *Briggs* v. *Spaulding,* 141 U. S. 132, certain bank directors were exonerated. The observations above quoted, concerning the distinguishing facts in that case, apply with even greater emphasis to the case at bar.

The defendant Foster testified that the Commissioner of Banking (Vivian M. Lewis) said to a delegation of the directors who called upon him at Trenton (p. 1441):

"Well, from your explanation of this thing why it looks to me as if your stand is all right."

We considered this testimony as not deserving of rebuttal by the then Commissioner (now Vice-Chancellor Lewis), because his reported statement is so absurdly at variance with the sharp and condemnatory tone of his letter of May 14, 1909 (p. 87).

The subesquent expression of disapproval by the Commissioner made it even more improbable that he had been correctly quoted by the witness Foster—and took away whatever effect his alleged remark had, even if it be assumed he made it.

The delegation visited the Commissioner on June 15, 1909 (pp. 105 and 1442).

On July 16, 1909, the Commissioner wrote to the President of the trust company (p. 108):

". . . I emphatically disapprove of the decision of the Board in the matter."

POINT III.

Having retained Smith in office after being warned of his unfaithfulness the directors were bound to exercise unusual watchfulness and supervision over him.

Many of the authorities from which we quote define the care and watchfulness which it is the duty of the bank directors to exercise under ordinary circumstances when no evidence of infidelity have been brought to their attention. But these particular directors, having taken upon themselves the responsibility of continuing in a posi-

tion of trust a man who was proved, and confessed, to have been dishonest, were all the more remiss in giving him sole power over the reserve funds, in permitting him personally to keep the general ledger without systematic and independent supervision, in relying on his reports in lieu of first-hand investigation of the operations and condition of the institution, and in entrusting to him exclusive and unsupervised control in so many other directions. The following formulation of the duties of directors with respect to bank cashiers and other managing officers apparently originated in *Percy* v. *Millaudon,* 8 Mart (N. S.) 68 (supra), and has been quoted in so many later cases as to have become classic:

> " 'In relation to these officers, (cashiers and other managing officers of banks) the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.' "

The foregoing language has been quoted with approval in the following cases, among others:

Rankin v. *Cooper,* 149 Fed., 1010, at page 1011;
Williams v. *Brady,* 221 Fed., 118;
Campbell v. *Watson,* 62 N. J. Eq., 396; 50 Atlantic, 120, 132 (supra).

If, as is well settled, the standards of "*ordinary* diligence" have become increasingly higher with the development of more ingenious modes of manipulation and theft, and if as held by Vice-Chancellor Pitney, *ordinary* diligence forbids trusting even *high-grade* employes who "by years of right living and acting have earned the confidence of their employers" beyond what is necessary to the practical business of the bank, how much *more* culpable was the action of the defendants at bar!

> "It is true these directors may have exercised ordinary care, or indeed a high degree of care, in selecting as cashier a competent experienced man who had a good reputation for integrity; but the mere selection of an officer of this kind will not excuse directors from continuing to give some attention to the business of the institution; or, in other words, from at all times, exercising ordinary care in its management."
>
> *Cunningham* v. *Shellman,* 164 Ky., 584,-597; 175 S. W. 1045.

> "The circumstances * * * fully authorized the directors to have implicit confidence in England, and justified their selection of him as president; but no circumstances justified directors in committing the management of the bank to the president, further than the duties of that office required. No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion."
>
> *Fletcher* v. *Eagle,* 74 Ark. 585.

If such is the legal standard of watchfulness over employees of *unblemished* record, what possible argument can be made for reposing such limited confidence, responsibility and power in a man

whom the Commissioner of Banking had officially branded as guilty, unworthy of confidence, and unsafe!

POINT IV.

The directors were no more watchful after the Nones incident than before.

In brief "A" we point out in detail respects in which the directors were negligent and even reckless in committing unlimited power to the treasurer. At this point we make merely the general observation that no reforms or changes in the methods of administration of the trust company were instituted following the Nones affair (Foster, p. 1439).

The confession of the appellant Benjamin (p. 329) that thereafter he never made any inquiry as to whether or not Mr. Smith was permitting loans to be made which he did not report to the board of directors, should be considered in connection with the fact that a large loss resulted from such unauthorized loans. Though Mr. Benjamin was a regular attendant at directors' meetings, he never heard any member of the board of directors at any time thereafter discuss the question of whether or not Mr. Smith was continuing in his practice of loaning the company's money unbeknownst to the directors (p. 369).

In the light of the fact that another large item of loss arose from the continuation of Smith's criminal practice of making drafts on correspondent banks with either no entries thereof or with fraudulently incorrect entries thereof, it should be observed that there was absolutely no intimation by any of the directors that even the slightest ef-

fort had been made to guard against a recurrence of such practice, or to inquire or investigate in respect thereto.

The following interrogatory was put to each defendant:

> "267. After the receipt of the letter of May 14th, 1909 from the commissioner of banking and insurance, were any measures taken by the board of directors to safeguard the Roseville Trust Company against any loss which might be made possible by failure to provide an independent check upon and supervision of the operations of Raymond E. Smith?"

Not one of the defendants could recall any change of administration or increase of watchfulness. The defendant, Scarlett, in explaining his answer that to the best of his knowledge no precautionary measures were considered or taken, had the effrontery to say that

> "the *alleged* letter of May 14th, 1909 as reported by President Odell of the board of directors referred to a single specific transaction of Raymond E. Smith as an officer of the bank and * * * did not call for any special precautionary measures from the board of directors."

Appellant Munroe answered:

> " * * * none of the board anticipated any further trouble, I am sure."

POINT V.

The examining committees were negligent in the performance of their duty.

Section 22 of the by-laws (p. 73) provides as follows:

> "22. The Board of Directors shall appoint from its members annually an Examining Committee of five members, whose duty it shall be to examine the condition of the Company at least once every six months, or oftener if required by the Board, and perform such other duties as are mentioned in Section 14 of the Act concerning Trust Companies, Chapter 174, Laws of 1899."

The statute referred to in the by-law is as follows:

> "14. *Directors shall appoint examining committee. Committee shall report.*
>
> "The board of directors of each trust company shall from time to time appoint from its members, an examining committee, whose duties shall be to examine the condition of the company at least once every six months or oftener if required by the board; and such committee shall after each examination forthwith report to the board, giving in detail all items included in the assets of the trust company which they have reason to believe are not of the value at which they appear on the books and records of the company, and giving the value, in their judgment, of each of such items; and the board shall cause said report to be recorded in the minute-books of the company."

The undisputed testimony shows that the examining committee on the occasions of each of the last three examinations, viz: April 11, 1912, De-

cember 14, 1913 and May 21, 1913, failed in the following important respects to perform their duty:

1. The committee accepted Smith's unsupported statement of the amount of deposits in transit to the correspondent banks on the examination day, and the amount of drafts recently drawn on said banks and in transit on that day.

2. They failed to inspect any entries in the general ledger except the reported balances as of the examination day, ignoring even the debits and credits of the examination day itself.

3. If they made any footing at all of the asset and liability columns of the general ledger they failed to make sure that the figures which they footed were the figures which they previously verified or purported to verify.

4. They made no inspection of the cash book, even as of the examination day itself.

5. They made no examination of the teller's proof-books, even as of the examination day itself.

6. They made no inspection of the "treasurer's check" book.

7. They failed to value the assets of the trust company and to give in detail all items included in the assets of the trust company which they had reason to believe were not of the value at which they appeared on the books and records of the trust company, and to give the value in their judgment of each of such items.

We shall refer incidentally to other and less important respects in which the examining committee failed in its duty. Before considering *seria-*

tim the several respects of their delinquency as above listed, we shall refer briefly to certain testimony of the defendants themselves bearing on the *general* character of the examinations.

Appellant Benjamin was on every examining committee throughout the bank's career, except in 1911 (p. 337) and may hence be relied upon to know what sort of examinations were made. He says his only authority as to what his duties were was the word of the chairman; that he doesn't remember having read the by-laws (pp. 337, 338), and never even heard of Section 14 of the Act Concerning Trust Companies, which is specifically referred to in the by-laws, and is the statute describing the duties of examining committees of trust companies. Mr. Benjamin also testified that there was no discussion by or between the members of any examining committee of which he was a member as to just what were the duties of the committee (p. 338). When asked what he did personally in the course of the examination Benjamin answered the 114th interrogatory by saying:

> "114. I did different things at different examinations. Sometimes I checked up the securities with another of the committee, and at other times checked up the cash with another of the committee."

On the occasion of the December 14th, 1912 examination appellant Benjamin testified that he personally didn't do anything in the course of the whole examination except see that the totals shown on Smith's list of collateral loans compared with the total in a certain book (p. 340), whose name he did not know, and which he identified as the general ledger when the latter was shown to him. He didn't foot the general ledger (p. 357), nor did any of the other committeemen in his

presence (p. 357), nor did any of them state in his hearing that they had done so. He didn't even make an examination of the collateral loans, but merely checked them off with the list (p. 356). He didn't even add up the notes, but relied on the additions already there (p. 340). Although the work of the committee was performed in his presence he didn't see any other members of the committee make any additions (p. 348). He didn't examine the daily trial balance either as of the date of the examination or as of any other dates (answers to interrogatories 114 and 116). As to the list of collateral loans itself, Mr. Benjamin didn't know whether the aggregate of notes which he examined was the aggregate shown on Smith's list since he didn't add it up himself or hear any of the committee say that they had added it up (p. 347), and didn't ask any of them whether they had added it up (p. 348).

For all Mr. Benjamin personally knew, there may have been $100,000 less aggregate of collateral loans on hand than was called for on Mr. Smith's list (p. 354).

Mr. Sexton, the chairman, testified that he had never assigned to one man merely checking up collateral loans and nothing else (p. 379), but if the appellant Benjamin performed any other duties on the examinations in question, he could not be induced to tell about it.

Section 14 of the Trust Company Law requires the examining committee "*to examine the condition of the company.*" Obviously, the condition of the trust company could not be examined by merely ascertaining the amount of each separate asset or separate liability, even if this work were performed properly. It is necessary to ascertain the *total* of the assets and the *total* of the liabilities, and to compare one total with the other,

in order to ascertain the condition of the trust company.

It is literally true that the examining committee, at least on the last three occasions, *did not foot the assets and liabilities.* They did not even foot the figures which they themselves had previously (though in many cases negligently) accepted and checked off as the amounts of the several assets and liabilities. When they footed anything, they footed some *unrelated* figures put there by Smith, *during the examination,* for that very purpose. This is conclusively shown by their own testimony.

It was the committee's practice prior to 1912 to ascertain the amounts of the several assets and liabilities (after a fashion) from the original sources, and to prepare a balance sheet of their own, based on their own investigations. During this period, assuming that the ascertainment of the component items was correct, the committee may indeed be said to have footed the assets and liabilities, and to have "examined the condition of the trust company," but it is quite apparent that in the examinations during the years 1912 and 1913 the committee "would check up the items on the general ledger and add them right on the ledger." In other words, in 1912 and 1913 the committee saved itself the labor of making its own balance sheet by first *assuming* that the trial balance on the general ledger (as it existed when they began their examination) was a correct tabulation of the assets and liabilities; next confirming the correctness of their assumption by verifying the figures (after a fashion) from the original sources; next *assuming* that the figures in the general ledger (which for convenience they had used instead of and in place of their own) were the same as those they had previously

verified, they made a footing of those figures as they existed after their other work had been finished. The obvious defect of such a method is that it is based upon the assumption that the man whose figures in the general ledger they had footed, (and who had had unlimited access to those figures throughout the period which lapsed between the commencement and the closing of their audit) did not change any of those figures between the time they were audited and the time they were added up. The committee was, of course, not justified in any such assumption. Their earlier practice indicated that they knew of a better method. For their own convenience they chose not to make their own trial balance of the figures ascertained by them at first hand, but rather to rely upon the tabulation made for them by the treasurer himself.

It was obviously their duty either to keep the figures in their custody until they had footed them, or (better yet) to make a transcript of them at the outset and perform both the checking and the footing on the transcript. Indeed this latter method is the one that they had on earlier occasions employed. If it had not been for their negligent failure to take this ordinary precaution, they would have discovered the enormous shortage which existed on the occasions of the last three examinations, in spite of their negligence in other respects.

For example, it was brought out that in the trial balance of the examination day Dec. 14, 1912, the collateral loans as they are now shown in the general ledger are $151,438, exactly $100,000 too high and approximately $100,000 more than they had *ever* aggregated at any one time. It also appeared that if this item were correctly shown, the footing of the asset column (which bears no indication of

having been changed) would be excessive by $100,000. It was suggested by defendants that the digit "1" may have been inserted since the committee verified the correctness of the general ledger figure, and that the general ledger at that time may indeed have corresponded to the physical assets, viz: $51,438. Smith's explanation was as follows (p. 791, l. 40 *et seq.*):

> "The Court: Let me understand that. I understand your answer to be that the books as they are now were not in the condition in which they were when they were inspected by the examining committee; is that right? A. That is correct as to one account, I think, your Honor, which account is the collateral loans.
>
> "Q. I will ask you whether the change which you say has been made since the committee examined was made since they were there the first time or since they came back later to make a footing.
>
> * * * * * *
>
> "A. My recollection, your Honor, is that this was changed during the course of the examination, after the proof on the collateral loans had been made.
>
> "Q. (By the Court.) While the committee were there? A. Yes, sir.
>
> "Q. (By the Court.) In other words, as I understand it, the committee examined the collateral, compared it with the figures in the general ledger and found that the aggregate of the collateral notes corresponded with the aggregate amount in the general ledger; after that had been done, for the purpose of making a balance you made this change? A. I made that change, your Honor, in order to make the footings agree on each side.
>
> "Q. (By the Court.) And in the expectation of course that the footings would be examined by the committee or one of them? A. Yes, sir, that is the best of my recollection."

Since it has been demonstrated from the books (and has not been disputed) that a very large shortage existed at the time of each of the last three examinations, apparent on the face of the general ledger, it follows necessarily that on those dates *either* the footings *or* one or more of the several balances must have been erroneous. *Both the footings and the component balances could not have been correct at the same time.*

As a mere feat of accountancy it is impossible to deduce from a subsequent examination of the books and records with respect to those figures which appear to have been changed, in what condition they were when the committee commenced its examination, and in what condition they were at the time the columns were footed. As respects those figures which bear no indication of having been tampered with, the accountants can in many cases say not only that they did not correctly represent the true asset (or liability, as the case may be), but also that (not having been changed), they were incorrect, and should have been discovered as incorrect, on the day of the examination. But, as respects those figures which have been changed, all that the accountants can do is to say (in the alternative) that on the examination date either the footings were wrong, or certain of the component balances were wrong.

But the element of proof which is lacking from a *present* analysis of the books, is definitely supplied by the positive testimony of the treasurer himself, which is entirely consistent with the testimony of Mr. Sexton, chairman of the committee, on the occasion of each examination.

Mr. Sexton testified as follows (p. 1285):

> "Q. (By the Court.) Well, then counsel's inquiry assumes that there was a space of time between the time of checking off of the

items and the time of the addition of the entire column, when Mr. Smith or somebody else came in and changed the figures; now what have you got to say about that? A. Well, that may have——

"Q. (By the Court.) Could that have been done? A. It perhaps could have been done; the general plan was to add that afternoon and then check up again at the next meeting, but I couldn't positively say that that happened every time."

Raymond E. Smith's testimony as to one of the examinations is as follows (p.):

"Q. (By the Court.) Then while the committee were there and when they saw the figures they were correct? A. Yes, sir.

"Q. (By the Court.) And after that you change them for the purpose of making the footings right; is that it? A. Of making the ledger footings right, yes, sir.

"Q. (By the Court.) How were the ledger footings at the time the committee were there examining the originals, were they right or were they wrong? A. As I remember it they were wrong.

"Q. (By the Court.) So that if anybody had added up the column they would have found that the footings were incorrect? A. Yes, sir.

"Q. (By the Court.) After the committee left the figures were changed so as to leave the footings intact to make the additions correct? A. Yes, sir, that is exactly it."

(The testimony shows that the same facts existed on the other occasions.)

The members of the committee were well aware that entries were made after the committee arrived for the purpose of the examination (Banister, p. 524); and there was no more justification in assuming that those books would be honestly dealt with in the interim, than

there would be in assuming that the *cash* would be honestly dealt with if the committee had permitted its free handling by the employees *while they were counting it*. So far as the defendants Dunn and Benjamin are concerned, not only did they trust Smith not to tamper with the books during the course of the examination, but they trusted him sufficiently not to question his footings at all. Not only did Dunn not perform any footing himself, but did not recall that any member of the committee made any footing of the assets or liabilities in his presence (p. 1262), and never made any inquiry respecting the matter. Mr. Benjamin neither did any adding himself (pp. 340, 360) nor saw anyone else who did (pp. 341, 360), nor heard anyone else say that he had done it, nor inquired of anyone else as to whether it had been done (p. 360), nor did he hear any other member of the committee or member of the board of directors inquire as to whether the general ledger had been footed at all (p. 360). Apparently the committee and the directors were as trustful of Raymond E. Smith in respect to his footings as they were in every other respect.

POINT VI.

Appellants are liable for losses resulting from the examining committee's failure to report and mark down depreciated loans.

In our brief "A" we have discussed this item of delinquency with respect to the defendant Dunn, who took part in the examination of April 11, 1912.

On December 14, 1912 and May 21, 1913, the dates of the succeeding examinations there was

an enormous amount of worthless paper in the institution. The loss from this cause when a bank closed, a short time later, was over $181,000.

The Department's long letter of warning, dated October 28, 1912 (pp. 126-139), was utterly disregarded by the committee, though it caustically criticized many items of the worthless paper.

And the entire board was responsible, because the committee's reports showed that they had not even pretended to value and mark down the depreciated paper.

The directors' duty in such matters is clear, as we show in our brief "A," Point I, citing

Chesebrough v. *Woodward,* 195 Fed. 881 (approved 221 Fed. 912, affirmed 244 U. S. 72).

Williams v. *McKay,* 46 N. J. Eq. 25, 38, 39.

POINT VII.

Appellants are charged with knowledge of what the books plainly showed.

In Point II of our brief "A" we showed the condition of the general ledger on the examination date April 11, 1912.

Even grosser enormities appeared on the face of the general ledger on December 14, 1912 and May 21, 1913 (pp. 1045, 1046, 787 to 809).

The general ledger was similarly emblazoned with fraud on practically every other date during the last year-and-a-half of the company's existence, including the dates of the official reports and the dates of dividends (pp. 1025 to 1064, 809 to 832).

In our brief "A" we quote from numerous authorities showing that not only the examining committee, but all the directors, are charged with knowledge of frauds which appeared continuously on the books.

In *Bates* v. *Dresser,* 250 Fed. 525, and *Dresser* v. *Bates,* 251 U. S. 524, the directors were relieved from liability for abstractions by a subordinate employee because they did not involve any manipulations of the cashiers' ledger (general ledger), which they consulted, but were subtly concealed in the individual deposit accounts; and because, moreover, the bank had an active president and a cashier upon whom the directors were entitled to rely for supervision of the subordinate books of the bank.

The decision would undoubtedly have been otherwise in the *Bates* case if the directors had entrusted the entire control to one man—and had provided no independent scrutiny of his accounts —and such controlling officer had himself done the stealing—and the stealings had been continuously and plainly shown on the face of the general ledger.

In other words, the *Bates* case shows what directors *should* do, if they expect to be relieved of liability for abstractions which sometimes occur despite the care of the directors.

POINT VIII.

The appellants assumed the risk of entrusting un-heard-of power to one man.

We have argued this in Point IV. of our brief "A."

The argument in brief "A" applies with redoubled force to these appellants, because they all had the benefit of the Department's warning in 1909.

POINT IX.

The appellants were actionably negligent in not providing, after June, 1912, for an independent and adequate reconciliation of the accounts with correspondent banks.

In Point V. of our brief "A" we showed how the examining committee of April 11, 1912, accepted Smith's own statements as to the existence and amount of "items in transit" and thereby failed to discover substantial discrepancies; and what the authorities hold in that connection.

The situation was even worse in the examination dates December 14, 1912, and May 21, 1913, because the shortages were greater.

On December 14th, 1912, the day of a committee examination, the Union National Bank balance was overstated in the ledger $3,210, and the New York State National Bank of Albany balance was over stated $10,000 (Cloran, p. 1046). A large part of this discrepancy was represented on the day of the examination by checks or drafts recently drawn, for which no stubs had as yet been reached or made, and hence not taken into account in their balance as of that date. These were one sort of the so-called "items in transit", the other sort being the non-existent deposits which the Roseville Trust Company's books showed to have been "in transit" to the correspondent banks on

the day of the examination, which accounted for the rest of the discrepancies.

Similarly, on May 21st, 1913, the day of the last examination, the Irving National Bank balance was over-stated in the general ledger $14,406, including also to a large extent checks recently drawn but not entered and not yet paid by the Irving National Bank.

The fact that Smith in his subsequent thefts employed as one means the very kind of fraud to which he had previously confessed to the directors, makes the examining committee's acceptance of his figures all the more discreditable. This is especially true in view of their letter of June 3rd, 1909 to Commissioner Lewis (p. 101) wherein their spokesman, Mr. Odell, said:

> "* * * The practice of occasionally leaving blank stubs, where checks or drafts had been destroyed on account of errors and of failure to post the amount of checks and drafts on the date of issue, has been discontinued."

On December 14, 1912, in addition to the bald over-statements of the Union National Bank and New York State National Bank balances referred to above, the committee, if it had done its duty, would have discovered that a check of $3,587.38 had been recently drawn upon the Fourth Street National Bank of Philadelphia, and had not been entered on the books of the Roseville Trust Company, and had not yet been presented for payment. This would have been discovered by inquiring of the Fourth Street National Bank as to what checks had been paid during two or three days after the examination date. (Counter-falsifications apparently off-set this fraud, the overstatements of balance being concentrated in the Union and New York State National Banks, p. 1046).

On the occasion of the May 21st, 1913, examination, in addition to the large over-statement of the Irving National Bank balance (Cloran pp. ,) the committee should have discovered the fraudulent "draft item in transit" in connection with the account of the New York State National Bank, consisting of a $4,000 check drawn on May 21st, but not entered in the books until the following day (p. 1054).

All this might have been avoided if the directors have provided for *any one* of the following safeguards of the depositary accounts:

(1) Required two signatures

(2) Made an *adequate* examination themselves including an inquiry as to "items in transit."

(3) Engaged outside professional auditors at intervals

(4) Provided for a monthly reconciliation (with *sheet and vouchers*) by an independent employee.

It should be observed that the banking department examiners are not expected to make a full reconciliation of the correspondent accounts.

In *Campbell* v. *Watson,* 62 N. J. Eq. 396, Vice-Chancellor Pitney said (p. 413):

> "The case is quite different where the examination is undertaken by an officer of either the state or the national banking department. These gentlemen do not have the time, and do not attempt, and are not expected to attempt to compare the bank accounts of the bank under examination, item by item, in the mode above pointed out. All that they usually do, or all that they would do in the case in hand, in the absence of suspicion, would be to take a memorandum of the balance on a particular day on the books of the insolvent

bank against the Park Bank, with a memorandum of the recent drafts drawn on the Park Bank and credited to it, and the items recently charged against the Park Bank, which they designate as items in transit; then open a correspondence with the Park Bank, get its balance on the same day, and then add and subtract to and from that balance the proper items in transit, in order to get the true balance. If the result is an approximate agreement they are satisfied."

Moreover, as the directors knew, there was no department examination from July, 1910, to October, 1912, a matter which we shall discuss at a later page.

POINT X.

The appellants are liable for their failure to provide for an examination of the cash-book, the proof-books, and the treasurer's check account.

The books above-mentioned *might* disclose fraud even when the general ledger was apparently well-kept.

Smith's frauds involved *both* general ledger and the books we have mentioned.

The examining committee made their report to the directors. It was obvious that they made no pretense of consulting any of the books we have mentioned.

It was the duty of the directors to see that *somebody* inspected these books.

The Cash-book.

We have discussed this in Point VI of our brief "A".

The Proof-books.

In Point VII of our brief "A", we have shown how the loss of over $117,000 on uncharged checks might have been prevented (among other ways) if the paying-teller's proof-book had been consulted.

In verifying the *cash* for examination and reports, it was *necessary* to consult the receiving-teller's and paying-teller's proof-books.

Neither the general ledger nor the cash-book purports to distinguish between "cash" and "cash items." The general ledger account for "cash" comprises both of these "assets." Since it is an obviously important feature of an examination to determine whether any of the so-called "cash" consists of items other than actual money, and since a mere physical count of the contents of the cash drawer would necessarily involve the inclusion of "cash items" in order to make a total corresponding to the total of "cash" in the general ledger and cash-book, obviously it was the directors' duty to compare the total of these "cash items" as actually found, with the recorded amount as appearing in the appropriate book of the trust company. Otherwise an apparent conformity between the actual fact and book entries might be artificially forced by merely throwing in enough worthless paper under the guise of "cash items" to bring out the desired balance.

But there are only two books of the trust company where the "cash items" are shown as dis-

tinguished from cash. One of these is the receiving teller's proof book, and the other, the paying teller's proof book. The directors confessedly did not examine either of these books. Their attempted verification of the cash as shown in the ledger was therefore a mere guess. If they had looked in the proof books they would have found conditions, even on the examination day, which would have astounded them. The proof books of necessity not only detail the actual money, dividing it into bills, gold and silver, and nickels and pennies, but also list separately the amount of each so-called "cash item."

Even in the best managed bank the cash drawer will at the close of a business day contain certain "cash items." These can legitimately aggregate only a small amount, and consist of checks which have been cashed since the hour when the checks are "cleared." In other words, there is a short period at the close of each day when incoming checks drawn on other banks must be temporarily regarded as "cash." But these "cash items" have no legitimate reason for being found in the cash drawer after the particular day in question. They are supposedly removed entirely from the teller's cash drawer at the close of each day so as to be sent through the clearings.

In the Roseville Trust Company, however, it has been repeatedly shown that it was the practice made necessary by Smith's corrupt dealings, to accumulate (irregularly) so-called "cash items" not only in an amount which was entirely abnormal but of a nature whose presence in the cash drawer would not have been legitimate even for a single day. These, as has been shown, were checks drawn on the Roesville Trust Company itself and known to be worthless at the very time when they were cashed or received for credit.

These were deliberate and unconscionable overdrafts.

An inspection of the paying-teller's proof-book would have shown the presence of a large amount of these worthless items—itself a plain indication of fraud which would, or should, have set in motion a thorough investigation which would necessarily have resulted in complete exposure; but they would also have found that the totals shown in the proof books, even including these worthless items, did not correspond either to the cash book or the general ledger (Exhibits C-46, C-1463 and C-1464).

On May 20, 1913, a day preceding an examination, these "cash items" amounted to over $13,000 (Exhibit C-46).

In the published report as of June 4th, 1913, attested by the defendant Lurich and Foster, the cash as shown on the general ledger is $35,652.31, while the cash as shown on the report is $51,943.-36 (pp. 810, 811, and Statement 12). There is no indication that either figure has been changed. If the paying teller's proof-book had been consulted it would have been learned that $18,527.94 of this supposed "cash" was not *cash* at all but worthless "cash items" (checks fraudulently paid and not charged. (See Exhibit C. 1464).

Even in the absence of suspicious circumstances, it was the duty of the examining committee to inspect the tellers' proof books because of the very nature of the books and because they could not even purport to make an examination of the assets of the institution without inspecting the proof books. If they had performed that duty they would have discovered Smith's fraudulent operations. Having failed to perform their duty they, and those responsible for their neglect, should suffer the consequences.

Treasurer's Checks.

One of the duties of the examining committee was to ascertain at first hand the true liabilities of the trust company. As to the liability of outstanding treasurer's checks, the first place to look would naturally be the stubs of the treasurer's check book. In the ordinary course of business, as each treasurer's check was preesnted and paid, it was pasted onto the edge of its correspondence stub. The total of those stubs for which no checks have been returned would in the absence of fraud comprise the total of the trust company's liability for outstanding treasurer's checks. The next natural step in verifying this account would be to consult the cash book for the day of the examination and for several days prior thereto to ascertain whether any treasurer's checks had been paid or issued for which no stubs had been made. A few days later for a proper verification of this account, it would be necessary for the committee to return and consult the cash book in order to determine whether any checks had been paid which were outstanding on the examination date, other than those of which stubs had been made. By this means the committee could have detected any frauds committed by Smith by means of treasurer's checks, in the absence of collusion with one of the tellers. In other words, this would provide an independent check upon Smith's handling of the treasurer's check account, for while it would be easy for him to *issue* these checks without making corresponding stubs at the time of issuance (as disclosed in the Nones affair), it would be impossible for any such check to be *paid* in the ordinary course of business without an entry being made in the cash book by other employes of

the trust company. Otherwise the work of the tellers would not balance.

Apparently all that examining committee did (if it did anything) in verifying the treasurer's check account was to compare the total of the vacant stubs with the balance as shown in the general ledger, thus accepting, without verification, the assumption that the treasurer had faithfully and accurately made stubs for every check issued. Their examination thus rested upon the *assumption* that Smith was incapable of repeating the very trick which he confessed to in the Nones affair, and was incapable of the very sort of fraud for which the defendants in *Campbell* v. *Watson* were obliged to make good the losses.

The directors were responsible for the information which they caused to be published in their statutory reports. The published report as of June 4, 1913, indicates a liability for outstanding treasurer's checks of $274.83. If anyone had even taken the trouble to look at the general ledger on that date (to say nothing of the cash book and treasurer's check book) he would have found entered there a *debit* balance of $1725.17, an *asset,* obviously an impossible condition (pp. 813, 814, and Statement 12).

If the directors had required either the examining committee or *somebody else* to compare the vacant check stubs with the checks themselves after they had been presented and paid, and with the cash book entries thereof, they would have discovered that Smith was still manipulating the treasurer's checks and stubs as he did in the Nones transactions.

How else could the liability of "treasurer's checks" be verified?

POINT XI.

All the directors are responsible for the proximate results of the false reports which were filed and published.

In Point VIII of our brief "A" we discuss this question fully, and will not burden the Court with a repetition here.

What we say as to the defendant Dunn applies with particular emphasis to the appellant Lurich because he was a member of the executive committee, with his office nearby, and frequently affixed his name to the reports—which he signed without inquiry, accepting Smith's own figures.

The appellant Lurich did not even examine the statements set forth in the reports, and claims not even to have noticed the words "correct attest". Though he signed similar reports at more or less frequent intervals for several years, he never looked at a single book for the purpose of verifying any of the information contained therein (p. 1336). So far as the contents were concerned, he "relied upon the high character and reputation of Mr. Odell" (answer to 257th interrogatory).

It has even been claimed that when a director signed his name to one of these reports under the words "correct—attest" he did nothing more than to *witness* the signatures of the officers who verified the report *under oath before a notary public.* The absurdity of requiring three more "witnesses" to the signatures of two affiants as a supplement to the solemn act of the notary public as evidenced by his jurat is obvious, and needs no argument. It happens, moreover, that this matter has been the subject of judicial decision.

See

McDonald v. *Fremery,* 168 Cal. 189,

and the other cases cited in Point VIII of our brief "A."

It would seem that the authorities establish beyond dispute the fact that the word "attest" implies more than a mere subscribing witness. The following are among the definitions of the word *attest* in our abridged edition of Webster:

> "* * * to affirm to be true"; "* * * to authenticate by signing as a witness"; * * * "to bear witness"; "* * * to afford proof "of"; "* * * to certify";

And it is not alone in suits at law for damages for deceit that directors have been made to suffer the consequences of permitting the publication of false reports. In a leading case in this jurisdiction such a charge was an important feature of an equity bill like our own. The Court said:

> "The injury done by false reports to the creditors and stockholders is, that persons are led to give the bank credit, perhaps, to their ultimate loss, and that of the stockholders. The false reports work injury to the stockholders in another way also. They not only disarm suspicion, but inspire them with confidence in the management of the affairs of the institution, and so induce them to keep the directors in office until the disaster comes and the bank is, perhaps, utterly ruined. They also avert the scrutiny of the comptroller of the currency."

Ackerman v. *Halsey*, 37 N. J. Equity, 356, 364.

POINT XII.

The appellants are liable for the loans which they unlawfully made or permitted.

As this question is the sole subject of our brief "C" we respectfully refer thereto.

What we say in brief "C" as to the defendant Dunn, applies with even greater force to these appellants because they were directors from the beginning, and some of the bad loans originated before Mr. Dunn became a director.

POINT XIII.

The so-called "collusion" of Jennings was relatively unimportant, and did not substantially contribute to the disaster.

While Jennings was himself guilty of embezzlement, his only participation in any of the Smith frauds was that he permitted without disclosure the periodical accumulation of "cash items" upon Smith's explanation that he (Smith) held valid notes and other obligations to cover them. None of the other employees were guilty of embezzlement, and none of the other employees were shown to have been implicated in any irregularities, with the possible exception of the "cash items," of which explanation was made by their superior officer.

There is no basis for the argument that the so-called "collusion" between Smith and other employees made the corruption more difficult of detection by the directors. If the directors had performed their own duties in any one of the numer-

ous respects in which they were delinquent, they would have at once discovered the condition of affairs.

Let us consider one or two specific instances of neglect by the directors and see what, if any, part the "collusion" of Jennings and other employee plays in the directors' failure to detect and prevent the looting of the institution.

Suppose the directors had compared Smith's figures with the general ledger before publishing reports of the company's condition—would the so-called "collusion" have prevented their discovery that Smith's figures were false?

Or suppose they had performed their duty and verified the items of "cash" and "cash items" from the proof books before permitting the reports to be published—would any "collusion" between Smith and Jennings have covered up the plain-as-day accumulation of fraudulent "cash items"?

Since Jennings was not "reconciling" the depository accounts after June, 1912, the directors' wide-eyed acceptance of Smith's "items in transit," without investigation, can hardly be attributed to Jennings' "collusion."

Nor was "collusion" responsible for the directors' disobeying Section 14 of the Trust Company Law, requiring doubtful assets to be reported and marked down.

No, the only necessary complement to Smith's dishonesty (to make the disaster possible) was the *gross negligence* of the directors. Indeed, the other employees so far performed their duties respecting their own entries and books, that Smith was forced to employ such coarse methods as obvious manipulation of the general ledger, and imaginary "items in transit" to cover his stealings. If the directors had not been absolutely crass in their

trustfulness and inattention such methods would have failed immediately.

Smith, knowing his directors, took the chance that no one of them would ever, once, write to a depositary bank to verify a reputed "item in transit," or learn whether any unreported checks had been presented. He took the chance that they would never, even once, compare his official reports with the general ledger, or do any of a hundred other things that directors are expected to do, or cause to be done. And it was because there was no such "collusion" with Jennings or others that Smith could safely rely upon, that he was driven to adopt these easily-discoverable means of fraud.

POINT XIV.

Having invited fraud, the appellants are not excused because they were ignorant of it.

The argument is made that since nothing (as is claimed) had come to the appellants' attention to make them suspect Smith of fraud, they were quite properly not *looking* for fraud. Such reasoning is employed to excuse the examining committee for taking Smith's unsupported word as to the existence and amount of the so-called "items in transit" (whose definite verification was the only real reason for making any reconciliation whatsoever).

This same reasoning is used to excuse the examiners for not making sure that the figures which they *footed* were the same figures which they had purported to verify in detail, and for giving Smith free access to the general ledger during the very course of the examination (again neutralizing the

only possible benefit of a supposedly independent investigation).

It is obvious that to give Smith access to the general ledger, during the very examination, is entirely analogous to giving a teller free access to the cash drawer, while the money is being counted.

This precise situation was caustically commented upon by the court in *United States Fidelity & Guaranty Co.* v. *Muir,* 115 Fed. 264, where the examining committee carelessly gave the cashier an opportunity to change the ledger balances and footings during the course of the examinations, in which the court intimated at page 266 that the directors were *"grossly negligent"*. The Court said at page 265:

> "The examination, therefore, failed to reveal the cashier's defalcations, because the committee of the board of directors *in effect made the defaulter himself one of the examiners."*

POINT XV.

Contemporaneous detection is simpler than subsequent reconstruction.

Much has been said about the great industry and effort required by complainant's accountants in "digging out" the frauds of Smith committed during a period of two and one-half years, from which it is argued that it would have required equal industry and labor on the part of the lay directors to have dug these out contemporaneously.

The fallaciousness of the argument seems immediately apparent. It is one thing to discover the existence of discrepancies at the time when all of

the original material is at hand, and it is another thing not only to discover these discrepancies, but to analyze them and reconstruct the true from the false, after all the material itself has been "reshuffled", so to speak.

A savage can identify a living animal at a glance. It takes an erudite professor to identify that animal, ages later, from fragmentary and partially obliterated remains.

It should also be observed that the reason Mr. Cloran required several weeks for his work was not to discover the *existence* of fraud, but to analyze the situation and present it in a summarized manner embracing a long period. It was only a small part of one day after Examiner Ferguson visited the trust company on August 13th, 1913, that the existence of fraud was conclusively established, though Mr. Ferguson did not have nearly the opportunities and facilities for discovering fraud that the directors had.

POINT XVI.

The appellants have not been released.

Appellants contend that they are relieved of liability because the commissioner of banking delivered releases to certain of their co-directors who made partial restitution of the loss. If the complainant has made good by proof the allegation in its bill, then this question is *res adjudicata*.

The bill alleges (p. 67):

> "* * * certain of said directors have made partial restitution of said losses, which your orator has accepted from them respectively, in settlement of his claims against them severally in behalf of the Roseville Trust Com-

> pany pursuant to an agreement made with said Directors on December 10, 1913, and pursuant to an order of this Court made December 30, 1913, and pursuant to the express provisions of statute, but without prejudice to the causes of action against the other Directors as herein alleged."

In denying defendants' motion to strike, Vice Chancellor Stevens said:

> "The liability of the directors of the Roseville Trust Company is a joint and several liability. The agreement made with those who have settled is not, as far as appears, a technical release; but if it be, it contains a reservation of the right to sue and so would not operate as a discharge of those who were not parties to it. It would, because of the reservation, still be construed as a covenant not to sue."
>
> *La Monte* v. *Lurich,* 86 N. J. Eq. 26, at page 30, aff'd on opinion below, 86 N. J. Eq. 251.

Having been affirmed by this Court, the Vice-Chancellor's decision is the "law of the case."

In fact, since the liability is for *breach of trust,* and since the amount of damages can be ascertained, the compromise with the co-directors would not have discharged these defendants even if it had been in the form of a technical release without reservation. The well-settled law is concisely expressed by *Underhill* in his work on *Trusts and Trustees* (7th Ed.), page 469:

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

accepted a sum from another trustee in satisfaction of *his* liability."

See also:

Murphy v. *Penniman,* 105 Md. 452; 66 Atl. 282.
Gilbert v. *Timms,* 28 Ohio Cir. 107.
Edwards v. *Hood-Barrs* (1905), 1 Ch. 20, 23.
Sloan v. *Herrick,* 49 Vt. 327.
Louisville & E. M. Co. v. *Barnes,* 64 L. R. A. 574 (Ky.).
Lovejoy v. *Murray,* 70 U. S. 1.
Miller v. *Fenton,* 11 Paige (N. Y.) 18.

But inasmuch as the proven facts satisfy entirely the law of this particular case, it is not necessary to debate further the general rule. The facts are as follows:

On December 10, 1913, the Commissioner of Banking and Insurance and the Mutual Bank of Roseville entered into a written agreement, "*subject to the approval of the Court of Chancery*" wherein it was agreed that compromises should be made (as offered) with nine of the directors at amounts severally set forth as a schedule to the agreement. The proceeds of these compromises, it was agreed, were to be included among the assets to be sold by the commissioner to the bank.

But there was specifically *excluded* from the assets thus to be sold:

"* * * any right to recover from officers or directors of said Roseville Trust Company on account of the negligence or improper conduct of said officers or directors, exclusive of officers and directors with whom settlements may be made contemporaneously herewith."

And the agreement expressly provides:

> "* * * that the Commissioner will institute proper proceedings, actions or suits, against any or all of said persons, to recover for loss or damage caused to the said Roseville Trust Company, its business or property, by the negligence or improper conduct of the said persons while acting as directors or officers of the said Trust Company * * *."

At page 6 of the agreement the following specific provision is made respecting claims against directors from whom offers of compromise had *not* been received up to that date:

> "The 'Commissioner' agrees that in the event any offer of settlement shall be made by any such person or persons, and the same shall be approved by the 'Commissioner,' he will, at the request of the 'Bank,' submit such offer or offers to the Court of Chancery of Jersey for approval, and, if approved by said Court, that he will consummate such settlement without delay, and, upon receipt of the sum payable upon such settlement, distribute the same as herein provided."

Express and elaborate provision is also made for the bringing, by the Commissioner, of suits against those directors who were not settled with, and for the apportioning of the proceeds of such suits.

It is urged that none of the foregoing amounts to an agreement or reservation between the Commissioner and the *released directors.* But the latter of course knew that the statute required the Courts' approval of the compromise offers. *They (as well as these defendants) were, as stockholders and depositors, duly served, as provided therein, with copy of the order to show cause bringing on the hearing before the Chancellor to approve the agreement of December 10, 1913, and the ac-*

ceptance of the offers of compromise. The petition in that proceeding and the order to show cause refer to said agreement and the petition has a copy thereof annexed to it.

After a hearing, the Court of Chancery made the order of December 30, 1913, wherein the Commissioner is

> "* * * authorized to complete and carry out the compromise and settlements * * * *upon the terms and conditions set forth in the said Contract* between the said Commissioner of Banking and Insurance and the said Mutual Bank of Roseville, dated December tenth, One thousand nine hundred and thirteen * * *."

The releases were of course not given until after the making of the order authorizing them, and obviously are subject to the terms of the order; as much so as if said terms had been physically incorporated into the release. The contract, the petition, and the order, were all necessarily adopted by the directors when they completed the "compromise and settlements" with the Commissioner and accepted the releases; *and the reservation of the right to sue the other directors was as much a part of the settlement as though it had been contained in express language in the release itself.*

The releases are valid only in so far as they are authorized by the order.

Murphy v. *Penniman* (*supra*).

As stated above, we regard this question as no longer open to debate, and are obliged only to show that, *in fact,* the right to sue others was reserved—which we submit we have done.

Should the Court have any further interest in the subject we respectfully refer to the follow-

ing authorities, which we cited in our brief in this Court on the appellants' prior appeal:

3 Cook on Corporations (7th Ed.), §749;
2 Morowetz on Private Corp. (2d Ed.), §911;
Stockton v. *Anderson,* 40 N. J. Eq. 486;
Biglow v. *Old Dominion Co.,* 74 N. J. Eq. 506, 508;
Newman v. *Fowler,* 37 N. J. L. 89;
Roberts v. *Banse,* 78 N. J. L. 57, 58;
Dwy v. *Connecticut Co.,* 92 Atl. 883;
Line v. *Nelson,* 38 N. J. L. 358;
Robertson v. *Tramniell,* 37 Tex. Ct. App. 53;
Miller v. *Beck,* 108 Ia. 575, 582;
McCrills v. *Hawes,* 38 Me. 566;
Bohn v. *Crosby,* 49 N. Y. 183;
1 Cooley on Torts (3d Ed.) 234, 235;
Bowne v. *Mt. Holly Bank,* 45 N. J. L. 360.

POINT XVII.

Except as to Smith, there are no grades of liability as between the directors.

In *Campbell* v. *Watson* (*supra*), Vice-Chancellor Pitney said:

> "Moreover, where some one or more person or persons is, or are, primarily liable (*for most of the items of loss the cashier is liable*) to the bank for the amount of a loss or losses for which the directors are held liable, the directors, in equity, occupy the position of sureties for the principal debtor; and their right, upon payment of such loss to the bank or its receiver, to be subrogated to its, or his, rights against the party primarily liable, is quite clear."

It is obvious that the purpose of Vice-Chancellor Pitney's parenthetical reference to the liability of the cashier was to identify the cashier as the person primarily liable, as distinguished from the directors. The application of the above language to the case at bar, is to show that Smith is primarily liable and the other directors are secondarily liable.

Except in the peculiar field of admiralty, the law does not recognize different grades of liability for actionable negligence. If each of two tort-feasors is liable for an act for which both are negligent, it is immaterial that the negligence of one was more gross than the negligence of the other, or that one owed a higher degree of care than the other. Both are liable, and such an instance furnishes no exception to the rule that there cannot be contribution between joint tort-feasors.

Where the right of contribution between trustees exists at all, it depends upon the fact that one received a benefit, or was guilty, and the other was free from guilt and profit.

The directors who have been released were no more cognizant of the Nones episode than were these appellants.

If appellants were negligent, it will not avail them to say (if it be true) that some of the released directors were more negligent.

> " * * * where a loss is shown to have resulted from dishonesty, disregard of the charter's requirements, or culpable negligence, the managers who are chargeable with such faults, must be held alike responsible, so far as the receiver is concerned, *without reference to the degree of their dereliction.*"
>
> *Williams* v. *McKay,* 46 N. J. Eq., 25 (Italics ours).
> (quoted in *Campbell* v. *Watson, supra*).

POINT XVIII.

Laches.

The delay from August 1913 to July 1915 in commencing this suit is not only fully and adequately explained, but did not prejudice the appellants in the slightest.

The wreck of the institution was so complete that, even with the books and records in the Banking Department's possession, the work of ascertaining the facts, and the details of administering the estate necessarily consumed many months. The directors certainly cannot complain of the delay necessarily involved in the work of investigation and salvage of a disaster made possible by their own negligence.

Moreover, it was inevitable that the Banking Department should *not* have the books and records in its possession uninterruptedly during the period which appellants complain of.

The prosecutor necessarily kept the books and records in his own custody during the extended period of the preparation and prosecution of the numerous criminal cases growing out of the failure (vol. 3, p.).

And the attention and co-operation of the personnel of the Banking Department was to a large extent requisitioned by the prosecutor in connection with these criminal cases.

Before a reasonably adequate bill of complaint could be prepared in a case of this complexity, it was necessary that the work of administration of the insolvent should have been largely completed. Over three thousand passbooks had to be examined. The accountants had to attempt to reconstruct the facts from the manipulated books.

The work of preparing the bill of complaint itself necessarily occupied many weeks.

The negotiations for compromise with the directors necessarily occupied a considerable period, and naturally included the appellants, as well as the directors who compromised their liability.

The appellants had plain warning that they would be brought to book in the fact that they were parties to the proceeding for the approval of the compromises with their nine co-directors, upon moving papers which showed clearly the intention to proceed against the other directors, including appellants.

Appellants could hardly have expected that the complainant would let them off scot free after realizing approximately $140,000 in cash and credit from the settlements with their co-directors.

During the period complained of, there was nothing to prevent the appellants from preserving and keeping fresh their own recollections of the transaction and from keeping intact whatever documents they or the released directors possessed, if there were such.

In fact, the testimony of the numerous released directors, as well as of the appellants themselves, occupying many hundreds of pages of the printed record, showed that the recollection of each one of them was lively and remarkably complete, particularly as to such matters as were relied upon to exonerate them.

POINT XIX.

The allowance of appellants' claim as depositors is immaterial in this suit.

The contention of the appellants apparently is that the Commissioner of Banking should have

New Jersey State Library

made the filing of relatively trifling claims by the appellants, for their personal deposits, the occasion for litigating the enormously more important and entirely different issues in this suit involving the said claimants and other defendants.

Even assuming that the complaint could properly and legally have litigated the issues in this suit in the manner suggested, there was certainly no reason of law or of common sense which should have made it *obligatory,* or expedient, to do so. A party having even a strict setoff or counterclaim is not obliged to assert his claim as such, but may choose to assert it in a independent suit or action. This is particularly true where the issues are diverse and where numerous other parties must, or may, be involved.

We believe that no further discussion of this contention is necessary.

POINT XX.

The decree (except in so far as it relieves the defendant Dunn from liability) should be affirmed with costs to respondent.

Respectfully submitted,

ROGER HINDS,
Solicitor of Respondent.

ROGER HINDS,
EDWARD F. CLARK (of the New York bar),
of Counsel.

C

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

GEORGE M. LA MONTE, as Commissioner etc. in behalf of ROSEVILLE TRUST COMPANY, Complainant-Respondent

and

EDWARD D. DUNN, Defendant-Appellant.

On Appeal from Chancery.

BRIEF FOR COMPLAINANT-RESPONDENT.
(Concerning Liability for Unlawful Loans.)

Introduction.

This is one of three appeals, from the same decree, to be argued together. Three separate briefs are being presented in behalf of complainant (as respondent in two of the appeals, and as appellant in another) and are being marked "A," "B" and "C," in order to avoid confusion.

This brief "C" has to do with the appeal of the defendant Dunn from so much of the decree

as holds him liable for "the losses, if any, suffered by said Roseville Trust Company upon loans, unlawfully granted or permitted by said (other) defendants, and the defendant Edward D. Dunn, as directors, respectively, during their several terms of office, in conformity with the opinion heretofore filed herein" (p. 224).

This brief is in answer to the Brief for Appellant Dunn.

We cannot accept as correct the analysis by appellant (Appellant's Brief, pp. 1 and 2) of the grounds upon which the appellant is liable for unlawful loans.

Appellant in his brief says the decree holds him for such loans on two grounds (and cites the opinion at page 216 of the Case):

> "1. For loans made or approved by the executive committee contrary to Section 17 of the by-laws.
>
> "2. For loans made contrary to Section 6 of the Trust Company Act, which provides among other things that no Trust Company created under that act shall have power to discount commercial paper, or lend money on bills, notes and other evidences of debt without security."

The pertinent paragraph of the opinon (p. 216) cited by appellant, is as follows:

> "Mr. Dunn is liable for loans, made contrary to the by-laws and the statute, after he became a director, if any loss resulted therefrom, for the reasons heretofore mentioned."

The following is our own analysis of the liability of the directors (including appellant) for unlawful loans.

(Our first and second categories are strictly in accordance with both the law and the facts as set

forth in the opinion. The third is in accordance with the facts as found in the opinion, but involves a somewhat modified view of the law. The fourth is in accordance with the facts, but contrary to the view of the law, as expressed in the opinion. The fifth is in accordance with the facts, and with the view of the directors' duty as expressed in the opinion, the late Vice-Chancellor's view as to the *liability* being not entirely clear to us. The sixth category is in accordance with the facts but is not considered in the opinion.)

We find, then, the following categories of liability for losses upon bad loans, unlawfully made:

1. As to loans ("bills purchased") under $1,000 in amount, the directors, by an executive committee resolution in direct violation of the by-laws, permitted Raymond E. Smith to invest the company's money therein without the approval of the president. Such loans were unauthorized and unlawful and the directors must bear the consequence of all loss resulting therefrom. (Opinion, p. 201, l. 34, to p. 202, l. 12, and p. 204.)

2. As to loans *over* $1,000, the directors violated not only the by-laws, but even the resolution of the executive committee, and sanctioned a general practice whereby the loans were made first, and approved by the executive committee *afterwards*. This is established beyond doubt by the minute book itself and by the testimony of Raymond E. Smith. Since these loans were unauthorized and unlawful, the directors must bear the consequences of all losses resulting therefrom. (Opinion, pp. 202 and 204.)

3. As a matter of law, independent of all other facts and considerations, the mere enormity and universality of the loss upon "bills purchased" furnishes a presumption of negligence in the mak-

ing of said loans, for which negligence the directors are answerable. This is especially true in the case at bar, because the directors, without special credit facilities, made it the *principal business* of the trust company under the misnomer of "bills purchased" to engage in the *discount* business, which, strictly, is not a proper statutory function of trust companies. (The opinion supports us in this view only to the extent that it holds the *discount* business not to be a proper function of trust companies (p. 203). On the other hand, we do not regard directors as liable *ipso facto* for permitting an occasional "discount".)

4. All but one small item of the so-called "bills" which resulted in loss in the hands of the commissioner, were "purchased" during a period when the reserves of the company were depleted below the legal minimum, which depletion, if not actually known by each director, *would* have been known if the directors had performed their duty. The bills having been unlawfully purchased, the directors must bear the consequences of all loss resulting therefrom. (The opinion, p. 215, relieves the directors from this liability on this count because they did not *know* the reserves were depleted. We believe the decree can be supported on this ground, if necessary.)

5. By sanctioning an habitual violation by successive examining committees of section 14 of the Trust Company Law, in failing to report and mark down depreciated loans and other assets, the director's alleged blindness as to the progressive rottenness of the loans as a whole was, if true, *self inflicted,* making the directors liable, in bulk, for the bad loans. (The Opinion is clear that the directors violated their duty in this respect, but is

not clear as to the liability therefor (p. 214, l. 32, to p. 215, l. 16).

6. As to the "bills" of certain specified borrowers, these were "purchased" in undiminished amounts after the banking department had specifically directed that credit be first reduced and then withdrawn. Having disobeyed the department and "renewed" these obligations, and thereafter knowingly carried them upon the books and included them in the published reports at undiminished value, the directors have, in legal effect, warranted their collectibility to the stockholders and creditors, and to the company itself, and must now bear the loss at the suit of the company, in liquidation. (The opinion does not consider this phase of liability, though the facts are undisputed and the law, we believe, supports this view.)

We shall not burden the Court with a further statement of facts here, because they are fully presented in our other briefs and will be necessarily referred to in the course of the argument.

POINT I.

The directors (including appellant) are liable for bad loans, under $1,000, because they violated the by-laws in permitting Smith to make loans under $1,000.

Section 17 of the by-laws (p. 71, l. 36) provides as follows:

> "The executive committee shall superintend and advise all investments that shall be made with the funds of the company. The executive committee may in its discretion authorize the *president* to make investments

without previously consulting the committee, and all such transactions shall be reported to the committee at its next meeting."

Appellant frankly admits that he knew that the directors were permitting Smith to make loans up to $1,000 (p. 1251, l. 24).

A large number of loans made under $1,000, thus made by Smith, resulted in total loss to the trust company (p. 85 *et seq.*).

Smith was not the president. He was the treasurer. In direct violation of their own by-laws, the directors adopted a practice of permitting their *treasurer,* without authorization of the executive committee or board of directors, to grant discounts or loans without security, not exceeding $1,000.

The by-laws were never amended to this effect, and could have been amended only by the stockholders (p. 57). So that here we have the directors deliberately violating the by-laws. We submit that they were properly held liable for every note under $1,000 which was not paid in full.

POINT II.

The directors (including appellant) were properly held liable for losses on loans which they permitted Smith to make in advance of the executive committee's approval.

While appellant cannot be held for loans made prior to January, 1912, it will perhaps be helpful to show the development of the practices we complain of.

The minutes indicate that for a few months the executive committee actually did consider and

pass upon, in advance, applications for loans *over* $1,000. Instances of this measure of conservatism on their part are found in the minutes of January 5, 1909, January 26th, February 18th, March 30th, April 6th, April 13th, April 20th, May 4th, May 25th, June 1st and June 9th, 1909. Their conservatism, curiously enough, lasted only until the date when by unanimous resolution they voted to disregard the warning of the banking department and retain in the office of treasurer the man who had been found falsifying his books and misapplying the company's funds. At the meeting of the executive committee on June 21, 1909 (preceding the much-discussed directors' meeting of that date), the following appears:

> "Loans of the two last weeks were approved."

Attached to the minutes is a list

> "showing all notes in the institution at the close of business June 21st, 1909."

Several of them, exceeding $1,000 in amount, were "purchased" during the two weeks prior to the meeting of June 21st. This is the first indication on the minutes of the practice, which later became universal, of permitting Smith to loan the money first and get the perfunctory approval of the executive committee afterwards. Whether this practice actually occurred prior to June 21st, 1909, and was delicately veiled by the wording of the minutes prior to that day is a question that can be answered by anyone with sufficient industry to search through the old files and records. The important fact is that after the 21st day of June, 1909 (the date of Smith's confession and rehabilitation), it became the invariable practice in the trust company that Smith should loan the money

first (whether under $1,000 or over $1,000) and get the committee's approval *afterwards*. For example: in the minutes of June 29, 1909, we find again: "loans of the week were approved as follows." These included three notes of over $1,000, one of them $2,500. At the next meeting, July 6th, 1909, "loans of the week," which were "approved," included two notes of over $1,000. On July 14, 1909, four loans of over $1,000 which had already been made, were approved, one of them for $5,000, which was loaned, two days prior to the meeting, to Fred Kilgus, one of the directors, without other endorsement.

It would be tiresome to detail all the instances of this practice. Skipping at random to the meeting of April 26, 1910, we find that the situation had become much worse. On that date "bills purchased during the week" which were "approved" included 18 notes of over $1,000, one of them over $8,000, two others over $6,000, five others of $5,000 or over, three others over $4,000 and three of over $3,000. Skipping to January 23, 1911 (a typical instance), we find that one note of $9,616.98 had already been "purchased" during the week, before the committee had approved it, and another one of over $2,500. By 1912, when appellant became a director, the company was already feeling the effect of Smith's embezzlements, for we find on April 10, 1912, only six loans of over $1,000 made by Smith in advance of the committee's approval, one of them a loan of $6,120 to director Lurich. In 1913 the situation had not changed. On January 7th, the first meeting in that year, the committee perfunctorily approved loans which had been made for the past two weeks without previous authorization. This included five loans of over $1,000, one of them a loan of $7,000 to "A. M. Mott," endorsed by "H. Mott," presumably the director.

The directors were unregenerate to the last. On July 23, 1913 (the last date appearing in the minute-book), the same old formula appears in the minutes, viz.: "bills purchased during the week were approved as follows." The list includes four notes of over $1,000, one of them being in the amount of $5,000.

The directors thus showed that their confidence in Smith's fidelity was exceeded only by their confidence in his ability, facilities and opportunity for investigating credits. The man who was permitted to draw *ad libitum* upon the company's reserve funds in correspondent banks, and have unsupervised control of the general ledger, was also entrusted with the almost exclusive loaning out of the trust company's funds in unlimited amounts upon unsecured promises to pay of the trust company's (Smith's) customers, with no further safeguard than the perfunctory rubber stamp of the executive committee after the money had actually left the trust company, and without further credit investigation than Smith himself could find time for.

It may readily be inferred how little time Smith had for the duties as *credit man* which the directors thrust upon him. After he had attended to his sundry outside business affairs (which, in view of his own character, must have engaged his first attention); and after he had performed, with more or less diligence, the routine duties of treasurer, it is obvious that he could have found little time for credit investigations. Nor had Smith any more inclination than he had ability or opportunity for investigating credits. He had "helped out a friend" as early as 1908, when he appropriated the trust company's money to stock speculations of Mr. Nones. Was he likely to refuse his friends at the same time that he himself

was piling up a book shortage which eventually aggregated over $300,000? Is it strange, as testified to by Mr. Munroe, that Mr. Smith was "popular in the neighborhood?"

> " * * * a lot of bad loans were made by the cashier, and the directors were guilty in not managing the affairs of the bank and controlling the action of the cashier * * * this rendered the directors liable * * *."
>
> *Bank of Des Arc* v. *Moody,* 110 Ark. 39, 41.

The actual shrinkage or loss resulting from bad loans was $181,603.94. A large part of these loans *originated* after appellant became a director. Because of so-called "renewals" *all* took the form of "bills" which were "purchased" during appellant's incumbency.

It has been suggested that the minutes do not correctly set forth the facts and that the loans had *not* really been already "made during the week" prior to their approval by the executive committee.

But the positive testimony of Smith (pp. 725, 726) is that in such cases they had already been made, before approval, except where they were the subject of a separate motion.

The cash-books, also, are in evidence, and they confirm the minutes and Smith's testimony.

For that matter, the appellant cannot be injured by the decree in this respect for if he can show the Special Master, by the entry in the cash-book, that any given loan (which the minutes say was made first and approved afterwards) was in fact not made until after approval, then he certainly cannot be held liable on that loan—at least under this count.

But the cash-book, as a fact, does confirm the accuracy of the minutes, as we have said. Moreover, the late Vice-Chancellor after hearing the witnesses, and examining the evidence, found, properly, that most of the loans were made by Smith, with no approval by the executive committee in the first instance, but with only a "perfunctory approval of what Smith had already done" (p. 202, l. 1 and l. 26).

The minute book shows that the minutes of the executive committee were invariably read and approved at the next succeeding meeting of the Board of Directors. The Vice-Chancellor therefore quite properly said (p. 204):

> "Having lent money in disregard of the * * * by-law the directors as a body are responsible for any resulting loss, for they knew and approved of the action of their committee in this regard. *Citizens Loan Assoc.* v. *Lyon,* 2 Stew. 110; *Williams* v. *McKay,* 13 Stew. 189."

POINT III.

The fact that the "discount" business is not legally a function of trust companies is a cumulative element of liability.

This Court will of course affirm the decree if the *result* is correct even though this Court may not approve in every respect the reasoning of the Court below.

United States v. *Norris,* 222 Fed. 14.
Hirsh v. *Navigation Co.,* 200 N. Y. 263.
White v. *Railway Co.,* 122 Ind. 317.

We are frank to admit that we do not regard the business of discounting as so wrongful in the case of trust companies, that the directors become, *ipso facto,* insurers of every loan so made.

But it is *one element* to be considered in connection with all the other circumstances of the case.

As bearing on the degree of care which the directors should have exercised in their "bills purchased" business it is pertinent to consider the nature of that business with relation to the statutory powers of trust companies.

There is no statute authorizing trust companies to conduct a general discount or loan business as in the case of *banks.* The corresponding provision of the New Jersey Banking Law (Section 6) should be compared:

> "(6) *Powers.* * * * Every bank shall have power to exercise by its board of directors or duly authorized officers or agents, subject to law, all such powers as shall be necessary to carry on the *business of banking* by *discounting* bills, notes and other evidence of debt, by receiving deposits, * * * and by exerciisng all the usual and incidental powers and privileges belonging to or pertaining to such business * * * ."

Both banks and trust companies are authorized to "loan money on real and personal property", that is to say they are authorized to make *collateral* loans.

The provision (Trust Company Act, §6) permitting a trust company to "*invest* in * * * promissory notes * * *" contemplates an entirely different operation. There is a real and not a mere verbal distinction between investing in promissory notes, and discounting notes, when these terms are properly used. (Lest we be misunderstood let us say at once that, as applied by the directors of the

Roseville Trust Company, there was *no* distinction between those two terms.)

In discounting a note, a bank extends credit without security to a private customer after an investigation of the customer's credit which the facilities of a commercial bank afford. When a trust company *invests* in a promissory note it *goes into the note market,* and buys a piece of standard commercial paper, the maker of which, though not personally known to the trust company, has a marketable credit among note brokers. It might properly invest in or buy the bills or notes of, let us say, H. B. Claflin & Co. or some other concern whose paper was at the time widely bought and sold by banks, note brokers and others properly engaged in the credit business; but it is something else for a trust company under the guise of "investing in" or "buying" the "bills purchased" of such as Nones, Scarlett, Miele and Bruno, and other borrowers of the Roseville Trust Company, to do what in actual fact was making an almost exclusive business of what is normally the feature of a *bank of discount.*

While we do not charge the directors with actionable delinquency for engaging in the discount business *per se,* it is important that the foregoing distinction be kept in mind (in connection with other facts) in determining the quality of their administration of their trust.

It was not so much that they went beyond what, in the first place, are strictly the proper functions of a trust company by engaging in the discount business; but this soon became the *principal aspect* of their business, as reflected by their balance sheet. For example, on January 2nd, 1913 (a typical date taken at random), the collateral loans (the normal business for a trust company) amounted to $51,538. On the same day the so-

called "bills purchased" (really unsecured loans or discounts) amounted to $648,532.22.

While, concededly, there are many trust companies in New Jersey which engage in the discount business, there are, fortunately, few who make the business of discount their *principal* concern. Nor are we prepared to say that engaging in such business is *per se* so illegal or irregular that the directors should be held as insurers against any losses suffered in the course thereof. This would perhaps be ignoring the practical consideration that we are confronted by a condition and not a theory.

We do say, however, that so long as the directors did embark in this business of banking or discounting they should have at least seen to it that their institution was equipped with facilities for investigating credits, and fortified by a system and practice of investigating credits, without which the business of discounting must necessarily be not only hazardous, but reckless.

As we show elsewhere in this brief, instead of exercising *especial* care in conducting a business not strictly in accordance with the statute, the directors allowed Smith to do most of the lending, disregarded the criticisms of the Department, and failed even to ascertain that the reserves were depleted below the limit where any new loans were permissible.

Under such circumstances they were properly held liable.

POINT IV.

The directors are responsible for losses on loans made while the reserves were depleted.

Here again, the decree, as we contend, was right in holding the appellant liable for loans made contrary to statute, but erred in not specifying Section 20 of the Trust Company Law, as well as Section 6. The decree being correct in result, there was no occasion for respondent to appeal. (See cases cited in Point III, *supra.*)

The Trust Company Act provides as follows (section 20):

> "20. *Reserve in cash and in banks. Reserve depleted shall be restored.*
>
> "Every trust company receiving deposits of money subject to check or payable on demand shall at all times have on hand in available funds an amount equal to at least fifteen per centum of all its immediate demand liabilities; four-fifths of this amount of available funds may consist of balances due to the company from good, solvent banks or trust companies, and one-fifth of such sum shall be held in reserve in cash on hand; immediate liabilities shall include all deposits payable on demand made by individuals, firms or corporations, or by banks, or trust companies, and all items in the nature of claims payable on demand; whenever the available funds of any trust company shall be below fifteen per centum of its immediate liabilities, such trust company shall not make any new loans otherwise than by purchasing bills of exchange payable at sight, nor make any dividends of its profits until the required proportion between its immediate liabilities and its available funds has been restored."

The complainant has proved, Exhibit C. 1467, that both the reserve funds as a whole, and the cash alone, were continually below the legal minimum after January 31, 1913. If the directors did not know of the existence of this condition, they are none the less chargeable, because they would have known it if they had, as their duty required them, caused the assets and liabilities to be properly examined and the books inspected; a duty which they negligently failed to perform.

> "The supervision of the directors over the business of the bank should have been such as would have enabled them at all times to know its general financial condition, and to check or prevent imprudent or dishonest conduct by the president or cashier. They had the means of knowing, and they were bound to know, the amount and value of the paper and securities held by the bank. They were also bound to know the character and habits of the men they had placed and kept in charge of the bank as its president and cashier. There could be no excuse for their failure to examine the books of the bank, and for their ignorance of the manner in which its business was conducted."
>
> *Coddington et al.* v. *Canaday,* 157 Ind. 243, (at p. 259); 61 N. E., 567.

In so far as the resources of the Roseville Trust Company were impaired by the worthlessness of a large proportion of its loans (bills purchased), as indicated by their interminable renewal and lamentable results of realization, the impairment is *in addition* to that caused by the *book shortages,* which are the only shortages taken into account in Exhibit C-1467, showing the reserves were continually depleted after January 31, 1913.

The theory on which the above-quoted statute and similar statutes is based is that under certain conditions it is unwise and improper for a bank to make new loans. If there were no statute, the liability of the directors would have the same foundation except that a question of *fact* would be presented for a court or jury to determine at what particular point, in the depletion of the reserve funds, it becomes actionable negligence for the directors to authorize new loans. The statute merely substitutes an *arbitrary* standard or line of demarcation, and absolutely prohibits the making of *any* loans after the reserves have been depleted below a certain arbitrary minimum.

> "Section 5200 of the Revised Statutes which prohibits loans to any one person, firm or corporation in excess of 10% of the capital stock of a national bank actually paid in, creates a fixed standard by which to determine in many cases, whether loans which have been made to particular individuals or corporations are excessive, and for that reason indicative of negligence or bad faith, without remitting those questions to the decision of a jury or a chancellor * * * ."
>
> *Cockrill* v. *Cooper,* 86 Fed., 7, (C. C. A.) at p. 12.

> "It is the duty of a director to know the condition of his bank and to see that its affairs are honestly and properly managed."
>
> *Ellis* v. *Mercantile Co.,* 103 Miss., 560, 577.

> "It is the duty of directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know and which they have the means of knowing."
>
> *Seale* v. *Baker,* 70 Tex., 283.

In *Cunningham* v. *Shellman,* 164 Ky., 584; 175 S. W., 1045, the directors

> " * * * did not do anything to correct the conditions that were bringing the bank to ruin, because they did not know of these conditions."

In spite of their lack of knowledge they were none the less held liable for their violation of the statute.

Directors

> " * * * cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements and statements of the bank and which would have come to their knowledge except for their gross neglect and inattention."
>
> *United Society* v. *Underwood,* 72 Ky., (9 Bush) 609.

> " * * * the defendant was ignorant of the insolvency of the bank because he wilfully (wilfully in the sense of intentionally) neglected the means whereby he could or might have ascertained its condition * * * ; or his lack of knowledge arose from the fact that his unfamiliarity with business methods was so pronounced that he could not have ascertained its true condition, had he made an examination into its affairs, but would have been obliged to depend (as he did) upon statements of its solvency made to him by those who had active management of its affairs. A person cannot, upon such a pretext, escape the natural and necessary consequences of his own voluntary act which, in this case, clearly amount to criminal negligence."
>
> *McClure* v. *The People,* 27 Col. 358.

Schedule H (p. 79) shows the losses on notes (bills purchased) owned by the Roseville Trust Company at the time of liquidation. With the single exception of the $325 note of one Kitchell dated Jan. 30, 1913, every one of these loans was made during the time when the reserve funds were continuously below the legal minimum, that is, since January 31, 1913, as shown in Exhibit C-1467. (Respondent became a director in January, 1912.)

We submit that the decree might be affirmed on the foregoing grounds, if on no other, even though the Vice-Chancellor took the opposite view.

POINT V.

By ignoring their duty to depreciate bad loans on the books, and in their reports, the directors in effect warranted them to the depositors and stockholders.

We have shown in our other briefs how Section 14 of the Trust Company Law was habitually violated in that the examining committees (conspicuously including appellant) made no pretense of reporting upon the *value* of the trust company's paper, and how the directors approved this nonfeasance, which appeared clearly in the reports of the committees.

We have discussed also how the directors repeatedly caused to be made public reports of the trust company's condition which were grossly at variance with the facts (among other respects) with respect to the *real* value of the asset "bills purchased," which was (unjustifiedly) the outstanding asset of the institution.

The depositors and stockholders were quite justified in assuming

> (1) That the directors, as a result of frequent and careful inquiry, *knew* that the "bills purchased" were truly of the reported value.
>
> (2) That *renewals* were being made only after similar inquiry and knowledge.

By continuing to carry these loans at face value, and *renewing them,* the directors assumed the responsibility for them.

We say "renewing," but strictly the transaction is a new *purchase,* a purchase which is certainly unlawful if made with actual or *constructive* notice that the paper is worth less than face value.

Vice-Chancellor Stevens says, in this connection (p. 215).

> "The failure to comply with the statute is evidence of negligent conduct on the part of the Committee and of the Board, but does not necessarily increase their liability."

It is not entirely clear to us what is meant by saying it "does not necessarily *increase* their liability." If the Vice-Chancellor meant that the directors were already liable for the bad loans on another count, and that this liability is concurrent, as it were, rather than cumulative, then we are in entire accord.

> "The injury done by false reports to the creditors and stockholders is, that persons are led to give the bank credit, perhaps, to their ultimate loss, and that of the stockholders. The false reports work injury to the stockholders in another way also. They not only disarm suspicion, but inspire them with confidence in the management of the affairs of the institution, and so induce them to keep

the directors in office until the disaster comes and the bank is, perhaps, utterly ruined. They also avert the scrutiny of the comptroller of the currency."

Ackerman v. *Halsey,* 37 N. J. Equity, 356, 364.

POINT VI.

By purchasing bills from borrowers disapproved by the banking department the directors made themselves liable for the losses thereon.

In *Thomas* v. *Taylor,* 224 U. S. 73, Mr. Justice McKenna, speaking of those officers of the national banking system whose functions correspond almost exactly with those of the New Jersey Commissioner of Banking and his examiners, said (p. 82):

> " * * * disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

In a trust company, a loan is not "renewed" or "extended"—rather, a new "bill" is "purchased" and the old one paid off. To purchase a bill which the directors know, or should know, is of doubtful value, is an *unlawful loan.*

When it is the directors' duty, because of directions from the banking department to enforce collection, or reduction of a "bill," they are culpable in purchasing a new bill of the same bor-

rower, and continuing to carry it at face value. The transaction is an unlawful loan.

It would perhaps be reasonable to infer from the very number and amount of the uncollectible notes that the total or partial uncollectibility of at least some of them was known to or could have been learned by the directors, but we do not need to rely solely upon inference, for there is plenty of direct evidence that the directors knew that many of these notes were of such doubtful character that they should be carried at less than their face value, if not totally "written off" as worthless. In the case of the Scarlett note for $10,000, the directors had unsuccessfully been attempting to enforce payment for over two years. On Oct. 28, 1912, (p. 130) they received official instructions from the banking department to carry this "asset" at not over half its face value. Yet the examining committee did not report, either in writing (as required by statute) or verbally, that the notes should be depreciated on the books, nor did the directors require this to be done.

Commissioner wrote on October 28th, 1912 (p. 135):

> "The notes of Joseph Federici, $1,235 as maker and $2,840.75 as endorser, are regarded as of very doubtful collectibility. The Examiner reports that he has to be 'dunned' for weeks to take care of his obligations after they fall due, and it is admitted that nothing can be collected from him by the process of law. *The line should be eliminated from your Company's books.*"

Every member of the board of directors was of course responsible for this delinquency. The minutes show that the letter was read at the executive committee meeting of November 6th, 1912, and ordered spread upon the minutes. These minutes

were read and approved at the well-attended directors' meeting of November 13th, 1912, and the letter itself was "partially read and discussed." At an adjourned directors' meeting of November 19th, 1912, the letter "was carefully read, and each matter mentioned in the letter was taken up in its turn and *freely discussed.*" The letter was referred to the officers to answer as instructed by the directors, and a copy of the letter spread upon the minutes. In spite of all this, nothing was done. Not even a pretense of charging off bad loans was made until December 30th, 1912, and the minutes of the executive committee meeting of that date show that the Federici notes were *not* among those which were purported to have been charged off, to the alleged "Provident Reserve Fund."

The report of the examining committee of December 14th, 1912, shows that they not only did not pretend to make a valuation of the almost worthless Federici notes, but did not even recommend that they be carried at less than face value. At the directors' meeting of February 11th, 1913, the report was referred to the executive committee, and was thereafter (by silence) impliedly approved, though all of the directors knew of the Department's attitude as to the Federici notes.

The showing as to the Morel notes is even worse. These also resulted in a large loss to the trust company. In his letter of July 13th, 1910, the Commissioner recommended that the line be reduced and secured by competent collateral (p. 117). In his letter of October 28th, 1912, he again comments upon this line, saying that Morel " * * * is reported by the examiner to be a real estate speculator, pure and simple, and his line should be reduced in order to demonstrate that he is as good financially as he is reputed to be" (p. 137).

Yet, nothing was done by the directors or by the examining committees of December 14th, 1912, and May 21st, 1913, though all the facts were brought to the attention of the entire board of directors.

Appellant, being a real estate man himself, should have been particularly concerned.

The notes of Frank Bruno and Antonio Miele (also made jointly as "Miele and Bruno"), were severely criticised in the Commissioner's letter of June 13th, 1910, (p. 117), and again in his letter of October 28th, 1912 (p. 136). These notes resulted in enormous loss to the trust company, amounting to upwards of $24,000 as entered on the books, and directly known to all of the directors through the Commissioner's letter and the executive committee's minutes, and exclusive of over $21,000 more due from the borrowers on overdrafts (p. 78), which should also have been prevented by the directors.

We could refer in detail to many other instances where the examining committee utterly failed to make any under-valuation of notes repeatedly criticised by the Banking Department, and later resulting in total loss, or even to recommend their reduction or charging off on the books; and where the board of directors failed to see to it that the committee took proper action in accordance with the recommendations of the Department, but repeatedly approved the purchase of new bills. We recommend a careful reading of the Deputy Commissioner's letter of October 28th, 1912 (p. 126), and a comparison of the recommendations therein contained, with the losses shown in Exhibit H (p. 79), and with the complete inaction of the examining committee and the board of directors with respect thereto.

We call particular attention to the note of Jane A. Curtis (criticised by the Deputy Commissioner

p. 128), which resulted in a total loss because it was the accommodation note of a married woman.

A exceedingly serious loss resulted from the irregular conduct of the directors in connection with the notes of the International Tobacco Company as severely criticised by the Deputy Commissioner in his letter of October 28th, 1912 (pp. 132 to 135). The examining committee of December 14th, 1912, recommended that the loan be "reduced more rapidly," but utterly failed to place any value upon this "asset," and the examining committee of May 21st, 1913, was silent on the subject, although the situation had not improved in the slightest, and the trust company suffered a loss of over $13,000 (pp. 79, 80). The fact that the director Foster was an officer of the International Tobacco Company places an even more discreditable light upon the failure of both the directors and the examining committee to take any action in the matter.

The defendant Ingersoll's transactions with the trust company, both in his own name and in the name of his "Ingersoll Company" and his "Alpha Alcohol Utensil & Manufacturing Company" also resulted in substantial loss to the institution (p. 85). Although these were unfavorably commented upon by the Deputy Commissioner (p. 137), they were ignored by the December 14th, 1912, examining committee, and by that of May 21st, 1913, as well as by the directors, and the "bills" of these borrowers were again "purchased."

POINT VII.

Appellant was the more culpable because he neglected to use the especial talents which he possessed.

Appellant was an experienced real estate man (pp. 417, 1264 and 1265). Some of the borrowers who were most notoriously unworthy of credit were real estate speculators. Among these were Scarlett, Armstrong, Morel, and the Intercity Land and Securities Company, whose paper, in the aggregate, resulted in a loss of over $100,000. The statute required the assets to be valued. Appellant was better equipped for the valuing of these particular "assets" than his fellow directors. As a member of the examining committee he was assigned to "bills purchased." But he made no effort to inquire into the solvency of these borrowers. Their "bills" continued to be purchased.

Moreover appellant declared himself an *expert* as to "bills purchased" (p. 1260). Having counted them, he knew how large a percentage of the total assets they comprised. He presumably knew these loans were not a proper investment for the trust company (in view of the circumstances), certainly not in such quantities. He knew the necessity for exceptional care and scrupulous attention in this important matter.

Yet, despite his peculiar qualifications, appellant had no more regard than the other directors for his duty to obey the statutes, the by-laws, the Department's warnings, and the dictates of ordinary care.

POINT VIII.

The decree, in so far as it holds appellant Dunn liable for loans unlawfully made or permitted, should be affirmed, with costs to respondent.

Respectfully submitted,

ROGER HINDS,
Solicitor of Respondent.

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

New Jersey Court of Errors and Appeals

Between GEORGE LAMONTE, Commissioner of Banking and Insurance of the State of New Jersey in behalf of and in the name of Roseville Trust Company, Complainant-Appellant, and EDWARD D. DUNN, Defendant-Respondent.	On Cross-Appeal of Complainant from decree in Chancery.

BRIEF FOR RESPONDENT EDWARD D. DUNN.

The brief for the appellant is not arranged in accordance with the rule of this court; and so it is difficult for us to follow that rule in answering the brief. Under the title "The Facts" in its brief the appellant has blended fact with argument. There is no statement in the brief of the grounds of appeal. We shall later state those grounds as we gather them from the petition of appeal.

1.

STATEMENT OF THE CASE.

The Roseville Trust Company began business oon November 30, 1908. Edward D. Dunn was elected a director on January 9, 1912 (p. 418). The Company was taken possession of by the

Commissioner of Banking and Insurance on August 14, 1913. The final decree (p. 220) adjudges that the defendant-directors (not including Dunn) are liable for losses suffered by the Roseville Trust Company by reason of the misappropriation and misapplication of its funds and property by Raymond E. Smith, its secretary and treasurer, on the ground that said directors (not including Dunn) had notice that Smith was unworthy of trust and confidence, but nevertheless retained Smith as secretary and treasurer and thereafter permitted him to have control of the funds and property of the company without sufficient check, supervision and restraint.

Under the final decree Dunn, as well as the other directors, are also held liable for alleged unlawful loans. He has appealed from that portion of the decree, and it is proposed to argue that appeal with the appeal now under discussion and with the appeal of certain other defendants.

The petition of appeal of the present appellant alleges that the final decree is erroneous, for that it fails and omits to include Dunn as being liable for at least $200,000 on the ground that Dunn while director had notice, as well as said other directors, that Smith was unworthy of trust and confidence, but nevertheless retained said Smith as secretary and treasurer and permitted him to have control of the funds and property of the Company without sufficient check, supervision and restraint.

The questions involved in this appeal are, therefore, as follows:

1. Did Dunn have notice that Smith was unworthy of confidence and trust?

2. Assuming that Dunn had such notice, was Smith permitted by the directors to have control of the funds and property of the Company without sufficient check, supervision and restraint?

2.

BRIEF OF THE ARGUMENT.

Prefatory Statement.

For convenience we present a chronological statement of Mr. Dunn's connection with the Bank and attendance at directors' meetings.

Edward D. Dunn was elected a director of the Roseville Trust Company on January 9, 1912 (p. 449), the bank then being in the fourth year of its existence. He was then 28 years old (p. 451). He attended the directors' meetings in January, February, March, April, May and June, 1912 (p. 449). After June, 1912, the directors' meetings were suspended until September because of the hot weather. He attended the September and October meetings (p. 449). At the November, 1912, meeting he was ill, but appeared at the Bank and was excused from the meeting by the President (p. 449). His health then compelled him to go South, where he remained several months (p. 450). After he had recovered, the first meeting he attended was in February, 1913 (p. 450), and he also attended the March and April, 1913, meetings. In April, 1913, he was married and went away on a wedding trip. He did not attend the May meeting. The June and July meetings he attended (p. 450).

He did not read the minutes of meetings previous to his election and did not hear of the let-

ters written in 1909 with respect to the Nones transaction until after the bank had closed (p. 450).

He was appointed on the examining committee on the same day he was elected a director (p. 419), and acted with that committee only on the examination of April 11, 1912 (p. 419). As already stated, his illness forced him to go South in the latter part of 1912, and he did not act with the examining committee in its examination made in December, 1912 (pp. 423, 448). He was not reappointed on the examining committee in 1913.

The defendants, who were directors of the Bank from the beginning, were held in the court below to have had notice that Smith was unworthy of trust and confidence by reason of the Nones affair occurring in February, 1909.

Mr. Dunn's testimony (p. 450) that he had no knowledge of this affair until after the Bank closed is not contradicted or challenged. Dunn became a director in January, 1912. He did not examine the minutes of meetings held prior to his becoming a director; and we submit he was under no duty to do so.

Mr. Dunn's conduct must, therefore, be considered quite apart from the Nones affair.

Under the heading "The Facts" and "Informal Summary of Argument" in appellant's brief, counsel practically admits that Dunn had no notice that Smith was unworthy of trust and confidence. In the argument blended with these statements of alleged facts, the attempt is made to hold Dunn liable on the ground that under the system then in vogue in the Bank Smith was not subjected to proper check and restraint. In brief, the contention is that a director becoming such in 1912 in a trust company organized in 1908, is under

a duty to investigate the bookkeeping system of the company and see that proper checks and restraints are imposed on its secretary and treasurer. Even though such director has received no notice to put him on his guard, he is nevertheless under a duty according to appellant to assume that the officers of the Bank and the directors do not know their business and change the whole system of the Bank. The fact that the Banking Department has not challenged the system in vogue in the bank, except in minor respects, is, according to appellant, of no avail to such a director. He must overrule his fellow directors and the Banking Department and insist on a reorganization of the methods of the Company. If such be the law, then the only person who can safely become a director must either be an expert accountant or must employ one to go over the system of the Bank and report if it is sufficient. We confidently submit that no such absurd degree of care is required of a director.

I.

The respondent Dunn had no notice that Smith was unworthy of trust and confidence.

This point is practically conceded in appellant's brief. As already stated, Dunn had no knowledge of the Nones affair until after the Bank closed. His duty, therefore, was to give ordinary attention to the affairs of the institution. As was said in the opinion below:

> "In *Campbell* v. *Watson,* 17 Dick. 427, Pitney, V. C., quotes with approval the follow-

ing passage from *Percy* v. *Millaudon,* 8 Mar. (N.S.) 68, 'The duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and, in a great measure, be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

And the opinion continues (p. 201):

"In the present case, assuming it to have been due care in the first instance, to have given the treasurer unlimited opportunity to drw upon all the funds of the institution, certainly when it was found that, from the very beginning, he had abused his power, ordinary prudence would have suggested that restraints be placed upon his action."

The abuse of power referred to is the Nones affair. As Dunn had no knowledge of that, it must therefore, so far as he is concerned, be assumed that Smith was worthy of trust and confidence. And that brings us to the question, whether Dunn, the youngest member of the Board, both in age and in term of service on the Board, was under a duty, when he became a director, to investigate the banking system of the company and change that system, if in his opinion it was an improper one. This question we shall later discuss. Before doing so, however, we shall discuss Points I, II and III of appellant's brief.

II.

The contention in appellant's brief that Dunn is negligent because as a member of the examining committee and as a director he did not consult any of the books of the company is not properly before this court.

The petition of appeal does not challenge the final decree on either of the grounds above stated. Appellant in its brief has conveniently omitted to state his grounds of appeal. We have quoted them above. They allege that the decree is erroneous for that it should have adjudged (1) that Dunn had notice that Smith was unworthy of trust and confidence, and (2) thereafter continued him in office as Secretary and Treasurer without restraint or check.

Furthermore, Dunn alone is made respondent in the present appeal. Passing this obvious defect in the petition of appeal, it appears by the opinion and the decree below that none of the directors were held liable for their work on the examining committees or for alleged failure to consult the books of the company.

We submit that this court should refuse to consider the contentions in Points I, II and III of appellant's brief, first, on the ground that the question is not raised in the petition of appeal, and second, on the ground that the other defendants should have been joined with Dunn as respondents, if this question was to be considered by the court.

We shall, however, in presenting our argument on the main question in this case discuss Dunn's work on the examining committee and his duty as a director generally.

III.

Respondent Dunn gave ordinary attention to the affairs of the trust company and was not guilty of negligence either as a member of the examining committee or as a director.

We will first discuss his work as a member of the examining committee. The candor of Mr. Dunn is evident from his testimony when called as a witness for the complainant below. We quote it at length (p. 419 et seq.):

> "Q. You recall that you were a member; you served on the committee which made an examination in April, 1912? A. Yes, sir.
>
> Q. The date has been testified to as April 11, 1912? Is that correct? A. Yes, I suppose so.
>
> Q. Now Mr. Dunn, did you ever serve on any other examination? A. Never.
>
> Q. Nor in any other institution, in any other banking institution? A. On an examination?
>
> Q. Yes? A. Oh, never, no, sir.
>
> Q. Then the facts with regard to this examination are fairly clear in your recollection? A. Fairly clear; it is five years ago.
>
> Q. Yes, but you do not confuse them with some other examination because there was none? A. I do not.
>
> Q. Now Mr. Dunn, will you be good enough to tell us what you recollect of that April, 1912 examination beginning as his honor indicated to one other witness yesterday by stating your arrival and just what you did, or what was done in your presence? A. I arrived at the bank very shortly after three o'clock, and I met there the other members of

the examining committee; the only one whom I have very clearly in mind was the chairman, Mr. Sexton, though I am under the impression there were two others. Mr. Sexton took us in back of the long rail there with the grill work above, which separated the customers from the banking department of the institution, and Mr. Sexton announced that he had come for the purpose of examining the bank, announced that the employes of the bank, and said he wanted to take charge of all of the assets and material of the bank for the purpose of an examination. He talked with me as to what he would have me do, and decided to have me examine the purchased paper, all the bills purchased, the notes of the bank, all of the notes, the unsecured notes only of the bank, and I was led to the part of the bank which is the third section I believe back from the Orange Street side, it is still in back of the grill work but it is not in the cages where the tellers work or where the cash was or the books, it had a long counter, and Mr. Sexton brought to me quite a large bundle, almost five hundred thousand dollars worth, I believe, of purchased paper, of notes made in various amounts from, as I remember, five dollars up to a thousand or five thousand dollars, I think there were very few, most of them were very small amounts, and Mr. Sexton asked me if I had experience and understood how notes should be made out and entered and dated, etc., and I told him I had; so he told me to examine every one of those notes to ascertain whether or not it were properly made out and dated and endorsed; and I did so, and after I was probably half way through that work, which was a very large undertaking because there were a great many of these notes, Mr. Sexton brought me a list, typewritten, containing figures, and each figure corresponded with the amount of each note, and instructed me—

Q. No names on the list? A. I don't remember that. I remember that he instructed me to check off each note with the figure on this list; then to add up the list, to find the total, and then he came to me several times during my work to see if I were doing my work the way it should be done, because it was my first experience there and he seemed very anxious t o have the thing thoroughly done, and he assisted me in that way, though I thought I was doing them according to the way he required; so I did all all of that work, I went over every note and found the date and found that it was not past due, and found that it was properly made out and endorsed, and then after that I checked up each note with this list and I added the list up, and Mr. Sexton brought to me on a little slip of paper a total, because it seemed I took quite a long time at this work, as I was doing it alone on that occasion, and told me that that is the amount that the notes should total and for me to add up my column to see if it did, and they proved. Then Mr. Sexton also, understanding my experience with real estate affairs, led me to a drawer or box, I am not sure which, something in the safe that contained quite a bundle of mortgages and bonds and abstracts of title and insurance policies, each one had a rubber band around it, and it was quite a bulky affair for a mortgage, and asked me to examine those to see if the abstracts were there and if they were up to the dates of the mortgages, that I had a great deal of experience with buying property and mortgaging it, and I knew that very thoroughly, and I went over each paper very carefully and each insurance policy, and I took down the date of the expiration of each insurance policy, and I found those to be all correct.

Q. Now what next? A. That was all I did on that occasion, it was very late in the afternoon then.

Q. Do you recall when you finished? A. I know it was very late in the evening, it was probably between seven and eight o'clock.

Q . Do you recall who was in the cage of the examining committee next to you? A. I do not; I don't believe there was anybody in the cage next to me; you see they were two cages away.

Q. Do you know who counted the cash that day? A. I do not, sir.

Q. Now having arrived at the total of these promissory notes, as we will call them for simplicity, you compared the total with that given by Mr. Sexton? A. I did, sir.

Q. And did you have recourse to any other book? A. Not any, no, sir.

Q. So that while you were in the bank you did not see a single book, inside of any book? A. No, sir, I did not.

Q. Did you ask for any? A. I did not, no, sir.

Q. Did you understand that in the list of notes that were given you they had included the day's business of April 11th? A. I don't recall that.

Q. But you were examining as of the close of business, were you not? A. Yes, sir.

Q. In your own business and financial experience you are familiar with the cash book, are you not? A. I am, yes, sir.

Q. Did you on this occasion ask to see the cash book? A. No, sir.

Q. Now you have already testified that you did not see any book, and I will go to this unnecessary repetition for just this one question, to ask you if you saw this collection of figures? (showing witness book). A. No, sir, I did not.

Q. Indicating general ledger as of date April 8 to 12, exhibit C-6. Have you ever seen it prior to today? A. I may have seen it as I was making a deposit or walking around the bank.

Q. But as a director or examiner you have never examined it? A. Never, no, sir."

* * * * *

"Q. When you made this examination of the bills purchased were you also asked to examine into the financial solvency of the makers or endorsers? A. I was not, no, sir.

Q. Do you know of anyone on the committee who did? A. I do not, no, sir.

Q. Now following the completion of this listing up the committee met again, did it not? A. Yes, sir.

Q. When was that, about how many days apart? A. Oh, it must have been a week or ten days after.

Q. Tell us what happened then? A. We met at the Fidelity Trust Company vault where the Roseville Trust Company had a box in which it kept some of its papers, and we went to the box, to the vault, and took out the papers that were there; there were some stocks and some bonds, and the surety bonds covering the employes of the bank, and we checked over and took these separate securities and looked at each one and saw that they were there as the list that we had showed they should be there, and they were all intact and in good shape; then the officers who had come to the bank, one of them as I remember was Mr. Smith, had come with us to the bank to open the safe deposit vault, as the rule required several designated officers to be present; the examining committees went apart, stood away or remained later until the others had gone, and went over some letters that one member of the committee had, which were the replies that he had received in answer to inquiries made of the depository banks.

Q. One member, do you say? A. As I remember it.

Q. You don't know who it was? A. I do not, I am not sure.

Q. Go ahead. A. And we found that the replies tallied with the figures that we had,

as they should have tallied according to the books of our company, and that closed our examination.

Q. Well, you say 'we found,' then you took aprt in that? A. I was a member of the committee.

Q. No, no, but you say 'we found'; did you see any of those replies? A. I did, sir.

Q. Beg pardon. A. Yes, sir, I did.

Q. And who else? A. Who else saw the replies?

Q. Yes. A. The other members of the committee.

Q. All of them. A. I don't know.

Q. Well, I would like to have the names of anyone else who saw them besides you? A. The only one I am sure of, being five years ago, was the chairman, Mr. Sexton, I am more sure of him because he dealt directly with me, and I remember it very clearly because he took such pains to go over the necessary matters, because he seemed so particular about them.

Q. Do you remember Mr. Benjamin being on the committee? A. I rather have that impression but I couldn't swear to that because it may have been from hearing his testimony.

Q. I show you your report, part of the minutes found opposite page 371 of the minute book, being exhibit C-8, and ask you if that refreshes your recollection?

Judge Collins: On what subject?

Q. As to the membership of the committee and whom he saw attending? A. Oh, then I will just look at this.

Q. Yes. A. Mr. Sexton, Mr. Benjamin and Mr. Dunn. It is signed by Mr. Sexton, Mr. Benjamin and Mr. Dunn.

Q. Does that refresh your recollection that Mr. Benjamin served with you on the committee? A. It doesn't change my recollection any though I would be willing to say that it is very probable he did, but I cannot visual-

ize him there as I would like to do to say that I recollect.

Q. Do you recall any member who served on the committee who did not sign? A. I do not, no, sir, though I was under the impression that there were more than three.

Judge Collins: More than three?

A. I was under that impression, though that is just an impression.

Judge Collins: I understood you to say you were under the impression there were more than three?

A. Yes, that is my impression.

Q. You stated you went over these replies from the depositary banks; do you recall the substance of any of them? A. I do not, sir.

Q. What did you compare them with? A. A list of figures, a little memorandum of figures opposite the names of these banks, showing, as I understood it, the deposits that the bank books showed should have been at those banks on those dates.

Q. (By Judge Collins) You mean the Trust Company books? A. Yes, sir.

Q. You saw those figures in the Trust Company's books did I understand you to tell Judge Collins? A. Oh, no, sir, I saw a memorandum of figures taken from the Trust Company's books giving the banks.

Q. How did you know they were taken from the Trust Company's books? A. Well, that is what I assumed.

Q. You had assumed that? A. Yes, sir.

Q. Now do you recall whether or not the reply from the depository banks stated anything else than the fact that they had on deposit on April 11th so much money to the credit of the institution? A. No, sir, I do not so recall.

Q. Would you say there was anything else in those replies? A. I do not recall.

Cross examination:

Q. You have said that the examination that you had to conduct was down to the close of

business on the day that the examination was made; do you mean that that was so stated at the time, or you simply assumed that to be so? A. I assumed that to be so, I do not recall.

Q. Then you said that letters were read, I forget whether that was at the Trust Company's office or at the Fidelity, letters from the depositories? A. It was at the Fidelity.

Q. When the letters from the depositories were read at the Fidelity you said they tallied with the books of the bank, as you call it, or the Trust Company; do you mean that you had any books there, or that it was stated to you by someone that they did tally with the books? A. I mean that there were no books there, it was stated by someone that it did tally with the books.

Q. Who was it stated it? A. I think it was Mr. Sexton, the chairman."

It should be remembered that in April, 1912, Mr. Dunn had been a director but three months, and that this examination was his first experience on the examining committee. Therefore, when Dunn appeared at the Bank Sexton and he discussed the phase of the examination Dunn should handle. Sexton found that Dunn was familiar with notes and with real estate, and he put him to work xamining the bills purchased and the mortgages and their accompanying abstracts and insurance policies. Dunn totalled the purchased paper and it compared correctly with a total given him by Sexton. He found the mortgages and accompanying papers to be all correct.

A week or ten days later Dunn participated in the examination of the securities of the Fidelity Trust Company vault. It was on that occasion that the replies from the correspondent banks were tallied with Mr. Sexton's figures. It thus appears that Mr. Dunn had nothing to do with

the reconcilement of the "items in transit" except to compare the replies with the figures procured by Sexton from the books.

Mr. Dunn's position as a member of the examining committee therefore is that he did his share of the work and trusted to his colleagues to do their share. There is not the slightest criticism of the method pursued by Dunn in his examination of the bills purchased and of the mortgages, except the intimation that he should have assumed that Sexton's figures were wrong and himself taken them from the books.

Dunn was not required to assume that his colleagues were either dishonest or careless, and to arrogate to himself the whole function of the committee by verifying each man's work. He was entitled to assume in the absence of any indication to the contrary that they were doing their share of the work accurately; and Dunn testified that he was impressed with the care and anxiety of Mr. Sexton to have the work thoroughly done. Five years had elapsed since the examination when he gave his testimony. In the light of this fact the clearness and frankness of Mr. Dunn's testimony is all the more striking. True, he did not examine any of the books. So far as Dunn's work was concerned that was the function of the chairman. Sexton, being more familiar with the books and himself an accountant, probably reasoned that Dunn, who was new to the work, would have difficulty in getting the figures from the books and therefore kept him busy at other work. Indeed, Dunn testified that his share of the work kept him busy until nearly eight o'clock at night. The whole case of complainant against Mr. Dunn with respect to his work on the examination of April, 1912, may be summarized in the sentence—Dunn is negligent because he did not look at a

book. The chairman in supervising the work of the committee did not require him to do so; and surely he was not obliged to play the part of a suspicious intermeddler and insist on making himself an audit of the books and a check of the work of his colleagues.

Mr. Dunn stands in a very favorable light indeed when we consider that after the examination of April, 1912, the State Banking Department in October, 1912, examined the books and gave the bank a clean bill of health; and again in December, 1912, the examining committee of the bank again found everything correct in an examination in which he did not participate. In the light of these facts it is ridiculous for complainant to assert that it would have been childishly easy for Dunn in the examination of April, 1912, to have detected Smith's crookedness.

1. *As to reporting assets not of face value.*

As to this phase of Mr. Dunn's work on the examining committee, the learned Vice-Chancellor said in his opinion below:

> "It is insisted that Mr. Dunn is liable because as a member of the examining committee he with the others failed to perform his statutory duty to report to the Board such assets as in the opinion of the committee ought to have been carried at less than their face value. That there were such assets and that they did not report them is indisputable. That any loss resulted directly from the failure to report is not proven. The entire board knew that the Scarlett and some other loans ought not to have been carried on the books at their face value and if the examining committee had reported the fact, and the report had been entered in the minutes the Board would not have been informed of

> anything they did not know before. The failure to comply with the statute is evidence of negligent conduct on the part of the committee and of the board, but does not necessarily increase their liability."

This statement in the opinion below is, we submit, dispositive of appellant's contention under Point I in its brief. To charge Dunn, an inexperienced member of the examining committee, with liability for failure to insist on the committee reporting to the board something it already knew is, we submit, setting up an absurdly strict standard.

Appellant in its brief does not refer to any particular loan or note that in April, 1912, was being carried at more than its face value. The fact that some of the notes turned out eventually to be uncollectible does not prove that they were such when the examination was made. It must be remembered that the appellant has offered no proof whatever that *any* of the persons to whom credit was extended were not financially responsible.

That there were some notes in the bills purchased in 1912 as to which opinion might honestly differ as to what was their real value appears from the fact that in October, 1912, the Banking Department made an examination of the books and assets of the Bank. The examiners went over the bills purchased, and on October 28, 1912, Thomas K. Johnson, the Deputy Commissioner of Banking, wrote to Mr. Odell, President of the Trust Company, the letter annexed to the bill of complaint as an exhibit (Case, p. 126). In his letter the Deputy Commissioner criticises certain paper held by the Bank. President Odell submitted the Deputy Commissioner's letter to

the entire Board, and on November 25, 1912, wrote in detail in reply (p. 140). He states that the Company is accumulating a Provident Reserve Fund, then totalling $8,000, as an insurance against any losses, and that it is the intention at the end of the year to charge off against this Fund whatever past due loans are considered uncollectible. Mr. Odell takes up each loan criticised by the Commissioner, and as to nearly all the items makes a favorable statement, that is, that the directors at that time considered them good. For instance, with respect to the Scarlett loan, Mr. Odell says (p. 143) that it is the intention of the Board to secure additional collateral from him, if necessary. With respect to the line of Miele and Bruno, Mr. Odell says, "The line of Miele & Bruno while it seems very high is only a temporary matter. We have in our possession assignments of money which we are satisfied will bring us at least $18,000 in the near future. We also have second mortgages amounting to $12,000 which are very good, of which no mention is made in your letter" (p. 145).

It thus appears that in October and November, 1912, the board considered all of the paper good, except a few items, totalling about $3700 (p. 141) and as to those, the Board had accumulated a Provident Reserve Fund of $8,000 to take care of any loss.

Of course, some of this paper turned out to be uncollectible. The failure of the Bank undoubtedly rendered most of such notes uncollectible. It is not fair to judge the directors by the situation as it existed after the failure of the Bank. Viewing the bank as a going institution, we submit that it has not been proved in the case that any of the bills purchased examined by the committee in 1912 should have been reported as of

less than face value. At most it was a question of judgment. The examining committee did not report the Scarlett paper to the Board, for Scarlett was a director and the paper was known to all the directors. Appellant has not attempted to prove the financial condition of any of the persons whose paper was purchased as it existed at the time the purchase was made or at the time of the examination in April, 1912. To contend that inasmuch as a loss resulted after the Bank closed, therefore the paper was worth less than face value in 1912 is a plain *non sequitur*.

It must be remembered that Dunn and the other directors were testifying in 1917—five years after the examinations. They could not be expected to go into every detail of the examination. Mr. James B. Banister, who was also a member of the examining committee with Mr. Dunn, testified that in one of their examinations the committee discovered some items which should be reduced. He said (p. 537) "In making our examination we discovered that there were items that should be reduced, and the committee recommended in one of their reports that the board of directors appoint a committee to investigate exhaustively the condition of these items and get from the borrower a statement of his financial condition on which to base the credit. * * * They appointed me the committee."

As the learned Vice-Chancellor said in his opinion below (p. 212) "There was an honest effort on the part of the committees to do their duty." It is not true, as stated in appellant's brief, that the examination of the bills purchased was a mere comparison of the securities. It is apparent from the testimony of Mr. Banister that the committee considered the question of the value of the securities.

The statement in appellant's brief that had the committee included in its report a statement of assets that should be reduced or charged off, the manipulations of Smith would have been discovered is sufficiently answered by the statement that on October 14, 1912, the Banking Department made an examination of the books and went exhaustively into the bills purchased. It gave the Trust Company a clean bill of health, except with respect to certain notes. The Banking Department, with its experienced examiners, saw nothing in the condition of the Bank to warrant suspicion.

2. The method of examination.

As to this phase of the case, the Vice-Chancellor said with respect to Mr. Dunn (p. 214):

> "In so far as I have been unable to convict the other and more experienced members of the committee of negligence, I cannot convict Mr. Dunn. And I do not think that he, as a member of the committee, could at that time, inexperienced as he was, be charged constructively with the negligence of Mr. Sexton who had not required from the correspondent banks such a statement as has been mentioned."

The appellant attempts to set up a fancied similarity between the case sub judice and the case of *Campbell* v. *Watson,* where Vice-Chancellor Pitney condemned the directors for their failure to make examinations, the defendants there attempting to justify themselves for *failure* to make examinations. But in this case there was of course no failure to make examinations. The committee examined the books twice a year and made reports.

The fault found by the appellant is that there were certain things in connection with the examinations which should have been done differently, or certain things which, if done in connection with what was done, would have resulted differently. It is mistakes of method which he relies on and not neglect of duty. He itemizes his points as follows:

1. They accepted Smith's word as to the items in transit.

2. They failed to examine entries in the general ledger except the reported balances as of the examination day (that is they examined the totals of the different accounts of the bank but did not examine the ledger figures further).

3. They did not re-verify the items in the asset and liability column when making the ledger footing to see if the assets and liabilities balanced.

4. They did not inspect the cash book.

5. They did not examine the teller's proof book.

6. They did not examine the treasurer's check book.

7. They did not value the assets.

As to the first six items we will concede the truth of the fact; as to the seventh we deny that such is the fact and assert that no loss has been proved in connection with the allegation.

Of the items which we admit, the second to the sixth items inclusive have to do with the method of the examination, while the first may go farther

and amount to a failure to take that last step which would have made their examination complete, that is a failure in operation of the method or system adopted.

An ascertainment of the condition of the bank is to be made only by comparing the liabilities with the assets and verifying this by reference to the books.

The assets consisted in this case of cash, collateral loans, bills purchased, deposits in corresponding banks, stocks and bonds, buildings, etc.

> "In order to ascertain the amount of these different items of assets and compare them with the ledger balances it is necessary to ascertain the amount of each without the aid of the ledger with which they are to be compared and independent of the books. To rely on the books alone for that purpose is simply absurd. The cash and the bills discounted and the other tangible assets must be seen, handled, inspected and counted, and the amount due from the other banks must be ascertained in a manner equally efficient" (see *Campbell* vs. *Watson,* 62 Eq., 396, last paragraph on page 416).

Here is the method of ascertaining the assets which has received the sanction of judicial approval and that by a judge who was, as court below marked at the hearing, not only a great Vice Chancellor, but was also an experienced banker.

This method was also approved by the expert who testified for the appellant (p. 1083).

With the other side of the account, the liabilities, a different method must be pursued. These consist for the most part of book entries, the principal ones being the individual deposits, and no practical way of verifying these exists except by

taking the individual balances as shown on the deposit ledger and comparing the total of these with the total shown in the ledger. These methods were followed by the examining committee and but for manipulation *practiced at the time of the examination by Smith,* who was present, the discrepancies would undoubtedly have been discovered.

Two of these manipulations he has testified to. Others may have been practiced. One was the use of accounts with depositary banks; the other was *the changing of the items in the ledger during the examination.*

Now, after the event, it appears that it would have been easy to guard against the changing of items in the ledger if the committee had known that that was the thing they had to guard against. But in the light of the situation as it existed then that was the most unlikely thing that could happen. That the figures would be changed during the examination probably never occurred to any man before.

Vice Chancellor Pitney, remarking on the method of examinations in *Campbell* vs. *Watson,* said:

> "Such examinations may and usually is conducted openly in his presence, and includes nothing in the nature of espionage or detective work; nothing secret or underhanded." (See last paragraph, p. 424.)

This was the opinion of a learned judge and a practical banker, but it now appears that a man with sufficient adroitness and nerve could turn even this situation to his own end and that the presence of Smith at the examination was a source of danger and in this case was fatal. It appears now to have been a mistake in the method of

conducting the examination, but it was a mistake which no one up to that time had foreseen, and it shows up an element in this case which the complaint has not in the least considered namely, the peculiar personality of Smith; he is a curious combination of honesty, frankness and ability on the one hand, and of astuteness, nerve, dissimulation and moral weakness on the other hand. Who could believe that it would be possible for him to be present at the time of each of these examinations, knowing that at any moment his shortages might be discovered, and yet appear so confident, so upright and plausible as not to direct any suspicion toward himself, and so cool and collected as to take advantage of any opening of the examiners to deceive them?

The complainant has attempted to creat the impression that the examiners as well as the directors were ultra confiding and guileless, but this is not the truth. The manner of Mr. Banister on the stand as well as his history is evidence that he at least was not likely to be over confident of the honesty of any man.

The fact is that the examiners were dealing with a situation which defied carefulness. Not only was Smith a consummate artist in deception but he was aided by the other employees, no one of whom but carried out Smith's orders.

The appellant suggests for instance that the examiners should have verified the entries since the date of the last examination and that this could have been done by any clerk or bookkeeper. Suppose the examiners had delegated this work to Jennings—and why not to Jennings as well as to any other clerk, they had no reason to suppose he was not entitled to confidence—is there any reason to suppose that his report would have done anything other than to confirm the commit-

tee in their confidence in the correctness of the accounts? Would Jennings have made any disclosures as to Smith which would have led to a further investigation and discovery as to his own wrongdoing.

Supposing Smith had been excluded from the examination and Jennings retained by the committee to assist them in their examinations, but with secret instructions from Smith, is there any doubt but that he would have seized whatever opportunity offered to deceive the committee?

It has been stated by the complainant and by the courts that the committee was entitled to the services of a clerk in listing the deposit accounts. Supposing Jennings had been selected for this, is it beyond the bounds of possibility that he would have manipulated the adding machine to give a false total?

Nothing in easier and yet the lists were so long that it was impractical to add them in any other way.

The deposit ledgers were of the loose leaf variety; the commissioner advised that the key to these be kept by the treasurer. (See bil of complaint, next to the last paragraph.) Other keys would unlock it (Thompson, p.). Is it beyond the grounds of possibility that Smith had duplicate sheets of certain accounts, a false one and a true one, and that at the date of the examination he substituted, or had substituted for him by Jennigs, or another clerk in collusion with him, the false accounts for the true, decreasing the liabilities? What safeguard would there have been again that? And yet this very thing may have happened. They might have called in the pass books but this obviously would have had to be entrusted to the clerks, who were all more or less in collusion with Smith, and is a dangerous

thing. Mr. Cloran, the expert, said that he thought it would start a run on the bank.

The complainant is able to point out some of the methods by which Smith deceived the committee, but not all and no one is able to say what figures stood on the general ledger when the committee made their examination. The complainant argues that the committee should have made a separate list of items and totaled them before comparing with the general ledger, but we submit that this is after-the-event wisdom, and that neither the committee nor any one of us would have thought of this as necessary or advisable, except as a matter of convenience.

The complainant insists that a verification of the previous work on the general ledger was essential, but the opinion of their expert was that the method which they followed, namely, of examining the assets themselves and comparing the result with the ledger balances, was the method which would give the more correct examination.

Vice Chancellor Pitney in *Campbell* vs. *Watson,* also designated this as the proper method.

The complainant insists that the examiners should have examined the cash books and the teller's proof books in connection with the examination of the cash, but this does not appear to be in any sense necessary to an accurate examination of the cash. Teh cash was a physical property consisting of actual money and cash items. The cash items consist of checks or other vouchers which have came in too late in the day to be put through the books. A limited number of these in the cash at the end of the day is a normal condition and there is no evidence that, on any examination day, more than a normal quantity appeared in the cash.

The evidence is that Smith on or just before the examination days secured the removal of cash items by false charges to other accounts, principally by fictitious deposits to depository banks. This brings us around again to the question of items in transit, which we will discuss by itself later.

The question of the necessity of an examination of the books as distinguish from an examination of the condition of the bank is one which it is proper to raise and argue, but it must be considered by itself and not confused with the criticisms of the method or the carrying out of the method adopted by the examiners. That method was complete without it and I submit that it was sufficient without it unless something was discovered, by the method adopted, to make further inquiry necessary, or unless a periodic verification of the books themselves is an essential factor of safety in a bank. It would have involved a considerable length of time—more than the directors could devote to it.

The accountant for the complainant—a man of surpassing cleverness and experience—spent nine weeks, having an assistant for five weeks, in verifying the books covering a period at less than two years. It was work for an expert accountant. No one except a man trained to the business could have accomplished it at all.

The question then is, should the directors have periodically engaged an expert accountant to verify the books? Some banks do it and some do not. It would have involved considerable expense. This should not have controlled the directors, but it was proper for them to consider. The Department of Banking and Insurance made periodic examinations and of the thoroughness of those examinations the directors had abundant

evidence i nthe detailed suggestions and criticisms in the letters of the commissioners.

The law required the commissioner to examine the Trust Company and made it the duty of the officers and employees of the company to exhibit its books, securities, records and accounts to the examiner and give him power to examine the directors, officers and employees undr oath, *and the company was required by law and did pay for the examinations.*

There is a disposition on the part of the complainant to ignore entirely this element in the situation, relying on the remarks of Vice Chancellor Pitne yin *Campbell* vs. *Watson,* but it cannot be so easily disposed of.

The department owes a duty to the company as well as to the state. It performs a service the bounds of which are defined by statute and custom and for that service the company pays. It has the sanction of a public office to inspire those whom it serves with confidence and they have a right to place reliance on the performance of that service for them. The courts in treating of this subject have used language which is misleading and unfortunate in creating an impression that this department is an unrelated element in the situation, with vast power, but without responsibility, and it seems to us but just that the connection of the department with this unfortunate affair should be taken into account and a due measure of the responsibility should fall on it.

The department was created and developed to safeguard this business, affected with a public interest for the benefit of all concerned in it—the depositors, the stockholders and the directors. It has built up an organization for the supervision of such institutions so capable, so exacting and so energetic that those dealing with it have come

to rely on it, and rightly, as we think, for it was created for their protection and to accomplish that purpose its functions have been extended until it not only has the power of life and death over banking institutions, but also buries the dead and administers the estate. The trouble with the complainant is that he has substituted a theory for a condition; has attempted to build up a rule of law by extending judicial remarks to cases to which they no longer have application. The truth is people do rely on the department and suppose that it exists for their protection, and not solely to provide a livelihood for certain worthy citizens. They may not rely on it to the extent of neglecting their own duties, but to say that they may not rely on it a all is not good law nor good common sense.

The complainant reverts again and again to the proven unreliability of Smith and to the unchanged condition of the commissioner's mind in regard thereto, and yet no examination was made of the Trust Company from November, 1911, to Octoberfi 1912, and in October, 1912, by which time a deficit of at least $109,000. appeared on the books, the department made an examination and gave a clean bill of health.

The complainant will of course say that that has nothing to do with the case. We think it has. It does not absolve the directors nor the examiners from the performance of any duty imposed on them, but it has an important bearing on their acts involving exercises of judgment, and we think that in view of their knowledge of the watchfulness and care supposed to be given to their interests by the department and in view of the examinations made at their expense by the examiners, they cannot be criticised for failing to employ an expert to audit their books.

It has another bearing on the question, and that is that it adds another link to the combination of circumstances which had gripped these directors. The first was the nature of Smith, who united a wonderful confidence inspiring personality with a fatal weakness of character and great cunning and deceitful cleverness; the second was that the rest of the employees were in collusion with him to a greater or less extent, Jennings to the extent of actively participating in the wrongdoing and the others to the extent of concealing knowledge of wrong acts; the third was the failure of paid experts, the examiners of the Department of Banking and Insurances, to discover and report anything.

It still has another bearing. Their examination forms a standard of comparison by which to judge the efficiency of the examination of the directors.

We come now to another phase of the book examination. The complainant insists that the book discrepancies were so apparent that any careful man looking at the books should have discovered them. Their expert testified, under objection, that any ordinary business man should have seen them.

We do not believe that such testimony was competent. It is true that they were apparent to one searching for them and trained to see them; that is Mr. Cloran's specialty, and he is very accomplished in this line, but the examiners were not looking for them; they were looking for the ledger items with which alone they could compare the results of the examination of the physical assets and of the deposit ledgers.

Those discrepancies, in the mass of figures, would not be noticed by one unless he was looking for them, although, as Mr. Cloran says, they

were there. If Mr. Cloran were to visit the stitching rooms of Banister's shoe factory, how much of what is perfectly apparent to Mr. Banister, in connection with the operating of the machines, would Mr. Cloran see? One sees what one's eyes are trained to see and the expert is the least qualified to say what the ordinary man would be likely to see. That is a jury question and not one for expert opinion evidence.

This brings us to a discussion of the items in transit. It is obvious that the examiners accepted Smith's word for the amount of these items when they might have discovered for themselves, without accepting his word, what they amounted to. It was the last step that would have made their examination complete, and, in the absence of the manipulation of the figures during the examination or of a manipulation of the deposit ledger, or of the adding machines, would have proved the correctness of the books.

For myself I am unable to see any act of positive negligence in this examination of the directors unless it be in this particular. It seems to me that the spirit of the examiners was all that was to be desired. They show industry and care in the performance of their duties. They adopted proper methods; it is true they did not each do all of the work; that was not necessary. It is proper, as the complainant himself, and as the court has said, for them to divide up the work. It is true that they were not all equally competent, but neither is that necessary. There were several kinds of work to be done and it was in charge of one mna; it could not have been done otherwise and done safely. Mr. Sexton, the chairman, was chosen for this duty and chosen year after year, because of his supposed fitness for the work. He had made a specialty of accounting;

he is a teacher by profession and had taught mathematics, and he knew what was necessary to be done and was capable of directing the work of others.

Mr. Banister, another member of the committee, was a man engaged in large business affairs and familiar with figures, shrewd, careful and exacting.

Now we do not mean to impute a conscious failure, on the part of Mr. Sexton, to do his full duty. He is a man of high standing, capable, intelligent and conscientious, but not suspicious, and he unquestionably put too great confidence in Smith. We concede that he should have verified the correctness of the books as to the items in transit, and that if he had done so Smith's defalcations might have been disclosed at an earlier period—probably as early as December, 1912. But that would not have prevented all the loss.

Dunn, however, had nothing to do with the items in transit except to inspect the replies from the correspondent banks. We submit that there is nothing in the case to charge him constructively with the negligence of Mr. Sexton with respect to these items.

In Point VI of appellant's brief it is contended that Dunn was negligent in not inspecting the cash book in his work on the examining committee. As already stated, he had nothing to do with the cash. His work was in connection with the bills purchased; and in such work under the instructions of chairman Sexton he had no occasion to examine the books. We submit that he was under no duty to examine all the books of the bank on the occasion of his examination. If he did his share of the work, that is all that can in reason be expected of him. If appellant's contention be true, then the only way that a member

of an examining committee can protect himself is by verifying the work of each of his colleagues—an obviously impossible task.

We will now discuss appellant's contentions that Dunn should be held liable as a director for negligence.

3. *Supervision over Smith.*

The contention of appellant in Point IV of his brief is that Dunn as a director is negligent because the banking methods of the Trust Company were inadequate, and that it was Dunn's duty to see that such methods were adequate.

It should first be stated that inasmuch as Dunn, concededly, had no notice that Smith was unworthy of trust and confidence, his duty under *Campbell* v. *Watson* was to give "ordinary attention" to his duties as a director. His position differs from that of the other directors who, under the decree below, were, because of the Nones affair held to be under a duty to exercise a strict supervision over Smith. The contention of appellant is that Smith was given "unheard-of power," and that even if his record was spotless he should not have been entrusted with such power.

It is first contended that the directors were guilty of negligence in failing to provide a check or supervision over Smith's power to draw on depositary accounts.

It appears now that this was one of the means used by Smith to mislead the examining committee at the time of the semi-annual examination. It does not appear anywhere in the evidence that this was a means by which he abstracted or misapplied the moneys of the institution. It was obviously impossible for the directors to provide absolutely against the abstraction

of funds by a man having charge of the company's funds and business. If it were possible to do that there would be no need of requiring officers of this sort to give bonds.

One of the methods that Smith used to abstract money is evidence that absolute security cannot be provided. It is stated that he abstracted money by falsification of deposit tickets handed in with deposits through the receiving teller's window. This might happen at any teller's window. It is true that it is bound to be detected sooner or later but so would the misuse of checks drawn on depositary banks. As a practical matter the requirement that another officer should be required to sign such checks with the treasurer would have been an ineffective precaution, because necessarily counter-signatures are more or less a matter of routine. Unless the officer counter-signing inquires into the history of each transaction and also compares the stub with the check, fraud might be worked in the same way. As a practical matter it was undoubtedly inconvenient to obtain the signature of one of the officers with the treasurer in this bank because none of the officers was present at the bank during business hours, habitually, except the president, Mr. Odell, who was there for a short time each morning only. It may be that it would have been safer to require a counter-signature, but we take it that matters of form and technicality are immaterial in a case charging negligence and it is only with the practical aspect of the affair that we need concern ourselves. As a practical matter can it be said that the loss or any part of it arose from the failure of the directors to require a counter-signature to the checks?

With our knowledge of the artifices that Smith employed, his readiness to adapt himself to the

situation and adopt expedients on the spur of the moment with which to conceal his defalcations from the directors, we think we may safely say that the requirement of counter-signature in this matter would have had no effect whatever.

It must be borne in mind that Dunn is not to be called to account because the directors did not adopt all possible precaution and foresee all possible events; he is not held to the highest care; he is not an insurer, he is only held to such conduct as under the circumstances seemed reasonable and prudent.

In view of the fact therefore that the only effect of Smith having been able to draw checks on the deposits without counter-signature was that it helped him to conceal the true condition of affairs from the examining committee at the semi-annual examination, we believe that no fault can be attributed to the directors as a body or as individuals for allowing the depositary accounts to be handled in this way; the fault, if any, in connection with this feature, arose from the failure of the committee to discover that the accounts had been so manipulated. This feature is elsewhere treated in this brief.

It is next contended that the directors were negligent in permitting the general ledger to be kept by the treasurer without independent or systematic supervision or check.

This is a matter of method. The bank was small and the number of employees was necessarily limited which involved having the manager do more work and more kinds of work than such an officer would have to do in a larger institution. The paying and receiving tellers were obviously quite occupied with their own duties and the keeping of such books as pertained to their special duties. The book-keeper had charge of

the accounts of the depositors. There were a very large number of accounts and it seems perfectly evident that the keeping of these accounts was sufficient to occupy the time of one man. These were the only persons beside a stenographer employed by the institution. It would seem obviously improper for an employee handling a subsidiary account to also keep the general ledger, the book in which all the accounts and transactions of the Bank were summarized. It would seem not only proper but natural for the person at the head of the operations to keep the book in which all the accounts were summarized.

The complainant has proceeded on the theory that all the bank directors had to do was to guard against defalcations on the part of Smith. This is not at all the case. They had no more reason to guard against defalcation on the part of Smith than on the part of the other employees.

In the letter of the Commissioner to the president of the Bank, dated June 13, 1920 (p. 118), the commissioner states for the guidance of the president that "the keys of the loose leaf ledger now in the possession of the book-keeper should be kept by the treasurer who, should also supervise all shifting of the loose leaves." And further says: "All posting should be made to the general ledger and the latter put in proof before the book-keeper leaves for the night."

This is the only suggestion made by the commission as the result of any examination as to the method of keeping books. Both of the examiners were unquestionably aware of the fact that the general ledger was in the handwriting of the treasurer. The commissioner recognizes the obvious fact that the treasurer was a person who must be trusted to check the book-keeper's accounts, and there appears to be no reason why

the keeping of the ledger by the treasurer was a fact that should have excited the apprehension of the directors. The mere keeping of this book did not place in the hands of the treasurer any greater means of abstracting the funds than he already possessed nor could he by this means alone have abstracted the funds nor conceal the abstractions, because, contrary to the statement of the appellant, the keeping of this ledger was not without supervision. It is true that there was not constant supervision of the accounts, nor was constant supervision necessary; the law does not require it nor does common practice sanction it. There were periodic examinations of the Bank by the examining committee and by the Commissioner of Banking and Insurance, and if Smith had not been able at these examinations to mislead the examining committee his defalcations would have been discovered.

It must be borne in mind that the Trust Company and the directors were victims of an unforunate set of sircumstances such as has seldom, if ever, occurred. It was their duty to take precautions to guard against misconduct by each one of their employees. In the ordinary case of this sort it is the experience that one of the employees is rather dishonest or succumbs to temptation, manipulates the accounts and abstracts the funds of the company, but in this case there was a conspiracy among practically all the employees. If not an active conspiracy to abstract and divide the funds it was a conspiracy of silence. Jennings the person next in authority to Smith, was actively dishonest and himself abstracted some of the Bank's funds. Thompson, the receiving teller, was not dishonest but had sufficient knowledge of what was going on to charge him with the duty to acquaint the officers

and directors of the Bank with the situation which he knew, and contributed to the result by his silence when he should have spoken. The same is true in the lesser degree of the bookkeeper Mindich (pp. 1083-5).

This was a combination of circumstances which was exceedingly unusual and which would have defied almost any means to safeguard the institution, and we have no reason to believe that the keeping of the general ledger by any one of them would have effected any different result than that which actually came about.

We think it is unquestionably true that under the circumstances as the directors supposed them to be, and also under the circumstances as they actually existed, the keeping of the general ledger by Smith was not so imprudent an act as to constitute an actionable wrong.

4. Payment of uncharged checks and "false reports."

It is contended in point VII of appellant's brief that the directors, including respondent, were negligent in not discovering and preventing the felonious payment in large amounts of uncharged checks of Smith's favored depositors.

This point has to do with checks paid, *but not charged*, concerning which nobody had knowledge except Smith, Jennigs and Thompson; and if any actionable negligence can be charged it must be in connection with examinations by the examining committee or failure to investigate at the time a published report was made, which indeed is the point made by appellant later in his brief under point VIII.

As to the examining committee the appellant admits that the cash items were cleared out of

the cash on examination dates (Appellant's brief, p. 55), and the only question which might be raised in connection with the examining committee and this point is whether an audit of the books, as distinguished from the examination of the condition of the bank, was called for. As elsewhere stated, we think it can hardly be laid own that Dunn as a director is guilty of negligence because he did not insist that the bank have its accounts audited by an expert accountant:

The quotation in appellant's brief (p. 53) from *Williams* v. *McKay* is from an opinion on demurrer and goes only to the question of whether answer is required. The language of that case and of the other case cited was delivered with a view to the circumstances of those particular cases. This court will not follow the appellant into the error of regarding each case as establishing a principle. The principles which control are fundamental and the chief one is that each case must be judged by itself with a view to the peculiar facts which surround it. There are no absolute rules of conduct which can be applied to measure the liability of the directors any more than in the case of a traveler on the public highway. In each case the duty of the individual is measured by the circumstances which surround him and it is a question of fact—a jury question—as to whether or not due care has been exercised.

Under Point VIII appellant contends that respondent, as a director, is responsible for false reports and is liable for losses proximately resulting therefrom.

The defendant Dunn had nothing to do with these reports. He did not swear to them, nor did he attest them. The only way he could have

verified the reports would be by himself making an independent audit of the books or hiring an accountant to do that. Certainly no duty of examination was put upon the directors not directly concerned in making the reports. It must be remembered that Dunn had no knowledge that Smith was unworthy of trust, and we submit he was entitled to rely on him and on the President making a correct report. We submit that the Vice-Chancellor in his opinion below took the reasonable view of this phase of the case. He said (p. 216):

> "I do not think it necessary to consider how far the President was in fault in signing the reports prepared by Smith and made to the Banking Commissioner without examination as to their correstness. He has been released. The attesting witnesses have been held on other grounds. At farthest the evidence does no more than show an additional instance of lack of diligence on the part of the president."

III

The examination by the Banking Department on October 26, 1912, affords a criterion by which to measure whether Dunn gave ordinary attention to his duty as a member of the Examining Committee.

Counsel for appellant misconceive the force of this argument. It is not our contention that the present directors could sit supinely by as did the directors in *Campbell* v. *Watson* and seek to excuse the failure of their examining com-

mittee to function by reason of the fact that the bank was being examined by the Banking Department. Our contention is not that the directors had a right to *rely* on the Banking Department examination; but that as the respondent Dunn, in the examination of April 11, 1912, admittedly made an honest attempt to perfor mhis duties as a member of that committee, the fact that the Banking Department subsequently on October 26, 1912, examined the bank, found nothing irregular, and made only certain suggestions as to loans, affords a criterion under which it must be held that Dunn exercised due care.

Throughout the brief of appellant it is asserted that the frauds were "blazoned on the books." No one can now tell how the books stood at the time of the examination; it is even within the realm of possibility that Smith had duplicate pages, for the books were of the loose-leaf variety in many cases. The fact that the frauds escaped the notice of the Banking Examiners is, we submit, dispositive of the statement that the frauds were easily observable. Appellant in its brief, unfairly it seems to us, intimates that Examiner Hardon was negligent. There is no such evidence in the case. The report of the Banking Department is a lengthy document and goes into detail. That report demonstrates, we think, that Hardon did his duty. Smith was too clever for him.

IV

Summary and Statement of Law.

Appellant in its brief has cited numerous cases; but we submit that in none of the cases is a more practical rule laid down than that quoted by Vice-Chancellor Stevens in the court below. He said (p. 200):

> "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Fletcher, in his work on corporations, summing up his discussion of the degree of care required of directors, says (see Sec. 2446):

> "The courts have in many instances attempted to define the degree of care required of directors and other corporate officers to absolve them from liability for negligence. Some of the statements are mere glittering generalities. Others are more specific, embracing in some cases more or less conflict of opinion. All of them are of little value in the abstract, and when applied to a jury, as is usually the case, the court will not interfere with the verdict of the jury except in a clear case. The theory of three degrees of negligence, described as slight, ordinary and gross, was introduced into the common law, it has been said from some of the commentators on Roman law. However, much

to the relief of all concerned, the courts have largely discarded this classification. As to some propositions the courts agree. First, there is no question but that the officer is not bound to exercise the highest possible degree of care—a rule applicable to all agents * * * Second, he is not liable for a mere mistake, i. e., an error in jugdment."

The opinion of our own courts is an agreement with these last propositions.

> "No man is infallible; the wisest make mistakes, but the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment, and do not proceed from fraud, gross carelessness or indifference to duty."
>
> See *Hensler* v. *Sharp*, 44 N. J. Eq. (17 Stew.) 107, Chancery; *Hensler* v. *Sharp*, 45 N. J. Eq. (18 Stew.) 367, E. & A.

Vice-Chancellor Pitney, in the *Campbell* case, lays down a practical rule (see top of page 426—62 Eq.).

> "No one, I presume, will go so far as to suppose that any system of supervision on the part of directors practicable at this day will absolutely prevent a dishonest cashier or teller who has charge of the cash of the bank from stealing some of it and stealing it in suc ha manner that not a shadow of ground would exist for holding the directors liable for loss. It is absolutely necessary to trust someone with the custody of the cash—usually in small banks, as here the cashier. The directors do not occupy the position of guarantors of his honesty. They are bound only to exercise such care and diligence in looking over his work as experience has shown is at once proper as well as practical and as is exercised by other experienced directors, and as is required by the charter and the by-laws."

With this standard and these remarks, which seem to have particular application to our case, no one can find fault. The application of the standard is not, however, without some degree of danger.

In 10 Cyc. p. 830, Sec. 5, is the following text:

> "Obviously the question of negligence or of due care in a board of directors of a corporation ought not to be judged by the cautious and hesitating standard of the legal schedule on the judicial bench, but it is a question depending in an imminent degree upon the facts and conditions of each particular case, and it ought, if the course of the court will permit, to be submitted to a jury."

To somewhat the same effect is Section 2547 of Fletcher's Cyc. on Corporations, Vol. 4.

The numerous cases cited and quoted by the appellant in its brief are but applications of fundamental principles to the facts of those cases. The standard by which the acts of an individual director is to be measured with respect to actionable negligence, is clearly defined by the courts of our own state. He must be held to such a course of conduct as a reasonable, well informed and prudent man would adopt under the circumstances. The circumstances vary in each case; therefore the duty varies and what would be sufficient care in one case is not in another. No two cases are alike, and therefore no one case can be a precedent for another in so far as judgment on the facts are concerned.

We think it our duty to call to the attention of the court the fact thatin its brief appellant has gone far afield from the grounds stated in its petition of appeal. We have therefore been com-

pelled to go over the whole case below. If the appellant is limited to the two grounds stated in its petition of appeal, then we submit

1. There is no proof in the case that Dunn had notice that Smith was unworthy of trust and confidence. He had no notice of the Nones affair, which, in the court below, was held to give such notice to the other directors.

2. Dunn was therefore required to give ordinary attention to his duties. He was not required to overturn the system of the Bank, and insist on the elaborate checks and precautions that appellant contends were necessary.

If the history of Dunn's connection with the Bank be summarized, it is difficult to see how it can be said that he did not give ordinary attention to his duties.

He entered the directorate of a Bank then four years in existence and to all appearances prosperous. He attended directors' meetings regularly except when prevented by sickness or, on one occasion, his wedding. At the directors' meetings he heard read the reports of the executive committee, showing that that committee was meeting weekly and doing its duty. Appointed to the examining committee, he went to the bank, consulted the chairman of that committee, and was assigned to checking up part of the work. The criticism of his part in that work is that he should have examined the books and valued each note he handled. The failure to examine the books was not neglect on his part; he was otherwise occupied and the chairman of the committee did it for him. He had no reason to doubt the chairman's figures. The committee discussed the purchased paper. True, they did not report any that should be carried at less than face value; but it appears from President Odell's letter of

November 25, 1912 (Case, p. 140) that in their judgment most of the paper was good and as to the paper not good they had built up a "Provident Reserve Fund." Subsequently, some of this paper turned out to be uncollectible after the bank was closed. In the absence of proof as to the financial responsibility of any person whose bill or note was held by the Bank, it cannot be said that the judgment of the President and directors as to the value of the paper held in 1912 was even erroneous, let alone negligent. Dunn is not responsible for an honest error in judgment. It cannot be disputed that in 1912 the directors considered most of the paper good. Appellant contends that the Bank was then "loaded down with worthless paper." In November, 1912, the past due paper amounted to approximately $18,000 (p. 141), and the President and directors considered all but $3700 of that paper good. (See President Odell's letter to the Commissioner, p. 141.)

So far as Dunn is concerned, appellant cannot point to any act on his part that was negligently done. The whole case of appellant against him is based on what may be conveniently termed "constructive negligence." Appellant says he should have verified the reports to the Department of Banking; that he should have inspected the ledger, the cash book, and other books; that he should have insisted on countersignatures; and that he is actionably negligently because he is conclusively presumed to know the contents of the Bank's books.

Dunn admitted he was not a bookkeeper, and so it would have done him little good himself to have gone over the books. As we view it now, the only way Dunn could have escaped liability would have been to do the following things:

a. In his work on the examining committee he should have done not only his own work, but verified the work of each of his colleagues.

b. As a director, he should not have been content with a system approved by his experienced colleagues and by the Banking Department, but should have insisted on a system that should have the approval of, say, an expert banking accountant. Even then, he must risk the peril of that accountant's advice conforming to the standard of the Banking Department and approving the system in use in the Bank.

c. He must satisfy himself that the books contain no false entries by hiring an expert accountant to spend say nine weeks, five weeks of that time with an assistant, as did Cloran, appellant's expert, to go over the books in detail. And for safety's sake, he ought to repeat this examination periodically, for, according to appellant he is charged with constructive notice of what appears on the books of the company.

Neither the court of New Jersey nor of any other State have set up such an absurd standard of duty for a director. Appellant must have realized the weakness of its case against Dunn on this appeal, for the concluding point in its brief (p. 71) is devoted to an attempt to drag him by main strength into the circle of liability for Smith's misconduct. It is claimed that the affirmance of the decree below, in so far as it does not include Dunn as liable with the other defendants, would amount to a "radical departure from the law of this state." It is quite evident from reading the opinion below that the learned Vice-Chancellor made no radical departure from

the law. He held that Dunn had made an honest effort to do his duty and that he could not convict him of negligence. When the whole case is examined in the light of Dunn's duty, under the law, to give ordinary attention to his duties, in the absence of knowledge that Smith was unworthy of trust and confidence, we submit that the opinion below, on this phase of the case, was fair and just.

The decree below should not be modified in the respect complained of by appellant.

COLLINS & CORBIN,
Solicitors of respondent Dunn.

GEORGE S. HOBART,
DAVID A. NEWTON,
Of Counsel.

New Jersey Court of Errors and Appeals

Between GEORGE LAMONTE, as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of ROSEVILLE TRUST COMPANY, Complainant-Respondent, and HARVEY MOTT, CHARLES C. LURICH and GEORGE E. KRUG, Defendants-Respondents, EDWARD D. DUNN, Defendant-Appellant, WILLIAM T. BENJAMIN, WILLIAM F. KEIM, HARRY W. FOSTER, EMILE C. BATAILLE, G. ROWLAND MONROE, JOHN B. SCARLETT, WORTHINGTON H. INGERSOLL and RAYMOND E. SMITH, Defendants-Respondents.	On appeal of Edward D. Dunn from decree in Chancery.

BRIEF FOR APPELLANT EDWARD D. DUNN.

1.

STATEMENT OF THE CASE.

The bill of complaint in this cause was filed by the Commissioner of Banking and Insurance of New Jersey against certain directors of the Roseville Trust Company for losses alleged to have

been occasioned by the negligence or malfeasance of said directors in the management of the Company. The present brief concerns only the appeal of the defendant, Edward D. Dunn. Mr. Dunn was elected a director on January 9th, 1912, the Company then being in the fourth year of its existence. He is, therefore, in a separate class from those who were directors from the beginning of the Company's existence. By the decree below he is held liable *as a director* on two grounds (Case, p. 216):

1. For loans made or approved by the executive committee contrary to Section 17 of the by-laws.

2. For loans made contrary to Section 7 of the Trust Company Act, which provides among other things that no Trust Company created under that act shall have power to discount commercial paper, or lend money on bills, notes and other evidences of debt without security.

From the final decree holding Mr. Dunn liable for losses, if any, sustained on loans made contrary to the said two grounds, appeal was taken by him to this Court.

The questions involved, succinctly stated, are as follows:

1. Were loans made or approved by the executive committee contrary to the by-laws?

2. If so, is Mr. Dunn *as a director* responsible for the acts of the executive committee in making loans contrary to the by-laws?

3. Was Section 7 of the Trust Company Act violated?

4. If the statute was violated, was such violation the proximate cause of the loss, if any, to the Company?

2.

SPECIFICATIONS OF GROUNDS OF APPEAL.

The decree is erroneous in the following respects:

1. The said decree adjudges that the said Edward D. Dunn, while director of the Roseville Trust Company, caused or permitted said Roseville Trust Company to discount commercial paper and to make loans on bills and notes to persons other than a county, city, town, township, borough and municipality of this state (contrary to the form of the statute in such case made and provided, that is, contrary to the provisions of section 7 of an Act of the 123rd Legislature of the State of New Jersey entitled "An Act concerning Trust Companies (Revision of 1899)."

2. The said decree orders, adjudges and decrees that it be referred to Alonzo Church, Esq., one of the Masters of this Court, to ascertain and report as to each of the defendants in said cause, including defendant the said Edward D. Dunn, the losses, if any, suffered by said Roseville Trust Company upon loans unlawfully granted or permitted by said defendants, respectively, during their several terms of office, in conformity with the opinion heretofore filed in said cause.

3. The said decree orders, adjudges and decrees that the complainant in said cause be allowed and granted a counsel fee of $5,000. to be paid by the defendants, as aforesaid.

3.

BRIEF OF THE ARGUMENT.

I.

Section 17 of the by-laws was not violated.

Section 17 of the by-laws provided as follows:

> "There shall be an Executive Committee consisting of the President, as Chairman, and six other Directors, to be elected by the Board, and four members shall form a quorum for business. They shall be elected annually by ballot, and shall hold their offices until others are elected in their places. All vacancies shall be filled by the Board. The Chairman of the Executive Committee shall, during the pleasure of the Committee, have such powers and perform such acts as the Committee may deem necessary for the proper transaction of the current business of the Company.
>
> The Executive Committee shall superintend and advise all investments that shall be made with the funds of the Company. The Executive Committee may, in its discretion, authorize the President to make investments without previously consulting the Committee, and all such transactions shall be reported to the Committee at its next meeting. They shall meet at regular periods, or on notice to all by any of their own number; they shall advise with and aid the officers of the Company in

all matters concerning its interests and management of its business, and generally perform such duties and exercise such powers as may be directed or delegated by the Board of Directors from time to time.

They shall keep regular minutes of their transactions, and cause them to be recorded in a book kept in the office of the Company for that purpose, and report the same to the Board of Directors at their regular or special meetings."

The learned Vice-Chancellor said in the opinion below:

"The executive committee authorized some of the loans, but most of them were made not by it or the president, but by Smith. * * * Had the executive committee passed upon these loans in the first instance, such a loss would hardly have been possible. Its collective judgment based upon personal knowledge and proper inquiry would have been quite a different thing from its perfunctory approval of what Smith had already done."

It will be noted that the president, as chairman of the executive committee is, under this by-law, given power to perform such acts as the committee may deem necessary for the proper transaction of the current business of the company and that the "executive committee shall *superintend and advise* all investments that shall be made with the funds of the company.

The evidence with regard to the making of loans and the purchasing of paper is as follows:

Odell, the President: He was at the bank every morning and talked over with Smith the matter of loans (p. 233).

"Q. How often did the executive committee meet? A. Once a week, and special meet-

ings at different times if they were called by the president.

Q. What did the executive committee do as a general thing at those meetings? A. Went over the whole week's business, the report that was read from the general ledger by the treasurer and secretary, and went over the printed list of the loans, talked over new loans to be made, and went over the general business of the bank" (Case, p. 257, ll. 30-40).

Mr. Fairlie, another member of the executive committee was at the bank every day (Case, p. 306).

Mr. Monroe, another member of the executive committee was there almost every day.

Mr. Mott, another member of the executive committee testified that he did not recall any loan which was not a renewal and which was over $1,000. had been made by Mr. Smith without previous authorization of the executive committee (case, p. 483) 502, 503.

Munroe, counsel for the bank and a member of the executive committee, testified (case, p. 1138) that there was frequent discussion at meetings of the executive committee with regard to new customers and new loans.

Dunn, the present appellant, testified (case, p. 1257) that Mr. Smith was authorized to make loans on purchased paper up to $1,000. He had no knowledge of Smith loaning on his own authority any money above $1,000.

Lurich, another member of the executive committee, testified (case, p. 1299) that the executive committee would pass upon and consider the status of each loan.

The only basis whatever for the finding of the learned Vice-Chancellor that the loans were made by Smith is his testimony (case, p. 724, l. 22, to

p. 729, l. 15). All Smith says is that "where the bills purchased were entered on the minutes as approved during the week, they approve the loans already made." He does not say by whom the loans were made or the bills purchased. In some instances he made loans of over $1,000 before the committee met. But his testimony must be read in connection with the evidence that the President was at the bank every day discussing loans with him (case, p. 233) and that Fairlie, Munroe and William J. Panister, all members of the executive committee, were also at the bank almost daily.

The method of noting approval of bills purchased is unimportant. The question is, was the executive committee functioning and did it "superintend and advise investments?"

The executive committee met weekly and sometimes oftener. Monroe, a member of the committee, said, speaking of the meetings: "As a rule we met at four o'clock, and I know I was often late for dinner, it was half-past six oftentimes before we would get through" (case, p. 1149). The character of the discussion at the meetings of the executive committee appears from he testimony of Munroe (case, p. 1138):

> "Q. Would there ever be any discussion between him (Smith) regarding paper that had been purchased by the bank or taken by the bank? A. Very frequently, Mr. Smith had always prepared for the meetings carefully, he had his statements clear and in business-like form, and any new customer he spoke of he always gave his reasons clearly and fully for the belief that certain notes should be purchased and a certain loan made, and when he was overruled he always accepted gracefully and seemed to have only the bank's interest at heart at all times."

Mr. Dunn was not a member of the executive committee. He was a director only. The minutes of the executive committee meetings were read at the directors' meetings. The loans and purchased paper were discussed at these directors' meetings. To hold him liable for failure to personally investigate each loan or paper when there is no proof in the case that any borrower was unworthy of credit, is to make him an insurer for any loss sustained on purchased paper.

The law imposes no such liability on a director.

The learned Vice-Chancellor in his opinion below held (case, p. 204):

> "Having lent money in disregard of the statute and by-law, the directors as a body are responsible for any resulting loss, for they knew and approved of the action of their committee in this regard. *Citizens Loan Association* v. *Lyon,* 2 Stew. 110; *Williams* v. *McKay,* 13 Stew. 189."

Both the cases cited were before the Court on demurrer to the bill. In *Citizens Loan Association* v. *Lyon,* the bill charged the directors with violating a by-law prohibiting the lending of money without security. The decision is not pertinent because in the case at bar it was legal for the Trust Company to purchase or invest in bills or notes.

In *Williams* v. *McKay,* the Court of Errors and Appeals reversed a decree of the Chancellor sustaining a demurrer to the bill. The Court held that the charter of the bank evinced a legislative design to prohibit the savings bank from investing the funds of the company in loans made on personal security only.

Both cases involved savings banks which are not authorized to purchase paper. In the case of

a business bank like a Trust Company purchasing bills or notes, has always been regarded as an important and necessary function of its business.

The learned Vice-Chancellor in the course of the hearing below, admitted that he was not an experienced banker, as was Vice-Chancellor Pitney (case, p. 205), who wrote the opinion in *Campbell* v. *Watson,* which will presently be discussed. This very unfamiliarity of the learned Vice Chancellor with banking affairs has led him into a rigid interpretation of the decisions he cites.

It must be remembered that there is no proof in the case that any of the persons whose paper was purchased were not financially responsible. In their brief in the court below counsel for complainants admitted that they had not proved financial irresponsibility. They attempted to do so by asking a general question of Smith (case, p. 1004), that is, they handed him Exhibit H annexed to the bill and asked him if any of the persons named were of such financial responsibility as not entitled to credit. The question was overruled as improper, and the complainant did not attempt to establish the fact in any other way.

The learned Vice-Chancellor did not even intimate that it had been proved that any of the persons whose paper was purchased were not financially responsible. He put his decision holding the directors liable on this phase of the case on the ground that the executive committee had not made investigation or inquiry. The evidence is that the committee met and discussed the loans. True, this evidence was general; but the nature of complainant's proof made it so. The attention of complainants was not called to any particular case in which it was charged that they had not made inquiry; so that they were not

called upon to produce evidence other than general testimony that the executive committee was meeting regularly and discussing and approving loans. Munroe's testimony that the committee went into the details of the financial responsibility of a customer should have been given the weight it deserved by the Vice-Chancellor. He should not have held them liable on the testimony of Smith that in some cases loans were made by him without approval of the committee first obtained.

All of the directors called as witnesses denied that Smith had, to their knowledge, made loans without the approval of the executive committee. They admitted hat he was by resolution given authority to make loans up to $1,000 without approval; but they all denied knowledge of any loans over $1,000 made by him alone and not by the President or the executive committee.

The Vice Chancellor in his opinion says that the loans were submitted to the executive committee for approval at their *monthly* meetings. The evidence is that the committee met weekly and approved the bills purchased. He says that the collective judgment of the committee would have been quite a different think from the perfunctory approval of what Smith had already done. How can it be said that the approval of the committee was *perfunctory* in the face of Munroe's testimony that the committee met weekly and discussed the bills purchased in detail with Smith?

II.

The defendant Dunn, as a director, is not responsible for the acts of the executive committee.

Assuming that the executive committee did not strictly comply with the by-law, that is, that the loans were made first and approved afterwards, Mr. Dunn is nevertheless not liable for so far as he was concerned, the executive committee was functioning and, so far as he knew, was performing its duty.

Division of labor is necessary in any banking institution. In *Cavanagh* v. *Gould,* 131 N. Y. Supp., 1059, the line of demarcation between the duty of a director and that of an executive committeemen was well put. The Court said:

> "The directors generally not upon the executive committee ~~was~~ are not supposed to have knowledge of the details of the business management of the corporation which are not submitted to them. In other words, it is not their custom to actively search the individual transactions in the bank in order to learn the responsibility of its debtors or the nature or value of the collateral. This they entrust, first, to the executive officers of the bank who are carefully chosen and paid for their services; and secondly, to the supervision of the executive committee of their body. This custom, however, does not relieve directors generally of all responsibility."

In *Campbell* vs. *Watson,* 62 N. J. Eq., 396, Vice-Chancellor Pitney, in referring with approval to the case of *Warner* vs. *Pennoyer,* 82 Fed., 587, on appeal 91 Fed., 587, said:

> "The opinion recognizes the resort to committees to investigate and supervise as a legitimate mode of looking after the interests of the stockholders and creditors and as relieving the other members of the Board from liability where such appointment is made and the committee appears to have done its duty."

In the case just cited, the bank had a discount committee. This committee was required to meet once a month and examine all discount paper. The committee did not meet oftener than twice a year and then only in connection with the whole Board of Directors to declare dividends. It appeared that the committee had reported to the Board upon the subject within its province and that the other directors had no reason to suspect that they had improperly or negligently performed their duty. The members of the committee were held liable but the directors not on the committee were absolved from liability.

The case at bar is quite different. The executive committee meet regularly each week, and their minutes were read to the Board of Directors. Moreover the Board in full meeting discussed the paper purchased by the executive committee. The president and other members of the executive committee were at the bank every day. Most of the directors were familiar with the persons to whom money was lent for most of them were depositors. Unless Mr. Dunn is made an insurer, how can he be held liable for losses on these loans in the absence of proof that the persons to whom money was lent were without financial means? Mr. Dunn was not required to personally investigate each borrower.

In this connection, we quote the following from the opinion in *Warner* vs. *Pennoyer,* supra:

"The fact that other paper turned out eventually to be uncollectible, does not prove that it was such that the directors would have refused to approve if it had been brought to their notice at the time when it was discounted. As to all these losses the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank wrecked by the misconduct of a cashier, could not have been held liable for all the losses."

We submit that Dunn as a director was under no duty to go into the details of the working of the executive committee. That committee was meeting regularly and reported regularly to the Board of Directors. In the absence of a showing that the committee was not functioning, Dunn was under no duty to go behind its reports to the Board of Directors.

III.

The Trust Company Act was not violated.

Section 6 of the Act (Comp. Stat., 5657) provides that every trust company incorporated under the act shall have power, *inter alia,* "(10) to purchase, invest in and sell stocks, promissory notes, bills of exchange, bonds and mortgages and other securities * * *."

Section 7 of the same Act provides:

> "No corporation created under this act shall have power to discount commercial paper; no trust company shall have power to make loans upon bills, notes or other evidences of debt except to a county, city, town, township, borough or municipality of this state, unless the same shall be secured by mortgage upon lands or by other securities, the actual market value of which other securities shall at all times exceed by at least ten percentum the amount loaned upon the same; * * *"

Section 20 of the same Act provides:

> "* * * whenever the available funds of any trust company shall be below fifteen percentum of its immediate liabilities, such trust company shall not make any new loans otherwise than by purchasing bills of exchange payable at sight."

The last section is quoted to show that in the minds of the framers of the act loans and the purchase of bills were correlative terms. Throughout the testimony the reference is to loans. By that term the witnesses understood not only collateral loans but also "bills purchased."

The question in this case is whether the company purchased the negotiable paper in question as it had a right to do under section 6 of the Act or whether it discounted the paper for the purpose of lending money with the paper as security. The matter is one of intention. The undisputed evidence is that the company, as do all trust companies, regarded the transactions as purchases and so treated them on its books. The law will not presume unless forced to do so that a person intends to do an illegal act. It will not presume that the company intended to enter into illegal

transactions. *Hoover Co.* v. *Schaefer Co.*, 90 N. J. Eq., 164.

The terms "purchase" and "discount" when used in reference to the transfer of a negotiable paper are generally used as correlative terms. "Purchase" is a broader term than "discount" and includes the latter. Justice Story in *Fleckner* v. *Bank of the U. S.*, 8 Wheat. 338, 5 l. ed. 631, refers to a "purchase by way of discount."

In *Durant* v. *Banta*, 27 N. J. L., 624, the question whether the transaction was a sale or a loan was held to be one of intention.

The distinction between the two terms has arisen mostly in cases involving usury laws. In *Flecker* v. *Bank of the U. S.*, just cited, the question was whether the power to "discount' given the United States Bank included the power to "buy." The Supreme Court of the United States held that it did. We have found no case, however, in which the distinction to be given the two terms is enunciated, where a charter gives the right to purchase but prohibits discounting or lending without security.

The Trust Company carried the paper on its books as "bills purchased." This practice was never questioned by the Banking Department of New Jersey. This fact alone, we submit, should now estop the Commissioner of Banking and insurance from asserting to the contrary. Mr. Smith testified (case, p. 866, l. 20):

> "that when the bank first started in business every note that was purchased we gave a treasurer's check for, that is for the proceeds of the note, and that continued the practice for I should say two years, each and every note that was purchased there was a check given to show the purchase until Mr. Hardin, of the banking department, made his exami-

> nation at one time, and he called my attention to it and said 'do you make out treasurer's check for every note that you purchase' and I said 'Yes, we have always done it;' Well, he said 'that is foolish, that is not necessary at all,' and he advised me to use my bills purchased book and enter therein all the purchased paper and let the bookkeeper enter from that book into his ledger, just as they do in National Banks, the various proceeds to the various customers credits."

The Vice-Chancellor who sat below says that the distinction is "between paper on which the payee has acquired a legal right to sue—paper which by the express terms of the Trust Company Act, the Company has a right to buy, and paper on which no right to sue arises until the company has acquired it, their right to sue arising and arising only out of the fact that they have lent money on it."

We must confess that this distinction is not at all clear. If the Vice-Chancellor meant that the transaction is a loan unless the company acquires the right to sue, the answer is that in the paper now under discussion it did acquire the right to sue as holder. True, the right to sue would not arise till maturity; but neither would such right arise until maturity on paper acquired from a payee. The statement of the Vice-Chancellor that the inhibited paper is that "on which no right to sue arises until the company had acquired it, their right to sue arising and arising only out of the fact that they have lent money on it," lays down a conclusive presumption that the transaction must be regarded as a loan unless the purchase is from a payee. We submit that this construction of the Act puts the right to purchase paper within limits altogether too narrow. For the purpose of

preventing usury, such a limitation is perfectly proper; but in our view section 6 subdivision (10) and section 7 may both be given effect in a broader way.

In our opinion the distinction is this: section 6 subdivision (10) authorizes a trust company to purchase *negotiable* paper from a maker. Section 7 forbidding discount of *commercial* paper prohibits a trust company from discounting business paper for a *payee* or any person other than the maker. This construction gives the word "discount" its true meaning, and is that phase of discounting paper which is neither a purchase nor a loan. Section 7 wherein it forbids the lending of money upon bills, notes or other evidences of debt unless secured by mortgage on lands or other collateral refers to non-negotiable bills and notes and to loans on bond and mortgage which latter of course are not negotiable. The collocation of "other evidences of debt" with "bills and notes" is evidence of the legislative intent to restrict this provision to non-negotiable instruments. "Other evidences of debt" means a bond or a chattel mortgage—neither negotiable. Furthermore, the expressions "promissory notes" and "bills of exchange" in section 6 subdivision 10, clearly indicate that negotiable paper only was included within those expressions.

That non-negotiable paper was meant by the expression "bills, notes or other evidences of debt" appears from the fact that it is provided that "the actual market value of which other securities shall *at all times* exceed by at least ten percentum the amount loaned upon the same." The only way a Trust Company could absolutely provide that the collateral should *at all times* exceed the amount of the loan by ten percentum, would be to

provide in the note or bill for the deposit with it of additional collateral. This would render the instrument not negotiable. Section 5 of the negotiable instruments law (Comp. Stat. 37, 35) provides in Section 5:

> "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable."

While it is true that under Section 5 the negotiability of a note is not affected by a provision which authorizes the sale of collateral securities in case the instrument is not paid at maturity; still where the collateral note contains a provision for the deposit of additional collateral, the note is thereby rendered non-negotiable. *Holiday State Bank* v. *Hoffman,* 85 Kansas 71; *Hibernian Bank* v. *Dresser,* 132 La. 53.

The learned Vice-Chancellor inquired of Smith whether the procedure followed in purchasing the notes was similar to that of banks of discount in discounting paper. The witness answered that at first the company had drawn treasurer's checks for each note but had discontinued that practice on the suggestion of the bank examiner, and that the practice then adopted was similar to that of banks of discount, that is, the proceeds of the note were credited to the customer's account. That the procedure was similar is of no consequence. The mere fact that the price of the paper was determined by deducting certain interest does not indicate that the transactions were discounts or loans. That was simply a convenient method of determining the sums the company would pay for the notes. Not only was it a convenient method of determining the value; but a necessary one, as it is the generally recognized method of determining such value.

The logical result of the Vice-Chancellor's reasoning is that while a trust company can go into the open market and buy of a note broker the note of a man in say San Francisco, it cannot purchase the note of its own customer because the mere fact that the price of the note is fixed at face less interest stamps the transaction as a discount or loan. We submit that no such result was intended by the Legislature.

The evidence in this case is that the company paid a certain sum for the notes. In the absence of evidence that the company intended the transaction as a loan, the presumption is that it was a purchase. It is undisputed that the company treated the transaction on its books as a purchase. If a man deliver goods to another and at the time of delivery receives certain money from the one to whom the goods are delivered, in the absence of evidence as to the character of the transaction it would be assumed that it was one of sale and not of loan with the goods as security for repayment. Bills and notes are as much the subject of sale as merchandise. They are tangible objects and are bought and sold daily. There is no reason for assuming in this case from the transactions themselves that the company did not intend to purchase the paper, but intended to make a loan with the paper as security.

As further evidence of the fact that a trust company may even purchase a note by way of loan and not violate section 7, we call attention to section 15 of the Trust Company Act with respect to loans to officers. That provides that before a loan can be made to an officer, director or employe, the proposition shall be submitted in writing, stating the terms and "security, *if any,* offered therefor." The clear intimation is that the

loan may be made by purchasing the note of the director or officer without security; else why the words "if any." Read with section 20, above quoted, providing that where the reserves are depleted the company may not make any new loans except by "purchasing bills of exchange payable at sight," we have conclusive evidence from the Act itself that it was not the intention of the Legislature to prohibit loans by way of purchase of bills or notes.

We think a fair construction of the Act, and one which will harmonize sections 6 and 7, is the following:

(a) A trust company has the right to purchase bills and notes, and may purchase them as well from the makers as from the payees. It may not, however, discount commercial or business paper for persons other than the makers, that is, customers of a trust company, may not discount at the trust company commercial paper of which such customers are the payees. There is no evidence in the case at bar that this was done. All of the paper was purchased from the makers; some of it bore an endorsement. This endorsement simply lent additional worth to the paper.

(b) A trust company has the right to purchase negotiable promissory notes and bills of exchange. It may not, however, lend money on bond or on non-negotiable bills, notes or other evidences of debt, unless the same be secured by mortgage on land or by collateral securities.

(c) The statute, under section 20, authorizes a loan by way of purchase of a bill of exchange. The plain intimation from this section read with

section 7 is that the statute contemplates two kinds of loans—first, the purchase of negotiable bills and notes not secured by collateral; and second, lending of money on bonds secured by mortgage on lands and on non-negotiable bills, notes and other evidences of debt, when secured by collateral.

So construing the statute, the action of the directors in the case at bar did not differ from that of any other trust company in New Jersey; and under this construction not only are the directors relieved of the charge that they violated the statute, but the Banking Department of New Jersey is not pilloried with the accusation that its examiners approved the violation of the statute.

Under P. L. 1920, p. 50, trust companies are now given power to discount commercial paper and to lend money on bills and notes without collateral This legislation took the form of a supplement to the Trust Company Act. Sections 6 and 7 of the Act still stand, except as they are modified by the Act of 1920. That Act is in the nature of an interpretation of sections 6 and 7. In subdivision (b) of section 2 of the Act of 1920, in enumerating classes of liabilities of a trust company, occurs the following "The discount of commercial or business paper of other makers actually owned by the person, company, corporation, or firm negotiating the same." It is this type of discount paper that in our view trust companies were, prior to 1920, prohibited from discounting.

IV.

Even if Section 7 of the Statute was technically violated, such violation was not the proximate cause of the loss and such violation was not negligence on the part of the directors.

At the outset, it should be stated that nowhere in the bill is it charged that the defendants were guilty of negligence for violation of this statute. The pertinent allegation is paragraph 20 of the bill (case, p. 38). The allegation of that paragraph is that the directors invested in promissory notes and made loans to persons lacking in financial means and responsibility. We submit that for this reason alone, the decree in this respect should be reversed. The complainant did not at any time amend his bill to include violation of the statute as an element of negligence.

Furthermore, we submit that the directors had a right to rely on the judgment of an administrative department of this state, namely, the banking department that they were complying with the statute in treating these investments as bills purchased. Indeed, in their brief in the Court below, counsel for complainant admitted that the defendants were not liable for engaging in the discount business *per se*. They said:

> "While concededly there are many trust companies in New Jersey which are engaged in the discounting business, there are fortunately few who make the business of discounting their principal concern. Nor are we prepared to say that engaging in such business is *per se* so illegal or irregular that the directors should be held as insurers against any losses suffered in the course thereof. This would perhaps be ignoring the practical consideration that we are confronted by a condition and not by a theory."

It is idle to say that the mere violation of the statute caused the loss. The proximate cause obviously is lack of means in the maker of the bill or note. The case, however, is devoid of proof that the makers of the bills or notes were unworthy of the credit extended to them. In the absence of proof to the contrary, the presumption must be that they were worthy of credit.

Section 7 does not prescribe any penalty for its violation. In that posture, we think that the reasoning in *Evers* vs. *Davis*, 86 N. J. L. 196, applies. That case was based on a violation of the tenement house law requiring fire escapes. It was sought to recover damages for death on the ground that the death was attributable to the absence of fire escapes upon a tenement house. Garrison, J., speaking for this Court, held that while violation of the statute was evidence of negligence, the plaintiff could only recover if "breach of the statute was the efficient cause of the injury of which he complains" (p. 204).

We submit that in the absence of proof that the persons to whom loans were made lacked financial means or were unworthy of credit, the statute does not warrant a decree against the defendants charging them with any loss that resulted from the purchase of bills and notes.

The decree below should be reversed in so far as it affects the defendant, Dunn, with directions that the bill of complaint as against him be dismissed.

COLLINS & CORBIN,
Solicitors of Appellant.

GEORGE S. HOBART,
DAVID A. NEWTON,
of Counsel.

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New Jersey Court of Errors and Appeals

Between

GEORGE M. LAMONTE, as Commissioner, etc., on behalf of Roseville Trust Company,
Complainant-Respondent,

and

GEORGE E. KRUG, EDWARD D. DUNN, HARRY W. FOSTER, EMILE C. BATAILLE, JOHN B. SCARLETT, WORTHINGTON H. INGERSOLL and RAYMOND E. SMITH,
Defendants-Respondents,

HARVEY MOTT, CHARLES C. LURICH, WILLIAM T. BENJAMIN, WILLIAM F. KEIM and G. ROWLAND MUNROE,
Defendants-Appellants.

On Appeal from Decree of the Court of Chancery.

BRIEF FOR DEFENDANTS-APPELLANTS.

STATEMENT OF FACTS.

The appeal (p. 4) of the defendants, Mott, Lurich, Keim, Munroe and Benjamin brings up for review a decree made by the Chancellor under date of December 31, 1919, but not filed until some time thereafter.

By that decree there is imposed upon these defendants an ascertained liability to pay $400,000 to the Banking Commissioner on behalf of Roseville Trust Company as well as a further liabil-

ity to be ascertained hereafter by a special master.

The nature and grounds of the liability in both instances are so concisely set forth in the decree that we give the pertinent portions in full, first stating, however, that our challenge here not merely extends to every portion of the decree, but largely rests in one instance upon the broad specification that the adjudication involved was never sought by complainant and is based upon matters neither pleaded, nor litigated and in the other instance largely rests upon the specification that our unsuccessful contention below is the self-same contention of the very complainant here upon which he secured a jury verdict in his suit against National Surety Co.

Let us then quote from the decree:

> "And it appearing to the Court that the Roseville Trust Company above named suffered losses to the approximate amount of $575,000.00 by reason of the misappropriation and misapplication of its funds and property, by its secretary and treasurer, the defendant, Raymond E. Smith; and it further appearing that the aforesaid Harvey Mott, Charles C. Lurich, George E. Krug, William T. Benjamin, William F. Keim, Harry W. Foster, Emile C. Bataille, G. Rowland Munroe, John B. Scarlett, Worthington H. Ingersoll, William Fairlie, John S. Bell, William W. Woodward, Elmer K. Sexton, William P. Odell, Clinton F. McCord, while directors of said Trust Company had notice that said Raymond E. Smith was unworthy of trust and confidence, but nevertheless retained said Smith in his office of secretary and treasurer of Roseville Trust Company aforesaid, and thereafter permitted him to have control of the funds and property of said Trust Company without sufficient check, supervision and restraint; and it further appearing by reason of said

negligent acts on the part of said directors, the said Harvey Mott, Charles C. Lurich, George E. Krug, William T. Benjamin, William F. Keim, Harry W. Foster, G. Rowland Munroe, John B. Scarlett and Worthington H. Ingersoll became and are liable to complainant for $400,000.00, parcel of said $575,000.00."

"And it further appearing to the Court that the said defendants, Harvey Mott, Charles C. Lurich, George E. Krug, Edward D. Dunn, William T. Benjamin, William F. Keim, Harry W. Foster, Emile C. Bataille, G. Rowland Munroe, John B. Scarlett, Worthington H. Ingersoll and Raymond E. Smith while directors of said Trust Company caused or permitted said Roseville Trust Company to discount commercial paper and to make loans upon bills and notes to persons other than a county, city, town, township, borough and municipality of this State (contrary to the form of the statute in such case made and provided, that is contrary to the provisions of Section 7 of an Act of the 123d Legislature of the State of New Jersey entitled "An Act Concerning Trust Companies" Revision of 1899); and that the complainant is entitled to the extent hereinafter set forth to the relief prayer for in the bill of complaint."

"It is, thereupon, on this thirty-first day of December, 1919, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the Chancellor, by virtue of the power and authority of this Court, doth hereby order, adjudge and decree that the said defendants, Harvey Mott, Charles C. Lurich, George E. Krug, William T. Benjamin, William F. Keim, Harry W. Foster, G. Rowland Munroe, John E. Scarlett, Worthington H. Ingersoll and Raymond E. Smith, shall within ten days after service upon them, or their respective solicitors of a copy of this decree, pay to said complainant or his successor or duly

authorized agent or deputy for and in behalf of said Roseville Trust Company the said sum of $400,000.00."

"It is further Ordered, Adjudged and Decreed, that it be, and it hereby is, referred to Alonzo Church, Esquire, one of the Masters of this Court, to ascertain and report, as to each of the said defendants, the losses, if any, suffered by said Roseville Trust Company upon loans unlawfully granted or permitted by said defendants, and the defendant, Edward Dunn as directors, respectively, during their several terms of office, in conformity with the opinion heretofore filed herein, and that the said Master do make his report with convenient speed, and that the complainant be, and he hereby is permitted to apply for a further decree, supplemental hereto, in accordance with such report."

It should be noted, perhaps, that while the decree was made by the Chancellor himself, it is based not upon his independent consideration of the proofs but essentially upon the opinion (printed in the state of the case) of our late Vice-Chancellor whose lamented death prevented giving effect to his own opinion.

The twofold nature of the liability of defendants demands a corresponding treatment of the facts. Accordingly we give first a summary of those features of Roseville Trust Co. history which shed light on the finding that the directors had notice of Smith's untrustworthiness but nevertheless retained him without proper check and restraint.

Roseville Trust Co. of the City of Newark was founded in the fall of 1908. Roseville at that time was a rapidly developing part of Newark, contiguous with East Orange, and partaking in some respects of the residential character of

the Oranges. Located on Roseville avenue, at a distance of several miles from the commercial center of Newark, the trust company sought to a large extent deposits from Roseville residents and local merchants but like all similar institutions also sought to swell its assets by securing larger accounts elsewhere. "McCreery's" of New York was a depositor.

Its first board of directors consisting of about twenty men was of a character to inspire confidence. The president, Mr. Odell, had for years been cashier of H. B. Claflin Co. Mr. Fairlie, its second officer, was president of the largest coal company in Newark. Mr. Bell had been at the head of the U. S. Secret Service and Chief of Police of Newark — certainly a man with a trained and watchful eye — and at the time well connected financially. Mr. James B. Banister was at the head of the large Banister Shoe Mfg. Company establishment in Newark.

Some of these men had had experience as bankers.

The Court here might read the succinct account of the standing and qualifications of the active members of the directorate of the defunct company, which is set forth on page 1115 (line 25) to page 1122 (line 35).

The trust company started business with a capital of $100,000.00 and a surplus (subscribed by the stockholders) of $50,000. It was, therefore, not a large institution. Its *apparent* deposits never rose much above $800,000.00.

During the process of starting the operations of the trust company, the chief actor in the drama, Raymond E. Smith, was chosen as treasuser of the company. He at once became one of the largest stockholders of the company. His

selection was based upon the highest recommendation made by those competent to judge; he came as a man of unquestionable ability as a banker and of most attractive personal qualities. The most notable of these was an appearance of native candor and frankness which inspired irresistable confidence in his integrity.

The testimony which establishes his excellent reputation is found in various parts of the printed book; but the Court might read pages 669 (line 15) to 672 (line 32).

(In parenthesis, it should be noted that after the debacle of the Roseville Trust Co. some of those who had been loudest in Smith's praise became very conservative in their recollection. We mention this here because we veritably believe that not one out of ten thousand men who are prepared to applaud the decree below would have acted one whit different than did the directors-appellants. Indeed, the true difficulty in forming what we believe is the just and proper estimate of the directors' acts lies in translating our selves *back to the time when they acted.* To the man on the earth the baseball in the air appears to describe a marked parabola 50 feet high; to the observer who can perceive the rapid course of the planet through space the baseball *may* be seen to follow the path of a practically straight line 50 miles long.)

Smith, the Court will note, was not a stranger in Essex County; he came to Roseville Trust Co. from the Second National Bank of Orange, upon the recommendation of a national bank examiner (pages 669-670); he had there come into active contact with the customers of that bank. One of those customers was a man named Charles A. Nones (page 87; pages 1128-1129). Nones became interested in the new trust company and

induced persons to open accounts with the trust company (page 1129, lines 1-30); Smith spoke openly to the counsel of the Trust Co. concerning the value which he attached to Nones patronage (*ib*).

We must remember that Roseville Trust Co. was a young institution anxious to grow and expand; Smith was naturally eager to attract new accounts and make a "good showing." He had been in practical charge of the Second National Bank in Orange during the illness of its cashier (page 672) and there had had experience in dealing with applications for credit.

Nones to him seemed worthy of credit (page 1128, line 29, to page 1129, line 40).

What then could appear more reasonable than to accommodate Nones in a small way when he applied for credit? In December, 1908, Smith took Nones paper for a small amount; this was two months after the bank opened its doors; again in January, 1909, further accommodation was extended. Nones paid both loans at maturity. On February 6th, 1909, Smith loaned out of the company's funds to Nones $1,000.00 and on February 13th, 1909, $1,350.00. It is true that the trust company already held, at that time, $6,000.00 of Nones paper, of which only $3,500.00 had been approved by the executive committee and board of directors (pages 87-88).

All loans that had been made to Nones—both those expressly authorized and those resting only on Smith's assumption of authority—were all paid; and Nones had withdrawn all his paper by March 18th, 1909 (page 91, middle).

Despite the utter absence of all loss to the trust company by reason of the facts just stated; despite the fact that Nones' responsibility was

fully proved by the withdrawal and payment of all his paper; despite the fact that Smith's stockholdings in the trust company furnished substantial ground for his claim that, if necessary, he personally would have taken up Nones' paper; despite the fact that it was Smith himself who called attention to and gave notice of his abuse of authority in making the loans; despite the fact that *for almost two years after this "Nones incident" the record of Smith at Roseville Trust Company was without a blot, observable then or now;* yet it is upon this "Nones incident" that the whole liability of the appellants (under this head) is predicated in the decree (page 188, line 30, to page 189, line 1).

Therefore, the necessity confronts us of placing, as far as lies in our power, a true picture of the influence of that "incident" upon the conduct of the appellants in this cause.

THE NONES INCIDENT.

May we to day, with propriety, looking backward from the standpoint of the ultimate catastrophe, gauge the Nones incident in the light of that catastrophe? Such a course would be manifestly so unfair that to make the suggestion involves its rejection. In a judicial investigation we may substitute hindsight for foresight only to a very limited extent, if at all.

May we today, with propriety, gauge the Nones incident *solely* in the light of the time when that incident developed, and of the letter of the Commissioner of Banking of May 14, 1909, addressed to the directors of the Trust Company, disapproving of Smith because of the Nones incident? *Not at all!* But, if not, why not? For and because of this critical reason—this organic and

controlling reason, namely: **For two years after the Nones incident the conduct of Smith appeared unimpeachable and is unimpeached by anything that the exhaustive examinations of the Trust Company's affairs since insolvency have disclosed.**

Whatever may now be said about the initial impressions, views, conceptions, purposes—and even the judgment—of the directors in connection with the Nones affair and their retention of Smith, those initial impressions, views, conceptions, purposes and that judgment was for a period of two unbroken years subjected to the approving and confirmatory influence of Smith's good conduct; so that ultimately that judgment appeared to have been sustained in the Court of Appeals of Father Time.

The retention of Smith by unanimous action of the Board of Directors after the Nones incident—when he offered his resignation—(pp. 105-107) must be regarded, in this case, not as an act whose termination is found in the formal action of the Board, when they acted upon such resignation; but as a CONTINUOUS ACT, extending over the period of two years of unimpeachable behavior following the Nones incident, when—necessarily—Smith's conduct, behavior and course of action was continuously subject to the scrutiny of the active members of the company.

May we be permitted at this point to suggest a parallel case by way of comparison.

Suppose we own a valuable automobile and employ a chauffeur; that he is driving one of our friends in our valuable automobile to the Pennsylvania R. R. Station; that the chauffeur bears a good reputation as a competent driver

and is an exceptionally considerate person; that on the morning in question he drives at a rate of speed more rapid than usual because he is eager to enable our friend to "catch" the Trenton train; that he at times even exceeds the speed limit; that while turning a corner he barely escapes running down an old lady; but stops the car, alights, goes to the lady and apologizes for his act and the terror which it aroused.

Suppose the chauffeur subsequently brings the incident to our attention, tells us that he knew that he did wrong in breaking at once the speed law and our injunction that under no circumstances must he do so; his act grew out of excess of zeal to bring our friend to the station in time. Suppose that we refuse to accept his resignation and are moved thereto by reason of the chauffeur's excellent reputation, his manly and characteristic admission of guilt and assurance that if we can overlook his act, his future conduct will justify our leniency and in addition are moved thereto by our assurance that his act does not indicate a criminal disregard of life or limb.

Then, suppose that during two years' steady employment after the incident narrated, our chauffeur to all appearances and in point of fact heeds our injunctions and the law in all respects, that at the end of two years (for some unknown reason) our chauffeur begins to follow a different course, takes out our car at nights for joy rides and when we are not watching breaks every law of the road.

Finally he runs down a child. At once, the friend who two years ago was being driven to the station—and then was so impressed with the apology of the chauffeur to the old lady—

will come to us and say: "I knew that your chauffeur was a reckless fellow; you should have discharged him years ago when he offered to resign." And the whole community will, when all the facts are disclosed, utterly condemn us for having retained in our employ a man who was plainly a rascal and of whose rascality we had plain notice years before.

* * * * * *

The Nones "incident" cannot be viewed solely as an "incident," but must be taken as part of a continuous course of conduct beginning October 1908 and terminating not earlier than January, 1911, when it is now alleged that Smith was guilty of the first abstraction of funds.

If in January, 1911, the Nones "incident" of January-February, 1909, taken together with all "incidents" and occurrences, good, bad and indifferent, before January and February, 1909, and all incidents and occurrences thereafter justified the faith in Smith's honesty and ability which the board of directors and these appellants then entertained, their continued retention of him after January, 1911, can only be impeached by showing the development of such new facts after that date as should have impaired that faith.

This view, for which we are now contending, was not adopted by the learned Vice-Chancellor below. Indeed, he went far beyond anything alleged even by the Commissioner of Banking in his famous letter of May 14th, 1909 (page 87, *et seq*), in which, referring to the Nones incident, it was stated that: "No confidence can be placed by this department in any official who may be guilty of this sort of thing, nor does he seem worthy of the confidence of the directors

of the institution. He should be required to resign and cease his connection with the company" (page 91, top). The learned Vice-Chancellor held that Smith's acts in the Nones transaction virtually amounted to a CRIME (page 198, lines 20-30). If the Nones transaction involved a crime, why did nobody—not even the Commissioner of Banking and Insurance, who sought Smith's removal—seek his indictment or even suggest criminality? Because at that time—and it should be realized now—Smith's purposes and motives in making the small loans to Nones was necessarily the most important factor. No criminal INTENT then was visible to anybody.

On the contrary, Smith did not come a craven guilt-stricken wretch whose carefully hidden peculations had been discovered. Manfully and with characteristic candor he went to the bank examiner Appleton and told him of what had been done in an excess of zeal; to the board of directors he went and offered his resignation, stating that he should "feel that you are entirely justified if you accept" it; "on the other hand, if you see fit to trust me, I shall appreciate it more deeply than you can realize, perhaps, and I need hardly say it will be a lesson to me which I will never forget and you will never have occasion in the slightest degree to criticize me again" (page 1133).

(The Court at this point should read page 1131, line 18, to page 1134, line 12.)

It was no Uriah Heep that slunk before the Board of Directors; it was a fine, wholesome man, of proved worth in former positions, who frankly acknowledged an irregularity, an unwarranted assumption of authority, and made manifest that it was due to a laudable desire to de-

velop his institution. There was not and is not the slightest proof that Smith could have gained anything for himself by the Nones transaction.

Indeed, it would appear that the learned Vice-Chancellor's opinion eliminates the human elements of the problem in reaching its conclusion as to the true character of the Nones transaction, and applies to it academic tests not unassociated with the disclosure of Smith's evil course which began some two years later. Instead, we respectfully submit, the Nones transaction must be visualized as it appeared in 1909, vitalized by all the human elements then existing.

Eighteen or twenty prudent men, constituting the Board of Directors, one of them ex-head of the U. S. Secret Service, passed judgment on Smith's conduct in the year 1909, at a time when all the facts were before them, alive, active and vital. Their judgment was that Smith out of excess of zeal had committed a technical wrong, which resulted in no loss to the institution; that the sequel had taught him, as he stated, a good lesson; that they might retain him, assured as to his honesty, which was really emphasized by his open conduct and admission of wrong, and confident that his discretion had been tempered by his experience.

What person today can say of himself that he would have done other than these directors?

That brings us to one important feature of the case, to which we believe all reference is omitted in the opinion below. That feature is so important that we will treat it under a separate head.

FOSTER'S TESTIMONY.

On the last day but one of the hearing, Harry W. Foster, one of the defendant directors, was called to the stand. After direct examination by his own counsel and cross examination by Mr. Hinds, the latter made Foster *his own witness* (for the complainant). (Page 1438, lines 21-22.)

Then was developed Foster's recollection of an occurrence, that through the lapse of time had faded entirely from the memory of all the appellants—except one. And in his case the mental picture was misty (page 1363, lines 1-25).

It seems that on June 21st, 1909, or thereabouts, a committee of the directors went to Trenton, to discuss, with the Commissioner of Banking and Insurance, the Nones transaction in the light of then existing state of information.

After having the case laid before him the Commissioner made a statement to this effect:

> **"Well, from your explanation of this thing why it looks to me as if your stand is all right"? (Page 1440, line 20, page 1444 top.)**

The testimony of Foster is uncontradicted; it was developed by complainant's counsel; it was capable of contradiction, if untrue, by ex-Banking Commissioner (now Vice-Chancellor) Lewis, who would unquestionably have been willing to testify and contradict Foster's statement on the subsequent (and last) day of the hearing, if the facts warranted.

That there was formed a committee to call on the Commissioner is unquestionable (page 105, lines 1-10; copy of telegram to Vivian M. Lewis). How often that committee went to Trenton it is impossible to say at this day.

Mr. Hinds, after himself calling the witness' attention to the date (June 21st, 1909) in connection with this committee, and securing from him an account of the conference in Trenton, tried to throw back and confine the activity of the committee to the period *immediately preceding the directors' meeting at which was reached the decision to retain Smith* (page 1442 *et seq*).

From all of this it appears:

(a) That a special committee investigated the Nones transaction.

(b) That this committee had one or more conferences with the Commissioner of Banking.

(c) That after the matter was thoroughly canvassed with the Commissioner, he himself said: "Well, from your explanation of this thing, why, it looks to me as if your stand is all right."

(d) That this committee reported back the Commissioner's statement to the Board of Directors.

(e) That the matter did not appear to have anything approximating a criminal aspect at the time—that nobody, not even the Commissioner, "dreamt" of such an aspect.

Of course, today, with the famous letter of May 14th, 1909 (page 87), upon which these appellants stand below, convicted of negligence, extant and fresh as when written, it is easy to say: there is the written record. Perfectly true; but if the Commissioner and the committee, after canvassing the matter in *all* its aspects—including those not made a matter of written record—after meeting face to face and having the benefit of clarifying discussion, reached approximately unanimity, can this factor be neglected. The bill of complaint in this suit was filed in July, 1915 (page 18), six years after the Nones trans-

action, and two years after Roseville Trust Co. failed; no threat of suit against the appellants was made until a few days before suit. In the lapse of time, recollection as to some features of the Nones transaction—which could not be refreshed by written memoranda—had approximated a state of deliquescence. Some of the directors, including the Vice-President, who might have remembered well certain facts were dead by the time of the hearing; some directors, including the President, had been discharged from liability (paragraph 32 of the bill of complaint, page 53), and had so come to destroy what few memoranda had initially been retained by them, and moreover had lost all interest in recalling anything to the advantage of these appellants; complainant had for years been in possession of all the papers of the defunct institution, so that these appellants were not in a position to revive their recollection by constant contact with such papers. Amidst all these disadvantageous circumstances, good fortune kept intact the important item to which Foster testified.

Can this be ignored in determining whether the unanimous judgment of the directors in retaining Smith, was the judgment of eighteen reasonably competent men after full investigation of all the facts AS THEY APPEARED AT THE TIME.

Is this not a factor of the greatest importance in determining whether these appellants were negligent in concluding that Smith was not disentitled to a continuance of their confidence because of the Nones transaction.

To be told by the Commissioner of Banking in 1909, with all the facts fresh, that "your stand is allright," and to be told ten years later

by a court after many features of fact have grown obscure, that you were so patently in the wrong that no reasonably prudent man could have decided as you did, we respectfully submit, involves elements which should impress this high tribunal.

That brings us to this question: Conceding, as we must, that the Nones transaction and the Commissioner's warning letter of May 14th, 1909, constitute full notice of such character that the directors of Roseville Trust Company were bound *in law* to notify the National Surety Company, which was a party to Smith's bond, so that it might take such action as it chose, and also required the directors to make a full and searching investigation, were the acts and conduct of Smith (at the time) such evidence of moral obliquity or disregard for duty, as to require the directors to conclude that he was no longer entitled to their confidence and to the free exercise of the powers which he had at that time?

That question has been answered by counsel for the respondent. It was answered in their brief in this court in *Roseville Trust Company* v. *National Surety Company.*

I will adopt their language. It is the language of men who by reason of their full and complete opportunity to examine all the records and memoranda of Roseville Trust Company and their contacts with the Banking Department of this State and its experts are in a position to answer that question with absolute accuracy!

Their language is this:

> "The Nones transaction as the facts appeared to the directors of the Trust Company amounted to neither more nor less than an act on the part of Smith, irregular in its nature, inspired wholly by a desire to in-

crease the business of the Trust Company of which he was a substantial stockholder. To them it appeared, as Smith explained it, that the entire transaction involved merely a loan to Nones, whom Smith regarded as a valuable potential customer or client of the institution, whom Smith reported and the directors believed to be abundantly good for the obligation—and, in fact. the obligation was taken up in full, a few days after the examiner's criticism. To the directors it appeared, as Smith explained it, that the chief reason for not entering the note in the books, which, when the transaction is analyzed, is the essence of the irregularity of the entries involved in the Nones transaction—was that Nones expected to need the loan from the Trust Company for only a short period. At this time it should be observed that as appears by the * * * witness, Appleton, the irregular entries on the books would have been entirely corrected by the formal entry among the assets of the Trust Company of the note which Smith, in fact, obtained from Nones for the Trust Company, and which the witness, Appleton, saw personally. In other words, the 'shortage' which is constantly referred to throughout the witness Appleton's testimony * * * may, upon the last analysis, be shown to be 'shortage' of entries in that Nones' note was not put through the books."

"So far as the omission to fill out the stubs involved in the Nones transaction is concerned, it must have appeared to the directors that there was nothing furtive in this, for the reason, first, that the Philadelphia National Bank had no check book, but merely stationer's drafts, and, second, as appears by the Commissioner's letter of May 14, 1909, *numerous other instances were reported of failure to fill out stubs when drafts were drawn.* The Court will bear in mind, as defendant's witness Appleton testified, the entire subject was first brought up

by Smith volunteering information on the subject to Appleton. This must have impressed the directors. Appleton explained the matter to Odell and Munroe, but at the same time, as he testified, he was explaining or complaining about all the other matters which are the subject of the long letter of May 14, 1909."

"The directors say they were impressed by the fact that Smith's conduct was undoubtedly to be explained upon the ground of desiring to advance the interests of the bank and, therefore, involved no discreditable reflection upon him. Smith was a large stockholder in the Trust Company; one of the largest. This, therefore, is not the case frequently found in the books of a hired officer having no other interest in the institution than his salary, whose conduct can scarcely, under any circumstances, be attributed to desire for the advancement solely of the institution. The directors thought that Smith, by his large stockholdings, had given hostages. To the directors, it seemed unthinkable that Smith, for the small amount involved in the Nones transaction, $2,350, compared to his large investment in the stock of the Trust Company, could have had any purpose other than the benefit of the institution."

"As we have elsewhere pointed out, it should also be borne in mind that the technical manifestations in the books of Smith's irregularity in failing to put the Nones note through in the usual form, would not convey to the directors a meaning such as it would mean to the technically trained examiner whose viewpoint was, regularity first and business afterward. *The directors did not act flippantly in this matter; it was undoubtedly a matter to which they gave the most thoughtful consideration.* At the time of the trial, which was ten years after the date of the occurrences, it is natural to find the directors without the accurate recollec-

tion of the details which we should expect in the case of more recent occurrences."

"The fact that the directors retained Smith in the management of the institution is an outstanding fact of importance * * * which must not be overlooked. As far as the directors were concerned, they had their investments in the Trust Company; they had their names at stake and it is to be presumed that as a matter of common human experience, based upon the ideas of self-preservation, they would not have retained Smith if they had received the impression from the Nones transaction that it was unsafe to retain him; that he was unworthy of their further confidence. The officers continued in office, Odell being president, from the beginning until the end. So far as it appears, none of them made any change in their view point of complete reliance on Smith. At the close of the Trust Company Odell had the large sum of $41,000 upon deposit—a man who had been a bookkeeper and cashier throughout his business life."

"Although Smith in the Nones transaction was guilty of excess of zeal or bad judgment in the viewpoint of the directors, they knew that in all other respects he was running the institution, as they thought, well and faithfully and was under their very eyes, as they believed, performing his duties in a most creditable manner."

How pregnant is the preceding paragraph. The directors *knew* Smith—he was running the institution well and faithfully under their eyes! Their determination to retain him and their confidence in him was in part a product of their *contact* with him. Can any subsequent judicial inquiry eight or ten years after the event supply that factor of constant personal contact? We look into a man's eye, we see probity there, we see his manly conduct day by day, we feel we

know the man. He comes to us and makes an admission of wrong; that admission is made in a manner harmonious with our previous estimate of him. By what process does justice require that this Court shall override the verdict of these directors, who had the *man* and *all the facts* before them and earnestly sought to find and do the right.

Again we repeat the question which we are now discussing: Was Smith's conduct in connection with the Nones transaction evidence of such moral astigmatism as to require the conclusion that his was a deceitful nature, or that he had the mind of an embezzler or a thief, or that his was a character unable to resist temptation?

The learned Vice-Chancellor could see only one answer to this question, viz: that Smith was patently untrustworthy; that he had deceived the directors once and that there was no sufficient reason to believe that he would not do so again (page 195, line 15, to page 199, line 20; especially lines 16-18, page 195, and line 15, page 198, to page 199, line 20).

The Vice-Chancellor does not question the honesty and business experience of the directors (excepting Scarlett) who concluded that Smith should be retained. He says: "It is undoubtedly true that the directors who so acted were, with one exception, men of business experience and perfectly honest. But that would not exonerate them, if they, with the best of intentions, knowingly retained a dishonest man" (page 197, line 39, to page 198, line 3).

We then have this curious conjunction of circumstances:

1. The directors, men of business experience and unquestionably honest, honestly decided that Smith was not dishonest, that the Nones transaction did not prove him dishonest, that he was entitled to remain as the working head of an institution which had the custody not only of the money of the general depositors, but the money of these very men who were according to Smith a vote of confidence.

2. That a learned Vice-Chancellor, sensitive to a fault in moral matters, decides ten years after the event that the judgment of these honest and experienced men, reached after full consideration, with regard to a question with which they were peculiarly well fitted to deal by reason of their business experience, is nevertheless a judgment which he, that sensitive Vice-Chancellor, is entitled to review and declare so palpably wrong as to mark it the judgment of fools.

Fortunately, with respect to this conjunction, an established test may be called to our aid.

It is found in the provisions of the statute which substitutes for the common law definition of the duties of trust company and bank directors (*Campbell* v. *Watson*, 62 N. J. Eq. 396) a new definition required by the complexities of this highly developed commercial and business age; the duties of trust company directors today are found set forth in the following sentence: "Each director of every trust company shall take an oath that he will as far as the duty devolves on him, diligently administer the affairs of such trust company and will not knowingly violate or knowingly permit to be violated any of the provisions" of the Trust Co. Act. (Comp. Stat., page 5660, Sec. 12.)

We say that in the Nones matter the directors did diligently administer the affairs of the bank; they diligently inquired, they earnestly sought for light, they gave their very best judgment; they gave that judgment feeling assured that despite Smith's error and impropriety in conduct, the result of excessive zeal, he was, in fact, as to everybody he appeared, an honest man, exceptionally candid and straightforward; they gave that judgment assured that his future conduct would be correct in form as well as worthy in substance; that the Nones incident would never be repeated.

Unless the directors are insurers what more than to give their best deliberate judgment could be asked of them. The *statute* does not make them insurers of their judgment.

May we present this supposition: that in February, 1910, one year after the Nones incident a judicial inquiry as to action of the directors in retaining Smith would have become necessary —let us say because of an internal quarrel of the members of the Trust Company; and in such judicial inquiry, examination would have shown the assets of the company intact and in general a healthy state of development. Would not, then, the Court of Chancery have *commended* the board of directors for their *good judgment* and perspicacity in retaining Smith? How different then would have been the judgment of men.

The truth is that the mass and momentum of the loss which eventuated is so great—like that of a huge glacier—as to crush everything that stands before it. Only when we remove ourselves from the overpowering might of that loss, and view the Nones incident looking forward—as did

the directors—into the pleasant prospect of the undetermined future, in the light of what was then the past, can a just judgment be formed—the judgment that gives heed to the injunction: PUT YOURSELVES IN THEIR PLACE.

The on-looker at a game of cards can discern the mistakes of the players because he can glance at more than one hand; but when he sits in the game and has to decide solely on the basis of his own hand, he makes the very mistakes which he saw so plainly as a spectator. The post mortem analysis in this case, as always, has its value; but would any of us have done differently, had we sat in the game with the directors of Roseville Trust Company in the year 1909?

Only one thing remains in our endeavor to elucidate the "Nones incident."

* * * * * *

The failure of complainant to call Bank-Examiner Appleton as a witness.

This bank examiner was the one to whom Smith, in March, 1909, first disclosed the fact that he had made irregular loans to Nones (page 880, bottom). Appleton's report was the basis of the Commissioner's letter of May 14th, 1909 (page 87, lines 10-15). The Commissioner did not write that letter from first-hand personal knowledge.

Appleton, who had such first-hand knowledge, was not called as a witness by complainant. Why was he not called? It would have been dangerous for defendants to have called him. They had no assured ground on which to base a right to *cross examine* him as a hostile witness. Yet they had good reason to know that at the time of the Nones affair *he was an applicant for*

Smith's position (page 1206, lines 22, to page 1207, line 30). They had a right to assume that in the absence of any contradiction by Appleton of testimony, which he was in a position to contradict, the learned Vice-Chancellor would not take the sworn testimony given to be false. They had a right to assume that since Appleton was connected with the Banking Department, inferences unfavorable to the Department would be drawn from the Department's failure to call him; and likewise, where there was a doubtful or hazy feature of fact involved, which his testimony might have cleared, the defendants would receive the benefit of the doubt, after they had done their best at clarification.

Appleton's conversation with Munroe (the Trust Company's attorney) and Odell (its President) on the day on which Smith disclosed his dealings with Nones was necessarily brought into the case.

On pages 1155 and 1156 are shown these parts of complainant's cross examination of Munroe with respect to this conversation:

> "A Mr. Appleton's conversation is not so clear in my mind; I know that he was strongly of the opinion, and expressed it to us, that we ought not to retain Mr. Smith, and I know that he gave his reasons for it, but I do not recall in detail any further than that, Mr. Clark."
>
> "Q Your recollection is very hazy on that conversation? A Yes."
>
> *By Mr. Stiefel.*
>
> "Q When you say 'us,' who do you mean? A Well, I mean Mr. Odell and myself; met him at Mr. Odell's house."
>
> "Q Now, after that conversation with Mr. Appleton, who represented the banking department and was the man who had discovered this shortage— A To whom Mr.

Smith had reported it, but he hadn't discovered it up to that time."

"Q Well, we will say the man who was making the examination. A Yes."

"Q After he had this talk with you did you report concerning the incident to the other directors? A I did."

"Q How soon? A I don't remember exactly, but, of course, it was matter naturally of great importance, and my recollection is it was taken up promptly."

"Q Will you say within a day or two? A I should say so."

"Q Do you recall the statement in the letter from the banking department signed by Vivian Lewis, as Commissioner, dated May 14, 1909, the following: 'The examiner states that the matter is known only to yourself'—the letter being addressed to Mr. Odell, the president—'and Directors Foster and Munroe, and that at the interview he had with you and Director Munroe, at your home on the evening of March 18th, the matter was thoroughly gone over and that he informed you and Director Munroe that the facts must be made known to every director, which I assume has been done.' Do you recall that being read as part of the letter? A I do; yes."

"Q Was there any discussion in the board at that time concerning whether or not there had been any withholding or delay on your part in giving information? A I do not recall."

"Q Don't remember anything of that kind? A I do not; no sir."

"Q Did Mr. Appleton tell you, you may recall one specific thing about that conference, did he tell you that Mr. Smith's record in some other bank previous to the Roseville Trust Company had been bad? A He may have done so."

"Q Did you investigate it? A Yes."

"Q Did you report that to the board of directors? A I reported to the board of directors everything I learned; yes."

"Q So that if Mr. Appleton told you that, you reported it, among other things: that is your best recollection? A Yes; that is my best recollection."

It should be noted that when Mr. Munroe stated that he reported to the board of directors everything which he learned upon "investigation" of Smith's "record," he was referring to the investigation *prior to the employment of Smith.*

This is made clear by reference to Mr. Munroe's re-direct examination, as shown on page 1200, line 40, to page 1202, line 26:

"Q Mr. Munroe, during the noon recess I spoke to you about what you had stated to somebody of the Roseville Trust Company, subordinate body, with respect to what Appleton reported to you regarding Smith's reputation; will you tell us in detail, if you can recall, what you reported to the board of directors or to the executive committee, either or both, with regard to that?"

"*The Court.* That has all been gone over two or three times, has it not?"

"*Mr. Hinds.* Mr. Clark tried to bring that out and the witness has no recollection, though he did have a very clear recollection of the favorable things that he learned from Smith himself; the unfavorable from Appleton he had no cognizance of now at all."

"*Mr. Stiefel.* In view of counsel's statement, and the questionable nature of the whole situation, I think I should be permitted to ask the witness with regard to that. I want to show that my man Lurich never heard of any conversation that Mr. Appleton had with Munroe, such as was hinted at this morning by Mr. Clark. That is what I want to show."

"*The Court.* Has it been proved that he had?"

"*Mr. Stiefel.* I do not know what the record is on that point. Mr. Hinds says that the witness said he had no recollection; I don't know that that is so. Am I to assume that Mr. Hinds' statement in that respect is correct—that Mr. Munroe said he had no recollection?"

"*The Court.* Well, ask the question."

"Q (Last question read.)"

"*The Court.* That is not the offer. The offer is to show that Mr. Lurich did not have knowledge of a certain fact. Now, if you want that question you may ask it, but I strike out the other question."

"Q Do you know whether Mr. Lurich had any knowledge of any conversation between you and Mr. Appleton, in which Mr. Appleton spoke of Mr. Smith's reputation? A So far as I know he did not. My recollection as to what Mr. Appleton said about Mr. Smith's reputation, as I said this morning, was very vague; I think he made some sort of an insinuation which was not supported by any facts, and it did not seem to me worthy of much consideration for that reason. I remember that he did state the facts, as Mr. Smith had already stated them, as to this transaction, that I remember clearly, but I am positive that he did not state any facts which were supported in any way as to deserve consideration as to Mr. Smith's previous reputation, anything derogatory."

Again, on re-cross examination we find the following:

"*Re-cross examination* by Mr. Clark."

"Q Mr. Munroe, you have stated in reply to a question by Mr. Stiefel, if I understood your answer correctly, that you had not reported to the board or the executive committee the substance of Appleton's conversation with you; is that right? A No; I did not say that."

"Q Well, what is it? A I said, or meant to say, and I am sure I did say that

all that I recall of Mr. Appleton's conversation I reported."

"Q To the board and the executive committee? A Yes; whenever the matter was under discussion." (Page 1208, lines 12 to 29.)

On pages 240-241 is shown the following portion of the testimony of President Odell:

"Q I will withdraw the question. Mr. Odell, upon the receipt of that letter, did you cause an inquiry or investigation to be made respecting the facts which I have just read to you as contained in the letter? A Not upon receipt of the letter; they had already been looked into after the interview with the examiner, which was previous, I think, to this letter; must have been just previous to the letter."

"Q And were the results of that examination brought to your attention, or did you take part in the inquiry or investigation? A The only investigation we made, I think, was made by Mr. Fairlie and myself, and that was with Mr. Smith personally."

"By the Court."

"Q What did you find? A He acknowledged the sum total of what has been stated in this letter; but that was previous to the receipt of this letter."

"Q Did you bring to the attention of each and every director the contents of that letter? A Each and every director had this letter read to him." (Page 240, line 24, to page 241, line 10.)

Also the Court should read page 246, line 20, to page 249, line 36. The passage is too long to insert here.

On page 283 appears this passage from Mr. Odell's testimony, referring to the directors' meeting at which Smith was exonerated:

"Q Was anything said about Mr. Smith's past record, so far as the members of the

board knew of it? A Yes; that I am certain of."

"Q Had members of the board made investigation of his past record? A They had made, I believe, an investigation *before he was selected to be one of the incorporators.*"

To the same effect are the passages shown on page 293, line 10, to page 295, line 10. Those passages conclude as follows:

"Q That is all the investigation you made after the agent of the Commissioner called to your attention that there had been some fault found with Smith at the Second National Bank, where he was formerly employed? A I didn't say there was any fault found at the Second National Bank; I am only speaking of the casual talk that Appleton had; where Appleton got his information from I don't know; as I remember, he said he got his information from going around examining different banks and trust companies."

"Q At any rate, you made no further investigation? A No; it was only gossip, talk; he couldn't substantiate anything; he said himself, 'I don't want to be brought into the matter.'"

Now, from all this testimony is it not plain that Appleton brought to the attention of Odell and Munroe some rumors so insubstantial that he did not want to have his name connected with them; that they were *not* investigated; that they were *not* brought to the attention of the board of directors as a whole; that both Odell and Munroe deemed them of no consequence. And today those rumors are not battressed in this case by a single bit of evidence, substantial or otherwise, to show that they had any basis in fact. Appleton is not even called to show *what they were;* as far as this case is concerned they have no foundation.

Notwithstanding this, the Court below came to this conclusion:

> "It is, moreover, *admitted* that when the bank examiner communicated to Mr. Odell and Mr. Munroe what he learned, he told them of rumors as to Smith's record. Mr. Munroe testified that he investigated *it,* but does not tell us how or what he learned, if anything. He says that whatever Appleton told him he reported to the board. When the board met on June 18th, 1909, the minutes state that the directors discussed the Commissioner's letter, *but they say nothing about any investigation of rumors.* In view of the fact that Smith's conduct had been so reprehensible from the start it is quite surprising that it was not thought advisable to follow up the rumors in order to find out what, if anything, Smith had done to give rise to them. The information came from a man in daily contact with bankers." (Page 197, lines 7 to 25.)

The whole board of directors was condemned by the Court below because they did not "follow up" certain rumors that even today, after all the publicity given the Roseville Trust Company failure, are not substantiated by a scintilla of evidence in this case; that were known only to two members of the board from their author, Appleton; and from him as unworthy of repetition; that are not repeated in court by their author, whom complainant dared not call as a witness.

The Court below evidently failed to notice that the Commissioner's letter of May 14th, 1909, does not refer to these rumors; or in any way give any hint with respect to them. If there had been any foundation to them, Appleton, "a man in daily contact with bankers"—to quote the Vice-Chancellor's language—would undoubtedly have discovered that foundation.

The fact that he was not called should have impressed the Vice-Chancellor and led to the conclusion that Appleton had found they were without foundation.

We respectfully submit that a certain and assured conclusion—the only kind permissible to sustain the decree below—cannot rest upon a clouded state of facts which complainant was unwilling to clarify by calling Appleton; showing what were those rumors, and what his investigation discovered with respect to them through his "daily contact with bankers."

* * * * * *

But the complainant's failure to call Appleton has a more important aspect.

Appleton was the man to whom Smith first disclosed his irregular dealing with Nones. Appleton examined all the books and records of the Trust Company at the time of the Nones affair; he was the one man who came in contact with all sources of information, the Commissioner of Banking, Smith, Odell, Munroe and the bank. He made a written report in the matter upon which the Commissioner based his letter. He should have been, in this connection, the *chief witness* in the case.

Why was the chief witness not called?

It is not part of the record in this case, but it is the fact, and the fact may be used *arguendo* —that Appleton was an important witness on behalf of the Commissioner of Banking in the action at law of the *Commissioner* v. *National Surety Co.,* tried shortly after the hearing below.

He there testified for the purpose of exonerating the directors in their failure to notify the Surety Co. with respect to the Nones matter.

May there not be circumstances known to Appleton and communicated to the Commissioner which led him to refrain from going beyond a mere disapproval of the directors' decision in his letter to Odell of July 16th, 1909 (page 108, lines 20-30).

If the Commissioner had *remained convinced* of the unreliability of Smith he had power to act, under the statute.

The Trust Co. Act provides (Comp. Stat., Vol. 4, Sec. 22, page 5663):

> "Whenever it shall appear to the Commissioner of Banking and Insurance from any report submitted or examination made under the provisions of this act, that the affairs of any trust company are in an unsound condition because of illegal or unsafe investments, or that its liabilities exceed its assets, or that it is transacting business without authority or in violation of law, or that it is unsafe or inexpedient for such trust company to continue business, it shall be the duty of the attorney-general, on notice by the Commissioner of Banking and Insurance, to institute such proceedings against the trust company as are hereinafter authorized in the case of insolvent trust companies, or such other proceedings as the nature of the case may require; if from any such examination the Commissioner of Banking and Insurance shall have reason to conclude that any such trust company is in an unsound or unsafe condition, he may forthwith take possession of such trust company's property and business and retain such possession until the termination of the action or proceeding instituted by the attorney-general, or until the appointment of a receiver pursuant to the provisions of this act, and pending such possession by the Commissioner or such proceedings by the attorney-general, all the remedies at law or in equity of any creditor or stockholder

against the said trust company shall be suspended."

Was it a recanvass of the matter with Appelton; was it the presentation of facts by the Foster committee (*supra*) which led the Commissioner to hold back his letter of July 16, 1909 (*supra*) for one month after notification of the board's action (page 105).

Something—and something big—is hidden here! Something, which Appleton's cross examination might have brought to light.

In an ordinary suit the failure to call an important eye witness within your control will always count against you. Why here, despite the magnitude of the losses, should such failure not have its ordinary or usual operation.

We are in a court of Equity, of Conscience; have we not the right to ask that the conscience of the Court must be fully satisfied, upon a full disclosure of *all that is ascertainable,* before it pronounces certain judgment condemning these appellants as foolishly negligent in holding to their faith in Smith.

It must not be forgotten that the hearing took place in 1917, eight years after the Nones episode. Fairlie, vice-president of the company, and an important actor, was dead; Odell, Sexton and other important directors had in 1913 been released from all liability upon payment of certain sums; their interest in the matter was dead and their recollection thereby uncertain. Appleton by reason of his examination of the trust company's accounts and its officers, and his records in connection therewith was in a far more favorable position. All the ammunition (in the form of documents) was in the possession of complainant.

The appellants sought to get into the records all reports prior to 1912; but complainant successfully contended against their admission (pages 1349-1350; also page 1448, lines 20-35). The Court was adverse to their admission and we did not press the matter unduly. But now, in view of the decision below, in view of Appleton's non-appearance as a witness, is it not time to say: By reason of complainant's course we can only see as through a glass, darkly; equity will only act upon a full disclosure and full assurance.

Ever and again the cry forces itself on us—for what reason was it that Appleton was not called.

* * * * * *

Our discussion of the Nones episode is now concluded. That episode furnished the basis of the finding below that the defendants "had notice that said Raymond E. Smith was unworthy of trust and confidence, but nevertheless retained said Smith in his office of secretary and treasurer of Roseville Trust Company."

We are therefore brought to the second finding of fact below, *viz:* that the directors after retaining Smith "permitted him to have control of the funds and property of said Trust Company, without sufficient check, supervision and restraint." (Page 222, lines 16-19.)

In our discussion of that finding, it is necessary to premise this: the findings logically arranged, are:

(a) that the Trust Company lost $575,000 "by reason of the misappropriation and misapplication of its funds and property" by Smith (page 221, lines 35-40); then,

(b) that the retention of Smith after notice of untrustworthiness and the lack of "sufficient check, supervision and restraint" are two items of negligence (page 222, lines 10-19); then,

(c) that *"by reason of said negligent acts on the part of the directors"* they became answerable *for $400,000 part of said $575,000.* (Page 222, lines 19-26.)

Those being the express and stipulated grounds for the ascertained lump liability of $400,000.00, we cannot discuss any grounds but those. If this Court should find that grounds of liability other than those premised may be involved then we respectfully submit there should be furnished to us an opportunity of presenting our case with respect to its new aspect. The complainant has not appealed from the decree except as to the part exonorating the defendant Dunn.

We therefore proceed along the line marked out for us by the structure of the decree.

* * * * * *

The Trust Company's history from June, 1909, to December, 1910; what was the course of the directors with respect to Smith and the management of the institution; and why.

The period we are now examining begins with the termination of the Nones affair and ends with the first abstraction of funds belonging to the Trust Company by Smith (and other employees).

It is an admitted fact that during this period the books of the Company are absolutely "straight" and that the course of Smith and the other employees is free from stain (pages 1350-1351 as to the books; page 729, line 18, to page 733, line 15, as to the first abstraction of funds in December, 1910).

As to this period the opinion of the Court below is silent. Its effect on the minds of the directors, the examining committee, the Department of Banking is ignored. The practical confirmation given by the experience of this period to the sufficiency of the bank's system of operation and supervision, plays no visible part in attaining the conclusions reached. The fact that this period and the experiences of this period, operating on the minds of the directors is necessarily a factor of the greatest importance in estimating their subsequent conduct, is by said opinion not even indicated to be an existent fact.

During this period the system of the Trust Company became fixed and its routine established and so far as observation then went and as critical examination now discloses, all was well, the bank was flourishing, its funds were intact, its surplus increased.

The opinion below however virtually places the losses which began in December 1910 (and admittedly for one whole year were not discoverable by any practical method) in *immediate juxta-position* to the Nones incident. A reader of that opinion, not acquainted with the proofs would be justified in believing that the proximity and connection of the losses and the Nones event were immediate in point of time and in the method pursued by Smith. Whereas, there is no proximity in point of time and the abstractions and embezzlements of Smith were not accomplished to any extent—if it all—by drafts on depository banks. So that if the directors had required two signatures to drafts it would have availed the Trust Company nothing. (Page 770, line 12, to page 771, lines 1 to 18, especially lines 10-18.)

During this period (June, 1909, to December, 1910) and the succeeding month, the Banking Department made three critical examinations of the Trust Company's affairs—that is on October 6, 1909, May 25, 1910, and January 26, 1911. (Page 1448, lines 20-35.) The defense tried hard to get the reports based on those examinations into the record, but the Court below would have none of that (page 1348, line 25, to page 1352, line 25). It is fair to assume from the attitude of the department voiced in May, 1909, that those three examinations following May, 1909, were as rigorous as could possible be.

They did not produce a single suggestion from the department, like that of the opinion below, that a further check on Smith or any of the employees was necessary—except in matters of insignificant detail (which were followed) and do not affect this case. This institution by law was under the supervision and control of the Commissioner of Banking. The fact that he found nothing wrong with the system of control of the bank, and that this was apparent to the directors, is, in the opinion of the Court below, not worthy of animadversion.

What changes of detail did the Commissioner suggest and what action was taken thereon. The following passages in the correspondence between the Commissioner and the Trust Company disclose their character:

From page 101, paragraph 3, we see that the Commissioner's requirement regarding banks stubs where checks or drafts had been destroyed on account of error, received attention; as well as the prompt posting of amounts of checks and drafts.

On page 118 (part of the Commissioner's communication of June 13, 1910) we find the following:

> "The keys of the loose leaf ledgers, now in possession of the bookkeeper, should be kept by the Treasurer who should also supervise all shifting of the loose leaves." (Lines 17-20.)

Now, who was the "Treasurer"? Why the Treasurer was Smith! Apparently the Department had modified its opinion of him. It delayed a period of eight months (May, 1910, to January, 1911) before making its next examination.

On the same page of the record (page 118) there is a suggestion about putting the general ledger in proof every night; interest on mortgage loans should be noted on the bonds; all "bills purchased" should be numbered consecutively.

These matters received attention (page 121, line 37, to page 122, line 20).

The absence of the supervisory department to suggest that any change in system should be made, the fact that *no one* suggested a change (until after the failure of the company) is a circumstance, we submit of the highest importance. Again and again it must be borne in mind that the laxity of Smith in the Nones affair related to drafts *drawn by him on depository accounts*, which accounts were reconciled by the banking department at each examination; which were reconciled monthly by an employee other than Smith (page 653, line 23, to page 654, line 30); which were reconciled semi-annually by the Trust Company's own examining committee through its permanent chairman, Mr. Sexton. (If he did his work imperfectly in 1911 and 1912, that is not the fault of these appellants; he

apparently had every qualification therefor; the Vice-Chancellor exonorated all the members of the examining committees as such (page 214, lines 2-25).

So that there *already existed* sufficient check and control over Smith's drafts in depository banks.

A second signature was not practicable; because Smith was the only officer in *constant attendance.*

The Commissioner himself in his letter of May 14, 1909, had indicated his opinion that Smith's drafts for Nones on depository accounts were bound *"to come out in the course of the examination"* (page 88, lines 12-16). Now, if that be so, the depository accounts, which never were large, did not appear to require further control. The dishonest employee in a bank is ordinarily not going to use methods which are *patently* bound to lead to discovery. He is going to use methods which will delay discovery as long as possible. And in fact Smith did not employ drafts on depository accounts to effect his embezzlements.

A purely academic view of the situation might suggest, despite all that we have said, that a second signature should have been required. No practical man conversant with the topic, neither the Banking Commissioner, nor any of his examiners, nor Mr. Odell, for thirty years cashier of Claflin & Co.; nor Mr. Fairlie, who was a director of Franklin Savings Institution, also of the former German National Bank (afterwards a constituent of Union National Bank), president of the Fairlie & Wilson Coal Co.; nor Mr. Bataille, an expert banker himself—practical men—made such a suggestion. This, we submit, should have its full weight here.

The directors did not consider Smith a "crook" by reason of the Nones affair. He had not put any money in his own pocket. He had made loans, without authority, to a former customer of the Second National Bank, whom he thought he knew better than did the directors, and afterwards when he realized what he had done "acknowledged the corn."

If they had considered him unworthy of full confidence they would or should have completely and utterly discharged him, not half-discharged him by retaining him subject to unpractical checks which would have interfered with the conduct of business by the bank. Half-way measures in such a case are not allowable. Checks and control only are possible of achieving anything in the case of *honest* men, so as to guard them against folly, temptation or moments of weakness, and make it possible to place the responsibility if anything goes amiss.

The complainant's argument in effect is that being confident that Smith was trustworthy, they should have treated him as untrustworthy.

To have done so would have *demonstrated* that they were not confident in their own judgment. To have proceeded on the theory that he *might* be untrustworthy, despite their judgment, would, carried to its proper and logical conclusion, *have necessitated his discharge.*

To retain a possibly or questionably trustworthy man in the capacity of treasurer of Roseville Trust Co.—in the presence of a doubt as to his character—on the shallow security of such safeguards as complainant suggests, would have been almost criminal.

We are dealing with a condition, not a theory. The condition is that the directors **believed** implicitly that Smith **was** trustworthy. **And so believing, they surrounded him with the safeguards with which sound banking surrounds apparently TRUSTWORTHY EMPLOYEES.**

The Best PROOF that the directors fully BELIEVED that Smith was TRUSTWORTHY is that after retaining him, they continued to TREAT him as trustworthy!

Had they done otherwise, complainant would have argued that their retention of Smith was not the result of an absolute *conviction* that he was trustworthy, founded upon their full examination of all the facts at first hand. And such argument then would have been correct.

However, that does not in any respect mean, that the directors having determined to retain Smith as trustworthy, also determined to discard all the safeguards which the *system inaugurated on the institution of the trust company, involved or established.*

The last paragraph requires us to show the "system" under which the Trust Company operated during the period now under discussion—before a single loss occurred. If that system was a practical and reasonably safe system in the years 1909-1910, then the directors are not to blame for retaining it—**unless they were unquestionably negligent in adhering to their initial judgment, after their experiences during the years 1909 and 1910.**

In considering the system it must be remembered that we are dealing with a small institution whose employees numbered three, four or five at the most including the stenographer and Smith (page 540). The banking room was small (page

304, line 40, to page 305, line 22; page 583, line 20, to page 584, line 20); great advantage lay in this, for each employee's actions could be watched by his co-employees. Indeed the eventual catastrophe would have been impossible without the *collusion* of Smith and the teller, Jennings, and the silence of a third employee as to visible irregularities. This feature of collusion, will, we hope, spell the complete exonoration of these appellants in this court; for it is the one element that no practical system can guard against. But we will not deal with it just yet.

None of the directors received compensation. Odell called at the bank every morning and usually every evening; and conferred with Smith "over the matter of loans" and other matters requiring attention; he would look into the books and seek information from the other employees. While none of the witnesses examined on this point, not even Odell, could vitalize his testimony, yet putting all the bits together we can in our minds fairly well reconstruct the picture. In addition to his regular morning and evening call, Odell spent Monday nights and Saturday mornings at the bank; he can remember that he "took off" all the individual deposit balances from the customers' ledgers, on one occasion and footed them on an adding machine. This task must have taken four or five hours. Fairlie, the vice-president, called at the bank frequently. (As to all this see page 233, lines 18-40; page 268, lines 20-40; page 332, line 30, to page 333, line 20; page 305, line 35, to page 306, line 30; page 584, line 20, to page 585, line 40; page 589, lines 30-40; page 595, lines 1-20; page 1342, line 19, to page 1343, line 5; especially page 1302, line 15, to page 1303, line 10; page 1306, line 32, to page

1307, line 18.) In short, the picture of Mr. Odell and Mr. Fairlie, the chief executive officers, apparent to their co-directors was that of earnest business men (who were both good churchmen) conscientiously directing the affairs of the bank.

To all *appearance* Mr. Odell (and Fairlie) carried out the by-law of the company which provides that the president "shall have general superintendence and direction of all other officers of the company and shall see that their duties *are properly performed.*" The appellants, we submit, had a full right to believe that that was so.

The directors had a right to believe from their contacts with Mr. Odell at directors' meetings, and on other occasions, from their knowledge of his daily visits to the bank, of his daily inspection of the books, and of his daily contact with Smith and of his financial experience with Claflin & Co., WITH THE ADEQUATE SYSTEM OF BOOKKEEPING IN ACTUAL USE, hereinafter described—they had a right to believe that the systematic plundering by Smith of the Trust Company, *was next door to impossible.*

The executive committee met every week. Mr. Odell (who has been discharged from liability) testified that at the executive meetings there would take place in the presence of Smith and the other members, a full, free and frank discussion of the condition of the bank and the showing exhibited by the books. (Page 306.)

Mr. Munroe testified that at the executive committee meetings they would discuss the purchase of customers' paper; that "Mr. Smith had always prepared for the meetings carefully, he had his statements clear and in business-like form

and any new customer he spoke of he always gave his reasons clearly and fully for the belief that certain notes *should be purchased and a certain loan made,* and when he was *overruled* he always accepted gracefully and seemed to have only the bank's interest at heart at all times." (Page 1138.)

Smith would report overdrafts; these were the special care of Mr. Fairlie and Mr. Banister, who would "follow up the matter at the next meeting" (page 1139, top). In connection with the purchase of notes, Smith gave full details of the maker, endorser, aggregate of other notes made by the same individual, the due dates, average balance and other items. (*ib.*)

In certain cases the committee established "lines of credit" for customers (page 1140, lines 14-20).

Regarding these "lines of credit" we bespeak the Court's perusal of page 500, line 15, to page 503, line 15.

Direct and positive evidence elicited by complainant's own counsel on examination of complainant's own witness proves conclusively (and was not contradicted) that no loans of over $1,000.00 were made without prior authorization.

"*By the Court.*"

"Q Or was it your practice to approve the loans yourself? A He could make loans up to the extent of $1,000."

"*By the Court.*"

"Q Up to the extent of $1,000? A Without coming before the board, and beyond that he had to come before the board."

"*By the Court.*"

"Q He had no authority beyond that? A No."

"Q As to the loans he made below $1,000, was he required by the practice of your ex-

ecutive committee and Trust Company to get your approval afterwards, or was that simply a finished transaction after he had made a loan under $1,000? A That was supposed to be finished, as I understood it."

"Q And as to those over $1,000, according to the practice of the Trust Company was he to get the approval of the executive committee before he made the loan? A Before the loan was made he got it." (Page 479, lines 20-40.)

"Q Then you did not disapprove any at all, did you? A Yes, I did."

"Q Did it ever occur while you were a member of the executive committee that a loan over $1,000, not a renewal, which had been made by Mr. Smith was disapproved by your committee?"

"By the Court."

"Q That assumes directly contrary to the evidence of the witness that Mr. Smith had made loans over $1,000. I overrule the question."

"Q Did Mr. Smith ever make loans to your knowledge over $1,000 before getting the approval of the committee, which were not renewals? A If you tell me what instance you are speaking of I will answer it." (Page 483, lines 3-14.)

"Q While you were a member of the committee was a loan ever presented for the consideration of your committee which was over $1,000, and had already been made by Mr. Smith without previous authorization and which was not a renewal? A I do not recall any such thing."

"Q Do you recall the loan of A. C. Windsor of $15,000, which was submitted to your committee at its meetings on March 4, 1913?"

"Mr. Whiting."

"That assumes it was submitted."

"Q Which appears by the minutes to have been submitted?"

"*Mr. Whiting.*"

"I would not object to the word 'appears.'"

"A I remember the loan very well."

"Q Is that a renewal? A Well, I don't know whether that loan was made before, but I remember of the loan being made to Mr. Windsor."

"Q Well, on the occasion when it was made had it already been made before it was formally acted upon by your executive committee? A Not to my knowledge." (Page 483, line 28, to page 484, line 16.)

Taking into consideration the testimony to which we have referred, and the common knowledge and established practice in all financial institutions of not actually passing a credit to a customer on the basis of unsecured commercial paper submitted until approved by the executive committee (except where lines of credit have been established or the like), is it not plain that the action of the executive committee of Roseville Trust Co. was perfectly normal, proper and commendable. The acceptance by an officer of bank, of commercial paper from a depositor is only provisional until passed by the executive committee or within an established line of credit.

And yet the learned Vice-Chancellor found himself compelled to say: "The executive committee authorized some of the loans" (made by the Trust Company) "*but most of them were made, not by the president but by Smith.* On November 30, 1908, the minutes of this committee state that it was moved 'that the Treasurer be empowered to make loans up to $1,000 without consultation.' He not only did this, but as early as June, 1909, he made larger loans. We find in the minutes of June 29, 1909, for instance, a statement that the loans of the week were ap-

proved and among them one of $1,100 and one of $2,500. After they were made they were submitted to the executive committee at their monthly meeting, and approved, the approval being noted thus: 'Bills purchased during the week were approved.' The money was so recklessly lent that an enormous loss resulted. Mr. Vredenburgh, the State examiner, found that the face value of the notes and loans ($623,585.65) when the company closed its doors, was $181,603.94 greater than their fair value. Had the executive committee passed upon these loans in the first instance such a loss would hardly have been possible. Its collective judgment, based upon personal knowledge and proper inquiry would have been quite a different thing from its perfunctory approval of what Smith had already done." (Page 202, line 4 to end of line 33.)

It is true that the losses referred to in said paragraph are not part of the $400,000, parcel of Smith's embezzlements for which the appellants are charged in the decree below, and which are the immediate subject of consideration. But the quotation at this point is important because it is founded upon a consideration solely of the formal minutes *unilluminated by the testimony above, which testimony stands uncontradicted.* Also the Court should note that the matter of the notes which were less in amount than $1,000, was, at the suggestion of the learned Vice-Chancellor himself, taken out of the hearing, with the acquiescence of all counsel concerned. (See page 1149, lines 25-40, and page 1150, first four lines.) From the quotation also it would seem that the Court below failed to notice the voluminous correspondence between the Commissioner and Odell annexed to the bill of complaint dealing with a large number of promissory notes pur-

chased, which correspondence shows that the purchase of notes was a matter dealt with by the board of directors and the subject of *their* action. Finally, the fact that Odell was daily at the bank and conferred with Smith "over the matter of loans" (page 233, lines 18-20) apparently was overlooked by the Court in speaking of a "perfunctory approval of what Smith had already done." The question here is: Were these appellants guilty of NEGLIGENCE? As to *that,* they are not bound by any formal and perfunctory minutes which do not pretend in the majority of instances to show the discussion from week to week in the executive committee and to truly picture the activity of the individuals concerned.

This, we respectfully submit, is not a contract case, where the question of contractual liability upon purchase of a given note arises. This, we submit, is an inquiry by a court of equity to determine the negligence or non-negligence of these appellants, and equity *will* go "behind the returns" to ascertain the *facts.*

The extent to which we were precluded from fully elucidating the activities of the executive committee is illustrated by the matter of page 1151 and page 1152, lines 1 to 25.

Neither the learned counsel for complainant nor ourselves took the view that the minutes were conclusive on the question of what occurred at executive committee meetings (page 728, line 30, to page 729, line 15). Whatever may be the genesis of the view taken by the Court below (page 717, line 25, and page 718, where the Court adopts the view that minutes may be supplemented) the matter is now before this Court which, as the learned Vice-Chancellor himself

said (bottom of page 718) will "correct" any error, if necessary.

We, therefore, will ask this Court to find that the executive committee in this case was a diligent executive committee which did not abdicate its functions to anyone.

This brings us to the

BOARD OF DIRECTORS.

The directors (with the single exception of Scarlett) were (as the Vice-Chancellor admitted in his conclusions) honest men of "business experience." (Page 197, lines 38-41.)

Fairlie, Ingersoll and Woodward were directors of other banks. Bataille was an expert banker. Sexton had had wide experience with building and loan association finance and the financial side of the Newark school system. Bell, from his contacts, while head of the U. S. Secret Service, was not given to sentimental judgments of men or methods. Odell, from his thirty years' experience as cashier of Claflin & Co., necessarily thought in terms of debit and credit, dollars and cents.

William J. Banister was the "kicker" of the board; always, he had to be shown (page 1116, line 29). Most unfortunately his death—which intervened between the failure of the company and this suit—deprived us of the aid of his testimony.

Did *these* men abdicate their functions to Smith? Did these appellants—their co-directors? Their testimony is to the contrary.

Whatever may be within the realm of scholastic inference from the sterile formal minutes of the board, with their record confined to the neces-

sary formal determinations, the positive evidence under oath precludes any conclusion that there was abdication. Indeed the whole board was an extraordinarily active body. (Page 266; Odell himself at times would step in and actually count the cash; page 267; page 268, page 270, line 30, to bottom page 271; page 273 to page 274, line 10; page 287, line 40, to page 288; page 305, lines 22-35; page 324, lines 15-33; page 470, line 20, to page 471, line 30; page 474, line 38, to page 475, line 15; *ib.*, lines 32-35; page 498, lines 1-25; page 500, line 20, to page 503; the entire testimony of the witnesses, Munroe, Lurich and Keim, in Vol. II of the state of the case.)

Nothing is more difficult for the ordinary witness, unskilled in drawing a picture in words, to delineate the *normal course* of his conduct during business in years gone by. Events merge in his mind into the composite picture of an impression. The hearings in this cause took place four years after the last of the events; it is, indeed, for this reason that the flashes of recollection, cropping up in the record, which we have specially cited above, are so valuable.

This Court must also remember—that on the hearing the attitude taken was that *if no loss was caused in any specific transaction, it was not the subject of inquiry;* if the appraisal committee was not charged with negligence in appraising, no evidence was to be received regarding its appraisal activities; if a loan on which complainant had touched in examination, afterwards, on cross examination, appeared to have been paid further inquiry was precluded. A signal example of the course taken in cutting off testimony of the defendants to show *what they could remember to their advantage in specific instances,* is shown on page 488, line 20, to page 490, line 15. This pas-

sage we urge the Court to read. Undoubtedly it was correct to preclude inquiry into loans or activities that were not connected with loss. These creditable features, of course, involved the greater part of the activity of the executive committee and the board. But not having been the subject of specific inquiry — not being writ large in the record—may not have played their full part when the conclusions below were framed.

Aside from Munroe (who was attorney and counsel for the Trust Company) these appellants were among its less "influential" members; none of them ranked with Odell, Fairlie and the Banisters in wealth or connection. They saw Odell apparently performing the duties of supervision, assigned to him by the by-laws, in full measure; the same was true with respect to Fairlie.

This is how it impressed the appellant, Lurich, for example (page 1302, line 17, to page 1303, line 11):

> "Q Now, did you ever hear Mr. Odell address the examining committee of the bank at any time?"
>
> "A I remember Mr. Odell taking up everything in connection with the bank, not alone the examining committee but every detail, and bringing up these various things; he used to come there to the bank with all sort of memorandum and go over one thing after another in the minutest detail, ever pertaining to the loans that were made, with the examining committee, advising ways and means to protect the interest of the institution and to comply with the requests of the Banking Department. I don't know where there could have been found a man to be more careful than he was along that line."
>
> "Q That was your impression, anyhow, that you gained? A That all happened

within my presence so that I couldn't help but observe it."

"Q How long would the meetings of the board last as a rule? A During the summer time we had morning meetings and the rest of the year, of course, we had meetings in the evening or late afternoon, I should say, and we would be called together, I think the executive committee, three until four, and then the full board meeting followed it, and that would be invariably up to six o'clock."

Again we find him saying (page 1334, lines 1-18):

"Q Have you finished?" "And likewise with our own directors. There were men present in our community that I think inspired the confidence of everybody; I myself had my own reputation in that little local place of Roseville at stake, to see that I would not commit any overt act whereby anyone could point a finger at me, so that I could continue making any living there. All those things I had in mind, and which led me to believe that I could rely on such men who stood high in financial and church circles, as Mr. Odell, as Mr. Fairlie and Banister, and so on down the line. Why should I not rely on them?"

These appellants know that they were diligent as directors—they know it in their hearts and souls—they have so testified, as far as they were permitted below; they knew—they beheld with their own eyes—that the executive officers and their co-directors were actively functioning—were supervising daily and constantly the work of the treasurer and subordinate employees in full measure.

Now, we have dealt with the board of directors taken as a body—as far as the evidence allowed

to be given by the Court below, will permit. (Page 488, line 20, to page 490, line 15.)

This brings us to the activity of the committee of the board which periodically examined the books and records of the company.

EXAMINING COMMITTEE.

This committee, during the entire history of the institution had at its head Mr. Sexton, whose peculiar fitness for the position lay in his experience with building and loan associations and the financial department of the Newark school system (*supra*).

The fact that Sexton was at all times head of this committee is a fact of great importance. For the familiarity with the books of the company which he managed to acquire by continuity of service should have been of great aid—should have furnished reasonable assurance that any irregularity would be discovered; that any impropriety that might be apparent to a reasonably prudent man familiar with bookkeeping would be reported to the board.

This committee made its examinations twice a year; these examinations were to alternate as far as possible with those made by the *State Examiners;* the witness, Lurich, knew the examining committee were desirous to perform their task well; they called on him—an expert real estate broker—in connection with the examination of abstracts and mortgage papers (page 1311); he met them on one occasion in the vaults of Fidelity Trust Company, where the securities of the institution were kept, examining those securities; Odell (Claflin's cashier) instructed the examination committee each year with care as to the performance of their duties (page 1302, lines 15-31);

it was understood that the appearance of the committee was to be a surprise to the employees (page 1316, lines 5-25; page 1326, lines 10-12). Smith and another employee testified that on one or more occasions he learned by telephone of the expected visit of the committee. These appellants know nothing about that and are not chargeable therewith. How the work of this committee impressed the directors is disclosed by a perusal of page 1325, line 1, to page 1327, line 20.

The Court below exonerates the appellant, Benjamin—the only appellant who was a member of an examining committee—from all liability as such.

The opinion reads in part:

"In so far as I have been unable to convict *the other and more experienced members of the committee*" (this, of course, includes Benjamin) "of negligence, I cannot convict Mr. Dunn." (Page 214, lines 3 to 10.)

That the committee went into all minutiae is plain from a reading of the testimony of James B. Banister (a member of the committee) shown on pages 1219, line 30, to 1225. For this testimony we solicit the closest scrutiny. Banister had been called and examined as a witness for complainant (pages 507, *et seq.*) at an early stage in the hearing. After such examination he managed to resurrect the few memoranda referred to on pages 1219 *et seq.* How different in its detailed precision is his later testimony when compared with that first given. *How strongly does this re-inforce our contention that for this case by reason of the circumstances of complainant's delay and the discharge of the principal actors there was lost all possibility of*

complete elucidation—that the record below is necessarily an emasculated record.

The work of the examining committee cannot be dissociated from that of the State Banking Examiners. Comparing the dates of the various examinations it is plain—and conceded—that the two sets of examinations were intended to interlock.

Taken together those examinations furnished to the directors ample assurance that the books of the company were correct and its securities intact. The directors in each instance knew of the state examination—they paid the bills (page 1315) and saw the examiners working there, at times (page 1315). In this connection the Court should scan the one report—that of the banking examiner Hardon (Oct. 14, 1912), which was admitted into the proofs (page 1348). This report was not marked as an exhibit—being part of the files of the Department of Banking.

In the opinion filed in the court below, we believe that there is no reference whatsoever to the examinations made by the Banking Department. During the hearing reference to these examinations received no encouragement from the Court. Yet an examination of Hardon's fourteen-page report will demonstrate that today an examination by a competent bank examiner, lasting several days, is fully worth the price which is charged therefor, and which is based upon the per diem of the examiner (page 1352, lines 30-40; aggregate, possibly, $187.00 for one examination, page 1315, lines 20-30; indicating, probably, *one week's work*).

Upon the basis of those reports the Commissioner communicated in writing with the institution. See correspondence annexed to bill of com-

plaint (pages 109-152). The fact that those official communications, after June, 1909, by their emphasis upon what is therein emphasized, and by their tacit approval of Smith's activities at the bank, necessarily and properly had their legitimate influence on the minds of the directors, is a fact which, we submit, cannot be ignored.

The fact that between July, 1909, and August 1st, 1913, there were at least eleven apparently well-conducted examinations, six by the committee and five by the examiners, not one of which disclosed any wrong doing by Smith or any other employee or any suggestion for additional safeguards is a circumstance of exoneration so strong, we submit, as alone and itself to require a reversal of the decree below.

That it now appears that Smith was able to deceive Sexton (who has been discharged from liability) and to whom as head of the committee fell the work of distributing the work of the individual members and collating the same (Sexton's testimony, pages 379, to line 30, to 380, line 20) cannot be used to cast any reflection on these appellants or be the basis of any liability with respect to them. The question as to them is: *what system did they establish and how did it appear to them to have been carried out.*

The system of bookkeeping on October 26th, 1912, is thus succinctly indicated by Bank Examiner Hardon in his report (q. v.):

"General ledger, full bound, Boston style, daily balance. Individual ledger, demand, loose leaf, three column balance, semi-monthly proof. Individual ledger, time, loose leaf, monthly proof. *Keys to Binders in custody of Treasurer.* All properly and promptly posted. Proof of loans

and bills purchased semi-monthly by Treasurer. *Bank reconcilement by Teller.*'' Of course, there were many subsidiary books.

The general ledger, Boston style, involves a summary of all other books; it shows on each page (in print), I believe, all the general accounts of the institution as follows:

ASSETS	LIABILITIES
Bonds and mortgages.	Capital stock.
Stocks and bonds.	Surplus.
Collateral loans.	Undivided profits.
Notes and bills purchased.	Deposits Time.
Irving Nat'l Bk. of N. Y.	Deposits—Demand A to L
Union Nat'l of Newark.	" " M to Z
N. Y. State Nat'l, Albany.	Certificates of deposit.
Corn Exchange Nat'l, Chicago.	Certified checks.
Nat'l Shawmut, Boston.	Treasurers checks outstanding.
Fourth St. Nat'l, Phila.	Bills payable.
Orange National.	Interest payable accrued.
Second Nat'l, Paterson.	Dividends unpaid.
Bloomfield National.	Mortgage on building.
Essex Nat'l, Montclair.	Interest received.
National Iron, Morristown.	Exchange & Commissions received.
Banking house.	Building income.
Cash	
Bills	
Gold	
Silver	
Nickels and cents.	
Checks and other cash items.	
Interest accrued.	
Expense.	
Cash over and under considered.	

Running across the page, and separated by vertical lines, are spaces for each day's entries; that is for the aggregate debits, if any, for the day with respect to each item of the above-mentioned accounts; the aggregate credits and the balance obtained for each item by taking the *previous day's balance* (for the specific item involved) and adding and/or subtracting the appropriate debits and credits. These new balances constituted the foundation for the next day's en-

tries. Naturally, there were proper printed rulings (in the space reserved for each day's work) for the debits, the credits and the balances. So that each day's entries constituted a balance sheet for that day.

Under this system the following example is possible: How can we determine on any day that the general ledger truly sets forth the condition of the institution? The method to be pursued is as follows: Check up and examine the bonds and mortgages. (2) Examine the bonds and securities (in the vault of Fidelity Trust Co.) and see that they agree with the balance in the ledger. (3) Take a list of the collateral loans and notes and bills purchased; compare this list with the notes and the other paper in the physical possession of the institution; after that has been done, foot the list and compare with balance in general ledger; the notes, etc., should be examined to discover whether endorsements appear correct, etc. (4) Correspond with the Irving National Bank and all the other banks shown in the above list and *reconcile* the balances which *they* report by comparing with the Trust Company's books (about as you would do in the case of your personal bank account); a perfectly assured reconciliation is impossible unless you permanently or temporarily close the account—because there always may be outstanding checks drawn against the account, presentation of which has been delayed for one reason or another, whose amounts may very from the stub, etc.; also deposits may be in the mail and variances may arise therefrom. ("Reconciliation" of depository bank accounts was Sexton's special task—page 380, line 20, to bottom of page 400, lines 20 to 24.) (5) Count the cash and compare with the general ledger. (6) Do the same

with respect to "checks and other cash items." (7) Examine the calculation of the interest accrued for the securities, etc., in your possession. (8) Examine the vouchers with respect to "expense", the last item under the head "Assets." (9) "Cash-over-and-under-considered" is intended simply to cover slight errors of the tellers and customers in paying or receiving deposits.

Then—turning to the liability side—do the following: (1) Foot all balances in the "Time Deposits Ledger and the two Demand Ledgers (A to L and M to Z); these footings should correspond with the General Ledger."

The last ten items of liability are to be dealt with according to the nature of the subsidiary books involved; and, the examination of witnesses below did not concern itself to any extent with the work of the examining committee in relation thereto.

Now, the method of examining, which we have suggested above, was actually followed by the examining committee of Roseville Trust Co. (testimony of Sexton, Banister and Dunn). And in addition their activity was directed to features of scrutiny not enumerated here. (See Banister's testimony referred to above; Dunn, page 420, line 2, to page 422, line 20).

Now, this Court may say, why did not the committee call in all the "pass books." It is an admitted fact in this case that in 1909 to have taken that unusual course would have produced a run on the bank. Only in the last few years has the custom of monthly statements to depositors found favor. (*Inter alia,* see page 206, lines 30-40).

Let us see who kept the books.

William J. Thompson, who was in the employ of the bank from its opening till it closed its doors (page 540, top) was in charge of the general ledger and made the entries therein during the whole of the period which we are now reviewing (June, 1909—December, 1910). In fact, it was in such charge till about October, 1911. (Then Smith *without the knowledge* of any of these defendants took sole charge. For this see page 552, line 1 to line 21.)

There was a bookkeeper in charge of the three customers' ledgers (loose leaf). By the written direction of the Commissioner as above shown, Smith was eventually entrusted with the keys of these ledgers.

The tellers kept their "proof" books, of course.

The monthly reconciliation of the depository accounts—a subject matter upon which so much stress is laid—was normally done by the teller Jennings from August, 1911, to June 1, 1912 (page 629, top). Who had charge of this reconciliation during the happy period now under discussion is not apparent; probably, because of the absolute correctness of the books during this period it did not occur to anybody to ascertain that fact at the hearing.

Smith probably did *not* keep the reconciliation book during this period.

Thompson, one of the former bookkeepers and tellers of the Trust Company, testified:

> "Why, he was the *active* officer in charge of the bank there, took charge of the administration of its affairs during a business day, discounted all notes, and was the man in charge, general charge" (page 542, at top).

So that at first Smith's activities at the books was confined to subsidiary books which it was

necessary for him as treasurer to take care of personally, but did not extend to the "Keystone" books, viz: the general ledger and the reconciliation book.

If Smith did reconcile the depository accounts in the period ending December, 1910, it was not deemed a matter of sufficient importance by the Banking Commissioner or examiner to become the subject of comment despite the declaration by the department in May, 1909, of its lack of confidence in Smith.

So, in December, 1910, almost two years after the "Nones episode," the directors found themselves in charge of a growing institution, whose books were in absolute order, whose securities were intact.

This was assured to them by several critical examinations by the bank examiner and by the reports of their own examining committee. Their president, Odell, and vice-president, Fairlie, were visibly faithful and assiduous in their supervision of the employees, in bringing to the attention of the board all matters of moment or interest. Smith by his conduct had fully justified their confidence; there had not been a repetition of his single indiscretion, the result of too great zeal—NOW NO LONGER NECESSARY, BECAUSE THE INSTITUTION WAS FULLY ESTABLISHED; he was making good and plainly was working to succeed Odell upon the latter's eventual retirement (page 1137, last three lines, to page 1138, top). The Banking Department, to all appearances, had found nothing further to cavil at in Smith's conduct. There was in operation a system of bookkeeping which it must be conceded was adequate in all respects.

The Nones affair had passed away to the limbo of misbegotten and false alarms.

It is therefore of the highest importance (in our view) that this Court instead of elevating itself above the level plain of events, upon the posthumous stilts which complainant has now erected over the dead body of the Nones affair of 1909, shall place itself, so to speak, squarely in the shoes of the directors of Roseville Trust Company as they were at the beginning of 1911, with their two years of happy and fruitful experience behind them, with the Trust Company firmly established and prosperous, with its system approved and proved by many examinations and customary investigations, with the two years test to which Smith as treasurer had been subjected by the course of events, overflowing with proof of his worth and the possession of every quality which entitled him to confidence and trust.

The vantage point from which this case must be viewed is the beginning of 1911, and not the early part of 1909.

By 1911 the success of the Trust Company, and the proved reliability of Smith—without the use of the untested extra precautions, which complainant now suggests should have been adopted by the directors in 1909, after the Nones incident—at once proved that those "precautions" were not required, and also removed all occasion for even the most supercritical and hypercareful man THEN—in 1911—receiving the inspiration to inaugurate the use of those "precautions."

In other words, there was *nothing in the situation as it stood in 1911,* which would have suggested to anybody that the directors were derelict in 1909—after the Nones incident—in failing

to initiate the use of the "precautions," which complainant *now* suggests should have been instituted in 1909.

The Nones incident, in truth, is not and cannot be part of this case, or the ground, directly or remotely, of any judgment against the appellants herein.

It occurred early in the institution's history when most of the men concerned—especially Smith—had not fully adjusted themselves to the co-operative task of running the Roseville Trust Company; and, in 1911 had been utterly extinguished by the lapse of two years of "good works and experience." *Under the conditions it had lost all power of influencing the psychology or intellectual processes of any normal careful human being, who was or might have been a member of the directorate of Roseville Trust Co. in the years 1912 to 1913.*

This brings us to the period 1910-1911.

* * * * * *

ROSEVILLE TRUST CO. FROM DECEMBER 1910 TO DECEMBER 1911.

During this period the bookkeeping system was continued as before; assuredly, during this period the "Reconciliation" book was in charge of Jennings (page 629, lines 1-10); not until about October, 1911, did Smith—without the knowledge of these appellants, take charge of the general ledger (page 552, lines 18 to 20). Odell, Fairlie, the examining committee, the bank examiners, continued in their normal course. *Everything visible on the surface* justified a continuance of the system of checks and balances, of supervision and direction in vogue; everything on the sur-

face justified a continuance of the directors' faith in Smith.

It must not be forgotten that there is not a particle of *evidence* in the cause to *show* that the bank's system was not a good system, meeting every practical test of good banking.

On the contrary, the proof is that that system was established by an expert banker, who had been employed by the Federal Trust Company, who had been a teller at the City Trust Company, who organized the Mutual Bank of Orange, who put on its feet the Bernardsville National Bank, who organized the American National Bank of which he was for some time president (Munroe's testimony, page 1119, line 36, to page 1120, line 18).

In December 1910 any person who would have suggested the dismissal of Smith, the candid, able, highly esteemed treasurer of Roseville Trust Company, would have been considered a lunatic.

In December, 1911, the books of the Roseville Trust Co. stood there to all appearances a testimonial of the probity and ability of Smith.

But there was, in fact, a change during that year. At its beginning fact and appearance were identical; at its end appearance and fact differed by about $25,000.00 (see items of Exhibit E, on page 74, and three items of said Exhibit on page 75).

What had happened?

Had Smith been guilty of another "Nones" transaction, or the like? Not at all! What then? Had he, without authority, loaned funds of the institution to others in whom he had faith? Not at all! He had turned thief—he had become a simon pure thief. He took $25,000, as it

was passed over the counter of the bank by depositors, and it disappeared.

The facts are shown in the record of this suit on pages 729 to 751. There is no occasion to describe them at length. Smith would enter or cause to be entered in a given savings department customers' pass book the true amount of a deposit, would then make a deposit slip for a nominal amount; would retain the difference.

The customer went his or her way without suspicion of wrong; there was nothing to indicate to the bookkeeper or to anyone what had happened. The books of the institution required no manipulation.

Only calling in the savings department pass books of the Trust Co. would have revealed the hideous truth. But such a course was unheard of; and nothing appeared to anyone to inspire the adoption of that course (Cloran, complainant's expert witness, page 1084, lines 10 to 21; page 206, lines 38 to 41). Even today savings banks (and the *savings department* of Roseville Trust Co. is here involved) do not send out monthly statements, or call in the pass books.

* * * * * *

Was there inherent in the Nones transaction of 1909 evidence of the moral obliquity which manifested itself in the pass book stealings of December, 1910-December, 1911?

Is a man who makes an unauthorized loan to a solvent customer of his bank necessarily a born horse-thief? We have all learned the difference between *post hoc* and *propter hoc*. The quality of the transgression, taking the Nones affair in its worst aspect and in the light of the debacle of the Trust Company, does not permit its assimilation to the pass book stealings. *No one* in

the year 1909 would have been able to foretell the one from the other.

Be that as it may, by December, 1911, the directors of the Trust Company had behind them another year, whose appearance gave them every assurance that a continuance in their course would lead to happiness and prosperity for all. That year cannot be used to spell their condemnation. *Its visible indications constitute an element of exoneration. The historical method, the method which looks at events as they develop, and not backwards, is, we submit, the only one properly applicable to this case.*

This brings us to the last period.

DECEMBER 1911 TO AUGUST 1913.

On December 16th, 1911, appeared the first falsification of the books of the Trust Company.

We bespeak the reading of page 1350, line 1, to page 1352, line 25—taking note that the date in line 3, page 1352, should be December 16th, 1911, instead of December 6th, 1911 (as the context fully indicates).

Also the Court might glance at page 1025 and the tabulation there beginning.

That tabulation and the testimony of the expert Cloran disclose how in a period of less than two years Smith (whose misappropriation and misapplication of funds ran up to an amount in excess of $575,000) wrote in the books of the institution plain evidence of his misdeeds and its monstrous growth.

On December 16th, 1911, he starts with $10,000; by January 31st, 1912, his book shortage had grown to $30,000; by March 30th, 1912, to $52,500; by May 31st, 1912, to $66,500; by August 31st, 1912, to $152,800; by September 30th, 1912,

this has dropped to $109,810.13; by December 14, 1912—after the lapse of one year—it has increased to $169,520.13. Two weeks thereafter (page 1047) it climbs to $209,111.63; then again drops; by May 31st, 1913, it reaches $297,532.48—in five and one-half months it had been augmented $90,000.00; when the bank ceased operations the book shortage stood at $312,580.63.

Of the difference between the amount named in the decree ($575,000.00) and the figure last given a vast sum simply vanished into thin air.

What did Smith do with these $575,000.00 or these $312,580.63? Did he speculate? There is nothing to show that? Did he gamble? No evidence appears to that effect. He was at the banking room morning, noon and night—an indefatiguable worker.

Smith was called as a witness by complainant. It appears from his testimony that in December, 1911, he began a system of honoring overdrafts of favored individuals — Armstrong, Scarlett, Miele & Bruno and others—to an extent almost beyond belief. (See pertinent exhibits attached to bill of complaint and the pertinent exhibits in Vol. III of the state of the case.) He gave these people *carte blanche* in the way of accommodation. Long before the crash came, he must have perceived that the case was hopeless and that discovery was inevitable. Nevertheless he continued his course as if drawing on a magic, inexhaustible purse. Did he show the slightest concern? Frank, upright in bearing, candid as always, he met his co-directors at executive committee and directors' meetings, unmoved by the slightest consciousness of guilt.

Mr. Odell, who was in daily contact with Smith, who went into tellers' cages and counted the

cash, who personally took off all the balances in the customers' ledgers and footed them (supra) increased his deposit account at the Trust Company to $41,000 and there it stood when the bank failed.

The banking examiner, Hardon, examined the books of the institution for days and found nothing wrong. Under the supervision of Sexton, the examining committee made at least three examinations; they also found nothing wrong. And yet the evidence stood there in plain sight. So we are told by the expert, Cloran. (Page 1019, last few lines, and 1020, top.)

WHAT IS THE EXPLANATION?

The word COLLUSION tells the story.

The collusion of Smith and Jennings enabled the former and the latter to cover up their tracks so well that despite months of examination the expert, Cloran (page 1017, lines 28-35; page 110, lines 37-41), made a mistake in determining exactly at what point the first book manipulation appears in the general ledger. On page 948 of the record (lines 25-35) Cloran's testimony fixes the date of the first irregularity on January 13, 1912, and the amount as $10,000; on page 1025 his testimony fixes the first irregularity as of December 16, 1911; and on page 1026 increases the shortage of January 13, 1912, to $20,000—that is, $10,000 more than his first figure.

Cloran's statement (page 1017, *et seq.*), which was read into the printed record, was prepared "not upon the basis of the general ledger as it came into your possession, but is on the basis of what is in the general ledger plus facts ascertained by you from *examination of all the books and records of the bank.*" (Page 1104, lines 25-35).

Cloran, of course, started his examination after the Trust Company's failure (page 947, lines 8-10); and after he knew from Deputy Commissioner Vredenburgh that the books were crooked (page 1102, lines 1-4). That involved a far different task from that which confronted the bank examiners or the Trust Company's examining committee, during the active life of the institution.

The difference between the nature of the data upon which he made his audit and the results of such audit is disclosed by the following: Page 1086, line 41, to page 1087, line 12 (in this connection read page 1094, lines 1-32); on December 14, 1912, while the "bills purchased" were overstated that overstatement is not visible in the entries of that date or the day previous—it is the result of calculation of the *accumulated* shortage based upon an "autopsy" performed on the books and records—and represents part of nine weeks' labor on those books (pages 1094, 1095); see also page 1091, line 30, to page 1092, line 12.

On page 1096 Cloran is shown as testifying thus:

> "Q You do not mean to say that you or any other man could get at the *fact* on that day through the maze of Smith's transactions. A Oh, no, we can only form a conclusion from what we see."

He could not tell whether an irregularity on that day lay in the cash or the bills payable (page 1095, lines 22-40).

After much "pumping" (page 1096, line 33, to page 1097, line 19) Cloran admitted that he had made no attempt to reconcile on the one hand the fact that the examining committee "went away from that bank * * * thinking that every-

thing was all right'' and the other hand what he found on the books after the bank's failure.

Enough has now been shown to indicate that a *post mortem* audit and an examination on a certain day of the living records and securities of an organization are two different things.

As to the credibility of Cloran the Court might read and compare page 1078, lines 25-42; page 1081, last line; page 1082, first two lines; page 1102, lines 2-15; page 1101, last five lines; page 1095, line 17 (nine weeks' work on the book).

His opinion — that any man possessed of the ability to read and write could have discovered Smith's manipulations, first set forth in his prepared statement, and repeated (on page 1086, lines 12-28) — is the statement of a man who found what he set out to find, without any effort to discover an explanation of the examination committee's desertion; who switches his statements (*supra*) to suit the exigency. In short, he is the typical paid expert witness.

Now let us see how that collusion of Smith and Jennings operated. Of course, a statement of each item of co-operation is impossible. We know that Jennings, personally, and for his own use, embezzled to the extent of some thousands of dollars; complainants proved that and it is an admitted fact in the case. For one item of these embezzlements see page 632, lines 8-18. We know that Jennings manipulated his ''proof book'' and the cash book (page 621; page 629, lines 25-42). We know that he knew of Smith's crooked dealings (page 640, line 37, to page 641, line 30). Crooked entries were made in all the books of account subsidiary to the general ledger (page 644, line 18 to bottom of the page). They were such books as are used by the normal trust

companies (page 644, lines 15-18). He was three years in the employ of the Roseville institution before he noticed the first false entry in 1911 (page 644, line 42, to page 645, line 10).

On page 646 we have the following:

> "Q Did you ever call the attention to those false entries in the books made either by Mr. Smith or yourself to any officer, director or committeeman of the bank? A No, sir." (Lines 10-15.)

He, Jennings and Thompson had access to the general ledger at all times. (Page 648, lines 15-18.)

Jennings stated that he did not know that Smith's "manipulations"—as Jennings called them — aggregated what we now find; but knew that they ran into "very large figures" (page 650, lines 28-34).

Jennings was friendly with Smith (page 649, line 15); "but not outside the banking business" —so he says. However, he was friendly enough with Smith in "the banking business" to aid him to loot the bank. He was discharged from his employment by the Trust Company in July, 1913. (Page 608.)

A few days after his discharge the Deputy Commissioner appeared on the scene and closed the doors of the institution.

Jennings is intellectually capable of filling any "position" in a bank. He came to Roseville Trust Company from the Seaboard National Bank of New York, where he had been at various times "assistant receiving teller, loan clerk, assistant paying teller, in the loan cage, individual ledgers, general ledgers, correspondence desk, foreign department." He had been with the Trust Company of America. Both these institu-

tions were among "the largest banks in New York." (Page 643, lines 10-42.)

Now, it is plain to see what happened! Jennings, clever at books and figures to the last degree, and Smith—candid, trust inspiring Smith—worked hand in hand; Jennings in his tellers' "proof" books, cash books and any other subsidiary books that might be necessary; Smith in the general ledger. They worked hand in hand to cover up their joint and separate manipulations. Jennings finally is discharged! Attributing his discharge to Smith, did he warn the Banking Department? The *Deputy Commissioner* goes to the banking house and a few hours' examination discloses sufficient to require him to take charge of the institution and close its doors.

Not until Jennings, who colluded with Smith, was discharged was it possible for the truth to come to light. After Jennings was discharged the book shortage began to diminish (see pp. 1062, 1063 and 1064).

Now, collusion is the one thing which will defeat any system of books or supervision. Not one banker to whom we have spoken has denied that. The least acquaintance with practical affairs requires its admission. Good as any system may be it cannot be "burglar-proof." Collusion burns through the best armored system like an "acetylene torch." (Compare *Campbell* v. *Watson,* 62 N. J. Eq., page 147, middle, where Vice-Chancellor Pitney alludes to the exonerating element of "collusion between the examining bookkeeper or clerk and the cashier"):

> "No one, I presume, will go so far as to suppose that any system of supervision on the part of directors practicable at this day will absolutely prevent a dishonest cashier or teller who has charge of the cash of the

bank from stealing some of it and stealing it in such a manner that not a shadow of ground would exist for holding the directors liable for loss. It is absolutely necessary to trust some one with the custody of the cash —usually in small banks, as here the cashier. The directors do not occupy the position of guarantors of his honesty. They are bound only to exercise such care and diligence in looking over his work as experience has shown is at once proper as well as practical and as is exercised by other experienced directors, and as is required by the charter and the by-laws." Campbell *v.* Watson, 62 N. J. Eq., at 426.)

How can these appellants be blamed? They did their best. Their best was defeated by the co-operation—the collusion—of Smith and Jennings.

As far as the opinion below is concerned, it would appear that the learned Vice-Chancellor felt himself bound to refrain from alluding to the circumstance of collusion — the distinguishing characteristic of this case.

If any persons are guilty of negligence we submit they are the following:

(a) Banking examiners, who by reason of their functions, experience and paid employment should have discovered the wrong doing, if it was discoverable.

(b) Odell, who was in daily contact with Smith, the books and the employees of the institution; and who was charged through the by-laws with supervision and control of these employees and books. *He has been discharged from liability.*

(c) Sexton, the chairman of the examining committee through its history, who directed the work of that committee and by virtue of his po-

sition examined the general ledger and compared the subsidiary work of committee members with that general ledger. *He has been discharged from liability* and exonorated from all claims of actionable negligence as a member of the examining committee in the conclusions of the Court below.

(For his control over the activities of the examining committee see page 377, line 32, to page 378, line 10; page 378, lines 35-41; page 379, lines 15 to 22; page 379, line 23, to page 380, line 20.)

With this and the appended excerpts from the brief on behalf of the Banking Department in *La Monte* v. *National Surety Co.* we close our statement of facts.

Much might have been added; perhaps the Court will say, much might have been omitted. If we appear to have been too argumentative in our statement of facts, palliation may be found in the necessity continually confronting us of seeking to give to detached details the organic vitality which once belonged to them. This is not a case involving a few naked questions of law. It is a case involving the history of an institution for four whole years.

The appended excerpts have been added so that the Court may have the benefit of our opponent's words—which we adopt—as an aid to understanding the important subject of the bank's bookkeeping.

No elucidation of the facts which must be considered upon review of the second branch of the decree appears to be necessary now. We can well leave all reference to such facts until we come to the specific points which deal with that branch of the decree.

EXCERPTS FROM COMPLAINANT'S BRIEF IN LA MONTE VS. NATIONAL SURETY CO.

"In order to describe intelligently the nature of the manipulations, it is necessary to summarize the system under which the ordinary transactions of the Trust Company were conducted."

"Deposits were at the outset received by a clerk combining the functions of paying teller and receiving teller.. Later, two windows were provided with a receiving teller at one and a separate paying teller at the other. It sometimes occurred, for the convenience of customers, that deposit slips were written out by the teller instead of by the depositor. It also frequently occurred that Smith himself would relieve the receiving teller and himself receive deposits, on which occasions he would, at times, write out the deposit tickets."

"It was invariable practice to require presentation of pass books when withdrawals were made from savings accounts so that appropriate entries might be made therein. Moreover, inasmuch as the pass book was the savings depositor's evidence of his deposit, it was the invariable practice of depositors to present their pass books upon making deposits so that credit entries might be properly made therein. It was this latter fact that made possible the ultimate discovery of the losses resulting from manipulations of savings account deposits."

"When a deposit was made, the deposit ticket was filed by the teller and at the close of the day a comparison was made by him of the amount of cash in his drawer with

the total of the deposit ticket as accumulated during the day. This 'proof' was entered in a book known as the 'Receiving Teller's Proof-book,' and the cash was thereupon turned over to the paying teller, to be used by him in his operations of the following day. The deposit tickets themselves were then used by the bookkeepers as the basis for entries in two different books in which deposits were recorded, viz: the credit side-book in which the deposits were entered in order, day by day, showing the depositor's name and the amount of deposit; and the individual deposit ledgers (loose-leaf) in which the entries were grouped under the accounts of the separate depositors, not listed under the successive days as in the side-books. The totals were entered in the general cash book and in the general ledger."

"Withdrawals from the savings accounts were in each case accompanied by a withdrawal slip or draft. This draft was ordinarily signed by the depositors. Its principal function was to furnish a memorandum to the bookkeepers for their entry in the debit side-books and individual deposit ledgers."

"The trust company protection in the instance of withdrawals was the debit entry in the depositor's pass book."

"The paying teller made up a 'proof' each day, in a book known as the 'Paying Teller's Proof Book.' This was somewhat more complex than the receiving teller's proof and included a totalling of the disbursements upon checks and withdrawal tickets, cash at the window, and checks presented by other banks and a comparison of

the cash with which the day was started, including that received the previous afternoon from the receiving teller, and the cash at the close of the day."

"The general ledger was the book which summarized and controlled all the other books and which furnished daily complete summarized statements of the assets and liabilities of the institution. The assets or debit column included the items of cash, bills purchased and notes, credit balances with the several banks with which the trust company had funds on deposit, certificates of deposit, bills payable (to other banks), and the like. Balances to each of these accounts were struck off each day and the aggregate of debits and the aggregate of credits for each day, in each of these accounts, was entered in an appropriate column, affording a simple means of arriving at balances to each account for the following day."

"Smith's embezzlements * * * were for the most part concealed by manipulations in the general ledger itself."

POINT I.

Complainant is guilty of laches.

The complainant is Roseville Trust Company; Mr. La Monte simply sues in the name of the company; he is no receiver. (See Court of Errors opinion in *Roseville Trust Co.* v. *Barney,* 99 Atl. 343.) Even if he were a receiver laches might be imputable to him.

The petition of the Commissioner filed to secure the Chancellor's consent to a sale of assets resulted in a competent order on December 30th,

1913, *a few months after the failure of the Trust Company.* (State of the case, Vol. III, page 1455) *That petition shows that the state of the Trust Company's assets was then known—substantially as developed during the hearing in this cause.* It was not necessary to wait until every cent of loss was ascertained. (*Campbell* v. *Watson,* first syllabus, 62 N. J. Eq., page 396.) But when the Court made its order of December 30th, 1913, such loss was fully ascertained.

Laches may arise out of a delay of one day or a week, if that delay be prejudicial. *Almost two years, after the Trust Company failure, elapsed before this suit was brought.* Why?

The treacherous memory of the men concerned is today lost in the complexities of this case. The testimony of every witness who was connected with the bank is full of surmise, conjecture or complete absence or recollection. Complainant waited in bringing this suit until the possibility of explaining fully the details of the directors' and officers' acts was lost, and only the "horror" which the manipulation of the institution's books constitutes, remained to shock the Court, if possible, into believing that the directors were guilty of negligence.

The Nones event was over six years old in July, 1915.

In July, 1915, appellants first received notice in the form of letters that claim of liability was made against them (see written stipulation in the proofs, Vol. III, state of the case). Those letters were all of this form:

New Jersey State Library

"July 8, 1915.

Charles C. Lurich, Esq.,
4 North 9th Street,
Newark, N. J.

Dear Sir:

You are hereby notified that the losses suffered by the Roseville Trust Company due to the neglect and improper conduct of its directors, of which you were one, amount, after deducting therefrom the total payments heretofore made by certain of said directors for the purpose of being released from liability thereunder, to the sum of at least $500,000. You and each of said directors of the Roseville Trust Company are individually and severally liable for the amount of said losses, and demand is hereby made upon you for the prompt payment of the same to me as Commissioner of Banking and Insurance of the State of New Jersey in charge of the affairs of the Roseville Trust Company pursuant to statute.

Very truly yours,

GEO. M. LA MONTE,
Commissioner of Banking and Insurance of the State of New Jersey, in charge of Roseville
M. H. Trust Company in Liquidation."

In the case of Lurich, that letter was answered as follows:

"Monday, July 12th, 1915.

Mr. George M. La Monte,
Commissioner of Banking &
Insurance of the State of
New Jersey, in charge of
Roseville Trust Co., in
Liquidation,
Trenton, N. J.

Dear Sir:

Your communication under date of the 8th instant addressed to Mr. Charles C. Lurich, Maplewood, N. J., has been handed to me

by my client and has had my careful scrutiny. You say in that letter that my client and each of the directors of the Roseville Trust Company are individually and severally liable for the amount of the loss of $500,000, which you say the Roseville Trust Company suffered; without prejudice to the rights of my client in any particular, and especially without prejudice to the right of my client arising from delay, might I ask you upon what basis you predicate the alleged liability of my client; I have gone over the situation with him and I can find in his conduct as a director of the Roseville Trust Company not the slightest indication of any act omitted or committed by him in his just mentioned capacity which would justify even the allegation of liability for any part of the above-mentioned losses; if you are informed that my client has been guilty of any omission or any active neglect or wrong which has resulted in loss to the company, despite the lateness of the day, without waiver of any right with respect thereto, will you not kindly point out to me the acts or failures to act with respect to which you are informed and the losses which accrued by reason thereof; I will then be glad to take up the matter again with my client.

Yours very truly,
OTTO A. STIEFEL."

The Court will note that the feature of surprise and delay is pointed out, by that letter, as soon as the claim of liability is advanced.

That claim of liability was made in 1915, despite the fact that in 1914 the verified claims of Lurich and other appellants against the Trust Company *over and above all counterclaims legal and equitable had been admitted as correct and just, and Lurich and the other claimants had been paid as all other creditors, out of the very fund*

which they are now said to have negligently permitted to be depleted. IF THE CHARGE NOW MADE AGAINST THEM WERE TRUE THEY WERE NOT ENTITLED TO A CENT OF THAT FUND UNTIL THEY HAD MADE RESTITUTION.

This last feature is discussed hereinafter under a special head. We now claim the following elements of laches:

1. Delay of one and one-half years in notifying of claim of liability and in bringing suit.

2. Giving absolute releases to directors Sexton, Odell, Banister and all others released; this caused Banister, Sexton and Odell to lose memory of details, and to destroy memoranda; so that we were not able to avail ourselves of their aroused and stimulated recollection—aroused by a continuance of their interest in the subject matter of the litigation. Added to which is the mere fact of one and one-half years' delay.

3. The approval and settlement of the claim of Lurich and other appellants against the Trust Company.

This delay put the memory of the appellants "asleep" or "off their guard." They were lulled into a false sense of security.

4. Death of Mr. Fairlie, Mr. Bell and Mr. W. J. Banister, three of the directors.

5. Necessity for diligence is greater in this case than in the normal case, because all papers of the Trust Company were out of defendants' possession and not subject to their leisurely inspection and study, to refresh and keep fresh their recollection; further, the papers were necessarily subject to alteration and loss.

6. Smith naturally testified in the year 1917 to please the Department of Banking and Insur-

ance. He desired to be released from prison. The longer he remained in prison, the more would he be influenced.

7. Loss of memory of appellants and others with regard to such correction and explanation of directors and executive committee minutes as is necessary to fully reconstruct the living picture of what occurred.

8. Defendants were put to sleep with regard to ascertaining facts which might establish greater delinquency on the part of "third-party defendants" than is now apparent—especially in the case of the president, who bought his release of liability without putting up one cent of cash (Exhibit J, page 152; paragraph 32 of bill of complaint, page 53).

POINT II.

The standard of duty of Directors of Trust Companies and Banks in New Jersey, ever since the year 1906 has been fixed by statute; this statutory provision has been taken verbatim from the the National Bank Act; that provision prior to its adoption by New Jersey, was construed by the United States Supreme Court; such construction was therefore also adopted, when the Federal Statute was adopted by New Jersey.

Vice-Chancellor Pitney's opinion in *Campbell* v. *Watson* was filed in 1901; the Middlesex County Bank, of which Watson was receiver, became insolvent on July 12th, 1899 (62 N. J. Eq. 398); that bank operated under a special charter, containing (from today's standpoint) unique features; for example, paragraph twelve of such charter made the *directors* of the bank "jointly and severally liable for all the bills or notes of

said corporation which may be in circulation at the time of its becoming insolvent * * * and it shall not be lawful for any director of said corporation to resign his office to avoid such liability * * * and it shall not be lawful for any director to resign his stock to avoid his said liability * * *" (Richard V. Lindabury's Library, *Campbell* v. *Watson*, page 41).

Such a standard of liability—by which the directors became insurers—and the spirit and ideas which gave rise to the charter provision involved are so foreign to modern Middle Atlantic State methods, that they would drive every responsible director from the board of every bank, if an attempt were made to resuscitate them.

The opinion in *Campbell* v. *Watson,* however, is—as reading between the lines makes apparent—under the influence of such a spirit and such ideas: is at the crest of the wave of the evolution of such spirit and ideas—as it were.

I say, at the crest of the wave, for just about the times of the deliverance of that opinion the legislature felt the necessity of making plain and definite the standard of duty and liability of directors and fixing it upon a basis at once just to the directors of financial institutions and just to the creditors of such institutions.

(We do not wish to intimate for one moment that we do not believe that the appellant's conduct will measure up to and exceed every real test which a proper reading of Vice-Chancellor Pitney's opinion will disclose. Now we are trying to find *what is the law today.*)

In 1899 the revision of the Banking Act and the Trust Company Act was effected by the legislature; in 1906 both revisions were amended

and in both amendatory acts it is provided, in identical language:

> "EACH DIRECTOR OF EVERY TRUST COMPANY (BANK) WHEN ELECTED SHALL TAKE AN OATH THAT HE WILL, SO FAR AS THE DUTY DEVOLVES ON HIM, DILIGENTLY ADMINISTER THE AFFAIRS OF SUCH TRUST COMPANY (BANK) AND WILL NOT KNOWINGLY VIOLATE OR KNOWINGLY PERMIT TO BE VIOLATED ANY OF THE PROVISIONS OF THIS ACT, AND THAT HE IS THE OWNER IN GOOD FAITH AND IN HIS OWN RIGHT, OF THE NUMBER OF SHARES OF STOCK," ETC.

P. L. 1906, page 341; Comp. Stat., page 5660, part of Section 12.

Contrast the just-quoted provision, in its *precise, definite* language, with the loose oath provided by Section 3 of the Middlesex County Bank's charter, which provided that the directors shall severally "*take and subscribe an oath faithfully to execute the trust reposed in them as directors.*" The latter language permits of any latitude of construction, and is quite in harmony with Vice-Chancellor Pitney's opinion. It speaks of the "TRUST reposed in them as directors."

By our present statute—under which, of course, the Roseville Trust Company operated, the duties of each director are separated by his separate oath into two classes, namely:

First: "*As far as the duty devolves upon him* he shall diligently administer the affairs of the Trust Company."

Second: "He shall not knowingly violate or knowingly permit to be violated any of the *provisions of this act.*"

The first part of the oath describes and defines his "common law" duty of "diligence" and then limits it to "so far as the duty" of administration falls upon *him.*

The second part of the oath exonerates him from violations of the act that he does not *knowingly* commit himself or that he does *knowingly* permit others to commit.

NOW AT LAST WE HAVE A DEFINITE *STANDARD* OF CONDUCT, A DEFINITE *PRINCIPLE* OF CONDUCT; WHICH, HAD IT BEEN APPLICABLE TO *CAMPBELL* V. *WATSON,* WOULD HAVE RENDERED UNNECESSARY THE ANALYSIS BY VICE-CHANCELLOR PITNEY OF THE VARIANT OPINIONS DEALT WITH ON PAGES 429 to 450 of Vol. 62, N. J. EQ. REPORTS.

The statutory requirement of the "National Bank Act" is identical with, and is the source of our New Jersey law (Sec. 5147, Rev. Stat. of the U. S.; Title "National Bank Act;" Act of June 3, 1864; Fed. Stat. Anno. Vol. 5, page 105); moreover, it is the foundation of the decision in *Briggs* v. *Spaulding,* 141 U. S. 132.

Briggs v. *Spaulding* is based upon reconsideration of the duties of the directors of banks as defined by the National Bank Act; it was decided in 1891, prior to our adoption of the Federal Statute.

It should, therefore, be presumed that by adopt-in the Federal Statute we also adopted the Federal Court's construction of that statute in *Briggs* v. *Spaulding.* (For authority, if any be needed, as to adoption of judicial construction, when a

statute is adopted, see *in re Christie's Estate,* 101 At. Rep., page 65, column 2, in which Vice-Chancellor Backes cites New Jersey cases.)

The Federal provision is herewith given in full so that it may more easily be compared with the provisions of the New Jersey Statute as set forth in the Comp. Stat. (*supra*), namely:

> "Each director, when appointed or elected, shall take an oath that he will, as far as the duty devolves on him, diligently and honestly administer the affairs of such association and will not knowingly violate, or knowingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office."

That a statutory provision prescribing and setting forth the *terms* of a director's *oath* by so doing necessarily describes his duties, is, of course, plain. It is the basis, the necessary basis, of the opinion in *Briggs* v. *Spaulding;* there the Court said (at bottom page 145 and top page 146): "It is not contended that the defendants knowingly violated or permitted the violation of any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank, but it is charged that they did not diligently perform duties devolved upon them by the act"—thus showing that the terms of the oath were assumed as necessarily descriptive of the extent of the duties involved.

What is meant by *diligence* in performing duty *devolving upon a director,* in accordance with his oath—and that is our main concern—is well shown in three syllabi of *Briggs* v. *Spaulding* (141 U. S. 132), which read as follows:

> "1. The degree of care required of directors of corporations depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances."
>
> "2. Directors of a corporation are not insurers of the fidelity of the agents whom they appoint, who become by such appointment agents of the corporation; nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty."
>
> "5. Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank and this includes something more than officiating as figure heads; they are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be shielded from liability because of want of knowledge of wrong doing, if that ignorance is the result of *gross inattention.*"

Even if we ignore the binding force of *Briggs* v. *Spaulding* as an authority antecedent to the adoption by us of the Federal Statute, its reasoning on what is embraced in the statutory requisite of diligent performance by a director of a duty *devolving upon him,* must commend itself to us.

Can it be imagined that the legislature was ignorant of the decision in Briggs vs. Spaulding when it adopted the Federal Statute? Why was that statute adopted, if our own standard was

sufficiently clear, fair and precise. The Federal Statute must have had something to commend it to our legislature.

Is it not a tendency of modern times for men in their endeavor to "know where they are at" to secure definitive legislation? But what can be worse than to *accept* another's definition, already interpreted by him, and give it a new interpretation? To do so would destroy the very purpose and object of the adoption.

At any rate, this much appears certain, by our own legislation we *now* know exactly from *what basis* to proceed in testing the liability of directors of a trust company.

We know that no violation of the statute, unless *knowingly* done or permitted, is culpable.

We know that "so far as the duty falls upon him" each director must diligently administer the affairs of the trust company.

Wherefore he is not bound where the duty of diligent administration does not fall upon *him.* That is rational, that is modern, that is in keeping with the requirements of today.

POINT III.

By the adoption in 1906 of the Federal Statute (see Point II), the Legislature repudiated the rules laid down in Campbell vs. Watson in so far as the same are incompatible.

The decision in *Campbell* v. *Watson,* 62 N. J. Eq. 398, was filed in 1901.

It excited much comment; the banking community must have felt that *in effect* it made bank directors quasi-insurers.

This undoubtedly led to desire for a change.

Naturally, the minds of men were led to the decision in *Briggs* v. *Spaulding,* which Vice-Chancellor Pitney had criticized in *Watson* v. *Campbell,* and to the statute upon which that Federal decision is founded.

The adoption of that statute in 1906, we submit, should be regarded as a legislative disapproval of the doctrines of *Campbell* v. *Watson.* This result is comparable with that represented by Chapter 27 of the Laws of 1920 (P. L. 1920, page 50), which gives to trust companies the power to discount notes; Chapter 27 of the Laws of 1920 was deemed necessary to safeguard trust companies in view of the opinion of Vice-Chancellor Stevens, in this very case of *La Monte* v. *Directors of Roseville Trust Company;* for as the printed book shows it was his opinion that the inveterate practice of "purchasing bills" (as pursued by trust companies in this state for years) was in effect the discount of notes, and so prohibited by statute.

The legislature of 1920 provided the assured remedy made necessary by Vice-Chancellor Stevens' decision.

The legislature of 1906 provided the assured remedy made necessary by the exposition of the common law liability of bank directors in New Jersey, as disclosed by the opinion of Vice-Chancellor Pitney.

POINT IV.

Whatever may be the standard of duty of Trust Company Directors, appellants were not guilty of negligence in retaining Smith in the year 1909.

These appellants were not insurers.

> "No man is infallible; the wisest make mistakes, but the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment, and do not proceed from fraud, gross carelessness or indifference to duty." Heisler *v.* Sharp, 44 N. J. Eq. (17 Stew.) 167, at 172; affirmed in 45 N. J. Eq. (18 Stew.) 367.

Circumstances alter cases; no two cases are alike. The question is, what would reasonably prudent men have done under the circumstances. Usually that question is asked to test the conduct of one man—perhaps a man who is operating an automobile in the public highway.

In this case the question is asked of eighteen or twenty men, who united in adopting the one course, believing it to be the proper and best course.

The important fact bearing on the question what reasonably prudent men would have done under the circumstances in March-July, 1909, is this: there actually were eighteen to twenty men, personally interested in the subject matter, of good character and high standing, of varied experience in life, most of them being business men, many of them being men of large business experience, several of them with experience in banking matters, who unanimously agreed that the best thing to be done under the circumstances was to refuse to accept Smith's resignation.

The fact that twenty such men under such circumstances act in accord is the strongest evidence that such is the action which reasonably prudent men would have taken under the circumstances and absolutely precludes the idea that the action was such an error of judgment as to involve actionable negligence.

POINT V.

In the year 1915 when this suit was instituted more than six years since the refusal to accept Smith's resignation had elapsed. The Nones incident, taken alone, cannot be the basis of any claim of actionable negligence.

The bill of complaint was initially attacked because there was no separation of the matter therein contained into separate and distinct causes of action. That attack was unsuccessful. The record of that attack is in this court, upon appeal from the Vice-Chancellor's refusal to strike the bill.

The Nones incident not being alleged as a separate and distinct cause of action appellants were in no position to plead the statute of limitations with respect thereto. Probably no plea of such statute would have been available, no matter what the form of the bill of complaint, because no loss directly followed the Nones incident or is involved therein. The Nones incident (1909) is projected forward during two years of uneventful and happy experiences, as notice to the directors of Smith's character at the time (1911) when he began to abstract funds. Now, is there no limitation to the time within which inquiry may be made as to that Nones incident? Were the appellants not entitled by 1915 to say: We are entitled to repose with respect to

the Nones incident; that is too old an affair; whatever inferences you may seek to draw from it today, its original form has been altered by time; at first, time, operating through the experience of two years, served to strengthen the form which that incident originally had, in our view; today that form is mutilated by reason of the impact of the huge loss which later time developed.

POINT VI.

Was the decision of the Directors in re Nones in 1909 the decision of fools? Of weak minded men lacking discernment and resolution to base their action upon hard facts?

For the answer we appeal to the expressions of Judge Dixon in re Lentz (65 N. J. L. at p. 137-138).

The Lentz case was heard by Dixon, Collins and Ludlow, *J. J.*

(a) Lentz had been guilty of misappropriating *for his own use* funds belonging to a client. Smith in 1909 was not guilty of that.

(b) The Court well knew that by retaining Lentz as a member of its bar, there would be furnished to him many an opportunity to handle the money of others. They decided that "a single offense" in a long career did not indicate an ineradicable characteristic, did not justify a declaration that he was "*unworthy of the confidence of clients*"—especially in the light of his reputation and years of good work.

In short, the mind of Dixon, *J.*, and Collins, *J.*, acted just as did the minds of Odell, Fairlie, Banister, Lurich, Mott, Sexton, Bell, Benjamin,

Keim, Munroe, Bataille, Foster, Woodward and the other directors of Roseville Trust Company.

> "With regard to Mr. Lentz, there is no occasion for the exertion of the Court's authority to constrain him to do justice to his client; he has already done so. *There remains only the question whether his misbehavior has been such as to prove him now unworthy of confidence as a member of the bar.*" * * *
>
> "I have stated the circumstances which tended to mitigate Mr. Lentz's delinquency; perhaps, they are sufficient to remove his fault from the category of "gross misconduct;" but if they be not, bearing in mind that this appears as a *single offense* in a long professional career, that since it was committed he has, for eight years, maintained a good character for integrity in private and in public station, and that he has made full restitution for the money wrongfully used, we think the Court would not be justified in declaring that he is *now unworthy of the confidence of clients,* and therefore should be struck from the roll of attorneys or suspended from the practice of his profession. Our conclusion is that the rule against him should be discharged."

To condemn the directors of the Roseville Trust Company for ~~restraining~~ retaining Smith, because two years after the Nones incident he turned crook, would be to stamp the eighteen or twenty men whose action is involved as fools, despite the fact that the operations of their minds were analogous to those of Judges Dixon, Ludlow and Collins.

POINT VII.

The judgment of the Directors in re Nones must be viewed in the light of its historical development, in the light of ALL the facts relating to Smith known to the Directors when their judgment was reached; both the facts brought into high relief on the hearing below and the facts whose importance now is diminished or obscured. That judgment must also be viewed in the light of the ratification which the succeeding two years gave to it.

Many members of this court undoubtedly have viewed a "moving picture" performance. They may have seen the ridiculous effect produced by reversing the film and making the figures "move backward." They may have witnessed the weird effect when an actual rapid motion of persons is reproduced very slowly on the screen.

We respectfully submit that any process of thought or reasoning, any method of analysis which dissociates the Nones transaction from what preceded it and was known to the directors, which dissociates it from Smith's attractive characteristics and personality, which dissociates it from the two years following, involves elements which necessarily vitiate the conclusion reached. One ought not view that incident by reversing the film or by using "slow exposures." One should view that incident as it occurred to human perception.

POINT VIII.

After July 16, 1909, the Banking Commissioner in effect ratified the retention of Smith by the Directors.

On that day he wrote a letter (page 108, lines 15 to 30) in which he stated *inter alia:* "I am in receipt of a letter, signed by Mr. E. K. Sexton * * * embodying the action of the board upon the resignation of Mr. Raymond E. Smith, WHICH WILL HAVE MY CONSIDERATION. I will say NOW, however, that I emphatically disapprove of the decision of the board in the matter."

What was the result of his consideration of that letter. On or about October 6th, 1909, the Commissioner's examiner reported to him; he communicated with the Trust Company on the basis of that report (page 109). Again, on May 25th, 1910, an examination resulted in a report to the Commissioner; such report was the basis of the Commissioner's letter of June 13th, 1910 (page 116). Again, about January, 1911, December, 1911, and October 14th, 1912, we have examinations, reports and letters.

These show that the Commissioner upon "consideration" not only did not continue to manifest disapproval of Smith, but suggested to the directors a new measure which plainly indicated *confidence* in Smith (page 118, lines 17 to 20).

The acts of the Banking Department—examinations, reports and communications—are part of the *res gestae.*

They should be taken as a whole, and not in isolated portions. Taken as a whole, they indicate the ultimate ratification by the Department of the retention of Smith and of the methods of check and control inherent in the bookkeeping system.

POINT IX.

> "Obviously, the question of negligence or of due care in a board of directors of a corporation ought not to be judged by the cautions and hesitating standard of the legal schedule on the judicial bench, but it is a question depending in an eminent degree upon the facts and conditions of each particular case and it ought, if the course of the Court will permit, to be submitted to a jury" (10 Cyc., p. 830, Sec. 5).

The very exactness, acuteness of perception and learning of the Court below became a source of injustice to these appellants.

There are persons whose rigidity of principle would cause them to stamp as unreliable a man who occasionally took a glass of wine or ale. It is not true that because a man has once in his life been intoxicated that he is therefore a drunkard. It is not true that because Smith was guilty of unauthorized and undisclosed loans to the solvent and desirable customer Nones, from which he, Smith, derived no personal advantage, that he thereby manifested an irresistible moral weakness.

A competent jury might have understood that fact.

POINT X.

The fact that Smith in October, 1911 (p. 552, ll. 1 to 21), took exclusive charge of the general ledger and that in June, 1912 (p. 629 top), he took charge of the depository account reconciliation book is not shown to have been known to these appellants or done by their consent.

The fact is that they knew of no change. Lurich testified that he had never looked into the books of the institution (page 1323, lines 20 to 40). Why should he? He was a real estate broker; not a bookkeeper. Dr. Keim's testimony is parallel to that of Lurich (page 1380, lines 35 to 43). Mott was under the impression that Mindnich, the bookkeeper, kept the general ledger (page 461, first two lines). He was unable to thoroughly dissociate what he learned after the Trust Company's failure, with what he knew before (page 460). Why should he make any special inquiry as to what employee was in charge of a given book. He saw Mr. Odell every day at the banking house (page 486). Smith did not assume control of the general ledger till October, 1911; what would have impelled Mott to make any inquiry.

Mr. Munroe, whose contacts, as counsel, with the affairs of the institution were probably more active than those of the other appellants, gave testimony which the Court should read in its fullness. See page 1146, line 20, to page 1147, line 3. The books lay there open all the time and "various clerks apparently making entries in it" (1147, top); "I had seen him working on what was undoubtedly the general ledger. I (had) seen him working in all departments of the bank." The idea of Smith taking exclusive charge of the general ledger was absolutely cut

off by what was visible to Munroe. Possibly Benjamin never even saw the general ledger (pages 342, 343, 344).

Certainly the act of Smith in taking exclusive charge of the general ledger in October, 1911, was an act that never had the sanction of the board of directors.

Yet the Court below states:

> "At first Thompson kept the general ledger. After a time Smith was *allowed* to keep it, and by keeping it to acquire greater facilities for deception" (page 201, lines 10 to 15). And that statement is coupled with the indication that "when it was found that *from the very beginning*" Smith "had abused his powers, ordinary prudence would have suggested that restraints be placed upon his action" (page 201, top).

In view of the lapse of time (till October, 1911) when *Smith took charge* of the general ledger without asking anyone, how can these quotations be supported?

POINT XI.

The fact that the Bank Examiners during the course of five examinations (October 1909 to October 1912) discovered nothing wrong with the bookkeeping system of the company or the entries therein, exonerates these appellants from all charges of negligence with respect to the bookkeeping system or what might have been found in the books.

If the expert examiners (to whom as members of the Banking Department was known its initial view of Smith as treasurer of the company, and whose examinations were necessarily made keen by that fact) found nothing wrong with the bookkeeping system or the entries therein, notwith-

standing that each examination necessarily covered days of work, how can it be expected that these appellants should have discovered or seen anything wrong therein?

To hold these appellants liable, in the face of the fact that the bank examiners found nothing wrong in either respect referred to, is to charge them, we submit, with the duty of possessing greater ability than a bank expert, or trained accountant.

POINT XII.

In its conclusions below the Court predicates them in part upon its finding that the Board of Directors "Were without banking experience," when they acted in the Nones matter. That finding is contrary to the uncontradicted evidence. The results that flow from this error examined.

The fact is that five of the directors, Bataille, Fairlie, Foster, Woodward and one other had had banking experience; that Bataille had been the president of a Newark bank; that Fairlie had been for about fifteen years on the directorate of banks of deposit and savings, etc. (see statement of facts, *supra*).

Prima facie, their judgment as experienced bank directors was entitled to great weight in the eyes of their co-directors, when decision in the Nones matter in June, 1909, was called for. Undoubtedly the opinion of these five directors had its influence. At that time the able Bank Commissioner Vivian M. Lewis probably had had less banking experience than the directors specially named.

And it must not be forgotten that eventually the Commissioner stated to the Trust Company committee: "Well, from your explanation of this

thing, why, it looks to me as if your stand was all right'' (page 1440, line 20; page 1444, top).

The Court, in reaching its conclusions, took into consideration neither Foster's testimony just referred to nor the facts regarding the banking experience of certain directors—despite the uncontradicted proofs involved.

POINT XIII.

The Banking Department not only did not disapprove of the Trust Company's system of control, and did not suggest any of those unspecified additional checks which the Court below thought the directorate should have imposed on Smith, but was itself through its examiner instrumental in the elimination of that very feature of control which ''necessitated'' disclosure by Smith of the Nones transactions. Such elimination was not brought to the attention of these appellants.

The Court at this point should read page 866, line 15, to page 868, line 35.

Smith there discloses how from its birth whenever the Trust Company made a loan to a customer (like Nones) or bought his note, there was drawn a treasurer's check which was handed to the customer. This check either was deposited by the customer to his credit through the receiving teller's window or was paid by the paying teller.

Two years after the Trust Company commenced business, the Department itself caused the abandonment of this salutary practice (p. 866, ll. 16 to 35).

Smith did not begin to steal until December, 1910, immediately after he was instructed by the Bank Examiner to abandon the salutary practice

instituted by the Board of Directors of Roseville Trust Company.

Had the Trust Company immediately after the Nones incident imposed the control of two signatures on Treasurer's checks that feature of control would have disappeared by reason of the new system inaugurated by the Examiner.

There is not a word to show that these appellants were advised as to the change in the system.

The testimony proving the foregoing facts (which are of immeasurable importance in this case) were the product of the Court's endeavor, on the direct examination of Smith, as witness for complainant, to lay its foundation for holding that all purchases of paper by the bank amounted to "discount" of notes and so were *ultra vires* (page 865). As out of a clear sky came the revelation that the change in system above indicated was the product of the *Banking Department's activity.*

If the testimony of Smith thus elicited were untrue it was within the power of complainant to have shown its untruth. Nobody at the hearing questioned its truth.

Smith says in part:

> "* * * Mr. Hardon * * * called my attention to" the practice of giving treasurer's checks for every note, "and said, 'Do you make out treasurer's checks for every note you purchase?' and I said, 'Yes, we have always done it'; 'well,' he said, 'that is foolish, that is not necessary at all,' and he advised me to use my bills purchased book and enter therein all the purchased paper and let the bookkeeper enter from that book into the ledger, *just as they do in national banks,* the various proceeds to the various customers' credits" (page 866, lines 15 to 35).

This occurred, as stated, two years after the Trust Company opened for business, viz: in October, 1910. As heretofore shown, the first defalcation of Smith occurred in December, 1910; and the first book manipulation one year after.

Notwithstanding the above-mentioned evidence, the opinion of the Court runs:

> "In the present case, assuming it to have been due care in the first instance, to have given the treasurer unlimited opportunity to draw upon all the funds of the institution, certainly, when it was found that from the very beginning, he had abused his power, ordinary prudence would have suggested that restraints be placed upon his action. None were even given the subject of consideration. *The evidence shows that, as time went on, Smith was allowed a greater degree of control.* At first Thompson kept the general ledger. After a time Smith was allowed to keep it, and by keeping it, to acquire greater facilities for deception."

The "greater degree of control" by Smith was the *work of the Banking Department itself.* That work was not known to and not procured by these appellants. The keeping of the general ledger by Smith was not the work of these appellants, as has been fully shown hereinbefore.

The "safeguard" which the Banking Commissioner in his letter of May 14th, 1909, must have had in mind when he wrote that Smith "evidently realized that" the Nones transaction "must come out in the course of the examination" (page 88, lines 15 and 16), was the safeguard which the bank examiner procured to be thrown into the discard.

Can anything prove more completely the attitude of the department to Smith in 1910? Can anything prove more completely how these ap-

pellants are the victims of circumstances, and not the negligent authors of evil? Can anything prove more completely that if fault there is in the case of Roseville Trust Co., that fault is the fault of an agent of the Banking Department?

But he too was the victim of circumstance—the circumstance which will defeat any system—the circumstance of **COLLUSION** between Jennings and Smith. For what he recommended was **THE CUSTOM IN NATIONAL BANKS.**

Under this head we have, perforce, discussed the matter in view of the decision and conclusions below. We were faced with the duty of pointing out error below. Our view of this case always has been that the Roseville Trust Company case is the case, *par excellence,* which proves how utterly vicious is a national or state banking system which does not harmonize with the banking experience of England, France and other countries (including Canada). Only large banking institutions, with branches in small communities or suburbs, can be conducted with a proper degree of safety. The Federal Reserve system, and the tendency towards amalgamation are moves in the right direction. When the work which the late Senator Aldrich inaugurated will have borne full fruit, such occurrences as the Roseville Trust Company failure will have become relatively impossible.

These appellants are the victims of a system; a system which demanded such an organization as that which these appellants in co-operation with others assiduously and faithfully sought to guide.

POINT XIV.

The proximate cause of the failure of Roseville Trust Co. is found in the action of the Banking Department.

This follows from the preceding point and is subject to what is ultimately pointed out there.

In *Campbell* v. *Watson* (62 N. J. Eq., at page 405, lines 1 to 4), Vice-Chancellor Pitney indicated that the complaint there involved was grounded upon negligence as the proximate cause of the loss.

In this suit it has been shown that Smith's defalcations did not begin until immediately after his conversation with Bank Examiner Hardon. The new system—the national bank system—inaugurated by Bank Examiner Hardon opened the door to the loans and advances to favored depositors and helped to close the door upon their discovery.

The bank examiners acts may therefore be said to be the proximate, the efficient cause of what followed—**if we are to adopt at all the lines of thought upon which the decree below is predicated.**

POINT XV.

The Bill of Complaint does not charge these defendants with liability for having "discounted" notes contrary to statute. The brief and argument of counsel below disclaimed any charge to that effect. The proofs did not seek to establish that charge. The question as to what was "discount" of notes and what were bills purchased came into the case incidentally, upon initiative of the learned Vice-Chancellor below. The portions of the decree predicated upon such a charge are therefore without foundation.

In the brief below, the complainant (Banking Commissioner himself) took this position: "While concededly there are many trust companies in New Jersey which engage in the discount business, there are, fortunately few who make the business of discount their principal concern. Nor are we prepared to say that engaging in such business is *per se* so irregular or illegal that the directors should be held as insurers against any losses suffered in the course thereof. This would perhaps be ignoring the practical consideration that we are confronted by a condition, not a theory."

The learned Vice-Chancellor, as his opinion indicates (page 203, line 15, to page 204, line 12), despite the absence of proper pleading, holds the directors responsible for any loss resulting from notes or commercial paper acquired by the institution contrary to *his interpretation of the statute.*

How the question of "discount" found its way into the case as an incidental question, unconnected with any allegation in the bill of complaint is disclosed on page 865, line 1, to page 866, line 15.

POINT XVI.

"Discount" vs. "Bills Purchased."

The Trust Company Act prohibits the "discount" of "commercial paper," but authorizes the "purchase" of "promissory notes" (Comp. Stat., Vol. IV, pages 5657 and 5658, sub-sections 10 and sec. 17). The language of the statute is:

> "In addition to the powers conferred" by the Corporation Act "every trust company * * * shall have power * * * (10) to purchase, invest in and sell * * * promissory notes."

Why does the statute deny on the one hand and permit on the other?

The only rational explanation occurring to us is, that by making discount of "commercial paper" *ultra vires* the legislature has made impossible the defense of usury in case a trust company "buys promissory notes" at a rate below the discount rate, six per centum per annum.

On the settlement of the decree below the *Chancellor* found himself bound to follow the opinion which had been theretofore filed in this cause.

Is there any reason in law why we should not issue our notes and sell them through any agency or at any trust company that will buy them, and at any price?

When New Jersey was still an agricultural state our courts decided as in *Freeman* ads. *Britton.* When our commercial development gave a new aspect to the sale of commercial paper our Court of Errors settled the law as we find it in *Durant* v. *Banta,* 27 N. J. L. 624. In that case

the Court reviewed *Freeman* v. *Britton* and came to this conclusion:

> "If the payee of a note transfer it by general endorsement, the transaction does not necessarily, and as a conclusion of law, import a contract for a loan; whether it is a sale of the note, or a loan of money upon it, depends upon the meaning and intention of the parties at the time; it is to be determined by the evidence, and is a question of fact for the jury" (Syllabus No. 4).

Neither the Banking Department, nor the trust companies of this state ever took the view expressed below as to the prohibition of the statute.

The learned Vice-Chancellor did not feel himself bound by the practical construction established by twenty years' trust company history and development.

The paper bought by the Trust company was almost invariably two-name paper, bought from the payee. It may well be that such paper was in some instances supplanted at maturity by single-name paper. Exhibit H, on pages 79 to 85, contains a list of all the notes purchased, upon which the Commissioner did not realize full value after the Trust Company closed its doors. This paper was sold by him to Mutual Bank of Roseville, which purchased all the Trust Company's assets. The Mutual Bank organized a holding company for realization purposes, called the "Enbyor Corporation" (page 1215, lines 1 to 10).

After the colloquy shown on pages 1004, line 30, to page 1006, line 2, the matter of Exhibit H disappeared from the case, complainant making no effort to supply the proofs which such colloquy disclosed were necessary.

We feel quite certain that there is no evidence in this case showing that a single item in Exhibit H is not within the rule of *Durant* v. *Banta*. We *know* complainant's attitude below; it is disclosed by the quotation for complainant's brief (*supra*).

The matter of "discount," we respectfully suggest, should be dismissed from the case.

The inveterate practice of trust companies, the unbroken course of the Banking Department may make apposite this quotation from *Den* v. *Geiger*, 9 N. J. L. 229.

> "If the force of contemporaneous exposition and long usage ever found place, it should be felt here. If a judge may ever look to consequences he should do so here. If he be ever permitted to pause in the march of duty, he may here be allowed to reflect on the wide spread havoc and desolating ruin which would result from requiring for the first time a literal compliance with the statute. The fancy of the poet and the imagination of the fabulist, at the opening of the box of Pandora, would be more than realized, for here not even Hope would be left at the bottom."

The minute book of the Trust Company in evidence in this cause shows that the institution "purchased bills." Page after page gives a list of "bills purchased." There is no record of "notes discounted" on any book of the institution. The Vice-Chancellor felt himself bound by the minutes in other instances. Why should a different rule prevail in the case of the notes bought by the Trust Company, in the absence of evidence to the contrary. The Trust Company acted according to the advice of its attorney and the Banking Department.

POINT XVII.

The absolute release from all liability of Odell, the President of the Roseville Trust Company, Fairlie, the Vice-President, Sexton, the Chairman of the Examining Committee, as well as six other directors for an aggregate "consideration" of $140,500.00 satisfies all claims of complainant, alleged in this suit, and by operation of law discharges these appellants.

A

The releases are all in evidence and are all of the following form (pages 168 to 169):

> "To all to whom these presents shall come or may concern, Greeting:
>
> Know ye that I, George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, for and in consideration of the release, cancellation and satisfaction of a claim against the Roseville Trust Company of Forty-One Thousand Dollars ($41,000.) by William P. Odell, of the City of Newark, County of Essex and State of New Jersey, have remised, released and forever discharged and by these presents do for myself and my successors in office, remise, release and forever discharge the said William P. Odell, his heirs, executors and administrators of and from all and all manner of action and actions, cause and causes of action, suits, sums of money, damages, claims or demands arising from the civil liability of the said William P. Odell for loss or damage caused or produced by any act or commission or omission while acting as an officer or director of Roseville Trust Company; it being expressly understood and agreed, however, that the said William P. Odell by the release, cancellation and satisfaction of said claim of Forty-One Thousand Dollars ($41,000.) shall not be released or acquitted from any liability to the said

Roseville Trust Company or to the Commissioner of Banking and Insurance of the State of New Jersey for money due said Trust Company, either on notes, overdrafts or other instruments of indebtedness, or for money had or received or obtained by collusion with any officer or employee of said Trust Company; nor shall this release in any way relieve, acquit or absolve the said William P. Odell of or from any responsibility or liability for any violation of any law or statute imposing criminal liability.

In Witness Whereof, I have hereunto set my hand and seal this 9th day of February, One thousand nine hundred and fourteen.

Signed, sealed and delivered
in the presence of
WM. L. MORGAN.

GEO. M. LA MONTE (L. S.),
Commr. Banking & Ins. State of N. J."

Those releases were properly pleaded (page 159, lines 30 to 161; amended, pages 168 to 170; also 186, lines 1 to 15).

The consideration for the six releases is set forth in the following table (page 152, Exhibit J.):

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

The Court will note that Odell, the president of the Trust Company, whose liability—if liability can be predicated against any director—stands out in high relief above the possibility of liability on the part of these appellants—Odell, we say, was released without PAYING ONE CENT IN CASH.

His surrender of a credit of $41,000, *if he was liable,* was a surrender of nothing—because, if liable, he was not entitled to *participate* in the realization fund in the hands of complainant, *until, he Odell, had satisfied and extinguished such liability.*

The Court will note that the only *reservation* in the releases is as follows: the releases do not affect claims "for money due said Roseville Trust Co. either on notes, overdrafts, or other instruments of indebtedness, or for money had and received or obtained by collusion with any officer or employee of said Trust Company; nor shall this release in any way release, acquit or absolve the said William P. Odell of or from any responsibility or liability for any violation of any law or statute imposing criminal liability."

The Court will note that the liability of Odell, if any, from which he was exonorated by the release is a *primary* liability (with respect to many features of complainant's allegations) when contrasted with the alleged liability of these appellants. The by-laws gave him a special duty of supervision. These appellants relied upon his performance of that duty.

So that we have this fact to deal with: THE RELEASE OF A PARTY PRIMARILY TO BLAME, by an instrument under seal, and an attempt nevertheless to hold liable other parties whose fault—if any—lay in relying upon the party primarily to blame.

In many instances, however, the alleged liability of these appellants is simply a joint and several liability with that of the directors released. And the feature of primary and secondary liability—or principal and quasi-surety is not involved.

Now, the opinion of this Court (*V.-C.* Stevens) on the motion to strike in this very case, contains this paragraph (100 Atl. Rep. at page 1033; affirmed 98 Atl. 1086):

> "The liability of the directors of the Roseville Trust Company is a JOINT AND SEVERAL LIABILITY * * * ."

That expression was not criticized in the Court of Errors and Appeals on review of the motion to strike.

Is it not in exact accord with every precedent; and so should be accepted as the unquestionable law of the case.

That the liability of directors for illegal declaration of dividends is the "joint liability" of "tort feasors" see *Holcourt* v. *Ames,* 100 Atl. Rep. page 610, 2nd column (*V.-C.* Backes).

The releases were actually executed by the complainant, and the consideration was received by him. He cannot be heard to deny their validity. However—though there is no strict occasion for seeking support for the validity of the releases, they were made in pursuance of an *administrative* order, made by the Chancellor on December 30, 1913. This order was put in evidence by complainant. (State of the case, vol. III, page 1455). *And the releases in evidence strictly conform to the terms of the order, as inspection will disclose.* The order was made pursuant to the provisions of statute. (P. L. 1913, page 283-4.)

The complainant is the statutory agent of the Roseville Trust Company. (*Roseville Trust Co.* v. *Barney,* 99 Atl. Rep. 343) with full power in the premises. Any instrument executed by him pursuant to the act shall have the same effect as if executed by the Trust Company (P. L. 1913, page 283-4).

The necessary conclusion from the premised matters is that these appellants are released.

First, in the cases where their alleged liability is the inferior liability of a quasi-surety, and the person released (Sexton, Odell) is the principal alleged tort feasor.

Second, where their alleged liability is of the same grade of the releasee—purely "joint and several."

An absolute release under seal of one of several tort feasors—(whose liability is both joint and several) is a release of all.

> "In a joint trespass, or tort, each is considered as sanctioning the acts of the others, thereby making them his own. Each is therefore liable for the whole damage, as occasioned by himself, and it may be recovered by a suit against him alone. There can be no separate estimate of the injury committed by each and a recovery accordingly. Brown *vs.* Allen, 4 esp. 138; Wynne *vs.* Anderson, 3 Car. & P. 596. The difficulty in maintaining the suit against the others is, that the law considers, that the one, who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received. Co. Litt. 232; Com. Dig. Pleader, 3 M. 12; Laisham *vs.* Rowe, *et al.,* Hob. 66a; Kiffin *vs.* Willis, 4 Mod. 379. The plaintiff by his own act appears to have precluded himself from a recovery against the defendants." *Gilpat-*

rick v. *Hunter,* 41 Am. Dec., page 371. (24 Me. 18.)

Stimson v. *Whitmore,* 85 Atl. Rep. 113;

Ellis v. *Esson,* 50 Wis. 138;

McBride v. *Scott,* 132 Mich. 176;

Carey v. *Bilby,* 129 Fed. 203;

Duck v. *Mayers,* 2 Q. B. 513;

Matheson v. *O'Kane,* 211 Mass. 94.

"A release under seal of one joint tort feasor releases him and all his joint wrong doers, because a sealed release operates to extinguish the cause of action." 34 Cyc., page 1086, citing cases.

That the liability of all the joint tort feasors is both *joint* as well as *several;* and that the rule, invoked by us as to the effect of a release, operates, despite the fact that the liability is several as well as joint, is apparent from a perusal of the following cases:

Rogers v. *Cox,* 66 N. J. L. at 434;

Newman v. *Fowler,* 37 N. J. L. pages 90 to 91 bottom;

Spurr v. *N. H. County R. Co.,* 56 N. J. L. 347.

Complainant's claim is one sounding in tort, permitting the direct application of the rule that the release of one of several joint tort feasors releases all.

Chancellor Pitney in *Bigelow* v. *Old Dominion Copper Co.,* 74 N. J. Eq. at 506, was confronted with a suit involving a branch of jurisdiction of this court very similar to that involved here; that was a suit to enforce the liability of a promoter; the Chancellor held that such liability is not a creature of statute, but arises out of the *fiduciary relationship* of a promoter to the corporation and is to be assimilated to the liability in general of a trustee to his *cestui qui trust*

(page 506, last paragraph, and page 507, first paragraph).

In that case the Chancellor applied to the situation the rule that equity does not recognize any right of contribution between joint tort feasors, thus recognizing that the suit involved a claim based upon a tort; he said that in that case there could be no contribution between certain of the parties because "equity does not recognize any right of contribution between joint tort feasors." (Page 512, bottom, and page 513, top.)

If a tort was involved in that suit, we respectfully submit an alleged tort is equally involved in this suit.

Such was the idea of Vice-Chancellor Pitney in *Campbell* v. *Watson* (62 N. J. Eq. 404, last line, and page 405, top).

It has been expressly held that a suit of this character involves a *trespass to property,* using the word trespass in a broad sense. (*Dodd* v. *Wilkinson,* 40 N. J. Eq. 581, next to last paragraph.)

Mr. Justice Dixon in the case just cited points out that a cause of action, *on all fours with this,* survives against the executors of one of the parties liable just as much as an action to recover damages, because of the back flow of water from a mill dam or because of negligence or deceit; he cites, in supporting the claim of survival in *Dodd* v. *Wilkinson,* the two cases of *Ten Eyck* v. *Runk,* 2 Vr. 428, and *Tichenor* v. *Hayes,* 12 Vr. 193, a reading of both of which will serve to emphasize that in this case we are dealing with an alleged "trespass."

There is therefore no reason, we believe, why the ordinary rules applicable to joint tort feasors can not be applied.

In *Dodd* v. *Wilkinson* (41 Eq. 580) the Court expressly held that there existed *no* relation whatsoever, legal or equitable, between the defendants and the firm of Fisk & Hatch, and that therefore the release of Fisk & Hatch could not inure to the benefit of the defendant directors; the language of the Court is as follows:

> "On the *hypothesis* that the loan was a *corporate* act, there existed no relation whatever, legal or equitable, between the defendants and Fisk and Hatch, and *therefore* there is no ground for applying to them the rules which pertain to *principal and surety*, or to those who are primarily and secondarily, or jointly liable for the same debt or *duty.*" (Italics are ours; page 580, near bottom; see page 581.)

The Court will note the expression "liable for the same * * * duty." That is this case; the proofs establish that the defendants and the persons released were "jointly liable for the same * * * duty,"—that is, they were all directors, and had all taken the same oath.

Is it not plain from that case of *Dodd* v. *Wilkinson*, that if there *had* existed some legal or equitable relation between the defendants and Fisk and Hatch, the Court would have felt itself *constrained* to apply the "rules which pertain to * * * those who are primarily and secondarily, or jointly, liable for the same debt or duty." Is the intimation not plain that in such event the release of Fisk and Hatch would have operated to release the defendants, who pleaded such release.

Since the defendants, Krug and Lurich, in their original answer, and by amendment (and the other appellants did likewise) have set up the releases which are in evidence, what is to prevent a dismissal of the bill as against them. The

proofs now support their allegation that they were discharged.

B

Complainant, however, claims that there must be read into the releases certain provisions of a contract preceding the delivery of the releases, which contract is dated December 10, 1913, and is referred to in the order of the Chancellor, made *in re* Roseville Trust Company, dated December 30, 1913; such order being the "authorization" for the releases. (Vol. III, page 1455)

Such *contract,* however, was not made by or executed by the releasees, co-directors with appellants; but runs between the complainant and "Mutual Bank of Roseville"—which is not a party to this suit or to said releases.

This in itself is fatal to complainant's claim. *Atwater* v. *Underhill,* 22 N. J. Eq. 600. The releases are absolute on their face, are under seal and release from *all liability* except as therein specified.

Any agreement to avail the complainant must be *inter parties;* here we have an agreement with a stranger—"Mutual Bank of Roseville." *Atwater* v. *Underhill, supra.*

The releases were not given in *pursuance* of the agreement with the new bank. They are mentioned in that agreement; it is recited and set forth what is their basis; what shall be the participation of the bank in the proceeds thereof. Undoubtedly the new bank would not have been obliged to carry out *its* contract, if the Commissioner had not been able to effect the settlements therein described. The releases and settlements therefore are a *condition* upon which the agreement depends or was formulated. But that

is something far different from a claim that the releases were given in *pursuance* of the agreement. The settlements had plainly been arranged *before the agreement was signed.* The recitals (especially the first half of paragraph 3 of the agreement) show that the *arrangements respecting the settlements* were anterior to the agreement with the new bank; that such agreement is *based upon* and therefore subsequent to the arrangements respecting the settlement with the directors.

Therefore, it cannot with propriety be said that the releases were given in pursuance of the agreement with the new bank; the fact that such settlements had already been arranged was one of the circumstances which made such agreement possible.

THERE IS NOT A WORD IN SUCH AGREEMENT TO INDICATE THAT *THE PARTIES RELEASED* HAD AGREED THAT THERE SHOULD BE ANY RESERVATION OF RIGHT, TO SUE OTHERS, INCORPORATED IN THE RELEASES TO BE GIVEN THE COMMISSIONER. AND THE NEW BANK BY AN AGREEMENT INVOLVING *RES INTER ALIOS ACTA,* HAD NO POWER *DERIVED FROM THE RELEASEES TO PROVIDE* FOR ANY MODIFICATION OR RESERVATION IN THE RELEASES WHICH WERE TO PASS.

The agreement between the new bank and the Commissioner is essentially an agreement to sell certain assets of the old Trust Company. It is true that in paragraph 4 of such agreement the Commissioner arranges to bring certain suits against certain persons, who were directors or officers of the old Trust Company—now declared to include the appellants. BUT NOWHERE IN

SUCH AGREEMENT IS IT SHOWN THAT THE EFFECT WHICH THE RELEASES MAY HAVE UPON SUCH CONTEMPLATED SUITS WAS EVEN CONSIDERED

How then can it be said that the *releases* were given with a *reservation* of right to sue the other directors. The Commissioner and the new Bank may have *presumed* that they had such right to sue, by reason of the provisions of Compiled Statutes, page 3781, Sections 15, 16 and 17 (P. L. 1885, p. 219).

But between PRESUMING that there REMAINED such right to sue, on the one hand, and suggesting that there is an express or effective contractual provision for the PRESERVATION of such right, on the other hand, lies a vast and decisive distinction.

It is perfectly plain to the undersigned upon reading between the lines of the agreement with the new Bank, that the draftsman of that agreement felt assured that the situation was covered by Compiled Statutes, page 3781, mentioned above, and so failed to provide for what complainant now contends should be read into the agreement.

We, therefore, have two distinct and conclusive reasons for refusing to reform by implication the definite and formally complete releases in this case.

First, the agreement upon which such reform by implication is sought was not an agreement to which the releasees are parties.

Second, the agreement did not contemplate a reservation of a right to sue to be incorporated in the releases or otherwise; apparently placing its sole reliance upon the efficacy of a statute, presumed to be applicable.

* * * * * *

There is an additional reason for discarding complainant's contention.

C

In paragraph 4 of the agreement between the new bank and the Commissioner is set forth (*inter alia*): "that the Commissioner will institute *proper* proceedings, actions or suits, against *any or all* of said persons, to recover for loss or damage caused to said Roseville Trust Company, its property and business, by the negligence or improper conduct *of the said persons* while acting as directors or officers of the said Trust Company, * * * ."

That agreement *does not mention these appellants.* It does not disclose whether or not *they* were within the class who were liable by reason of "the negligence or improper conduct" referred to.

Reading the language *as it stands* it has reference only to negligence or improper conduct for which the unnamed persons were SOLELY liable; and not to loss or damage for which they were *jointly and severally liable* with their (alleged) joint tort feasors who have settled and been released; *which settlements and releases by presumption of law covered all loss and damage for which such joint tort feasors were liable.*

That is to say, the language of the agreement is inapt and incapable of accomplishing what complainant now contends for; having given releases to certain joint tort feasors all claims on account of those torts must be considered as settled and satisfied; the further claims for loss and damage in paragraph 4 referred to must therefore be torts or negligent acts for which the

"persons" referred to are in each case *solely and individually liable.*

A reservation such as complainant contends for should not be read out of one agreement and into another (the releases) by an *implication* founded upon language which is susceptible of a construction such as will not necessitate the reservation.

Paragraph 32 of complainant's bill of complaint recites: "That William P. Odell, William Fairlie, John S. Bell * * * certain of said directors, have made partial restitution of their losses, which your orator has accepted from them respectively in settlement of his claim against them severally in behalf of said Roseville Trust Company *pursuant to an agreement duly made with said directors on December 10, 1913* * * *." Thereby complainant admits that there was an agreement between complainant and the releasees. *That,* however, is *not* the agreement between the *new Bank and complainant.*

The complainant may endeavor to support the releases by reference to that provision of our acts relating to joint debtors which is found in Compiled Statutes 3781, Sec. 15, referred to above; this statute, however, it is contended has no application for two reasons: first, by Sec. 17 it is provided that no "compromise or settlement shall be made as aforesaid without the approval first had and obtained from the Court out of which *such receiver or trustee was appointed*"; the Commissioner of Banking and Insurance was not appointed as receiver or trustee by any Court (*Roseville Trust Co.* v. *Barney, supra*); secondly, said provision, only applies to cases where a bond has been given to answer for the malfeasance or

misfeasance of an officer of a banking or other corporation; the act provides that:

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

* * * * * *

POINT XVIII.

The doctrine of Murphy vs. Penniman, 66 Atl. Rep. 282, does not defeat the effect of the releases.

On page 216 of the state of the case, the Court below adverts to the fact that on the application to strike the bill (*LaMonte* v. *Lurich,* 86 N. J. Eq. 26) there was raised the defense discussed under Point XVIII; but then it was based *on complainant's* "allegation that did not fully and fairly set up the facts."

In short when we came to the hearing we found that the facts with regard to the "settlements" were not as complainant in his bill of complaint had alleged. All the preliminary litigation, now, is therefore of no avail to either side.

The reality, as disclosed by the discussion under Point XVIII came before the Court for the first time on the hearing below.

Nevertheless, the Court found that the releases involved, despite their absolute form, were not effective to release these appellants. (Page 216, line 15, to page 219, line 22.)

The Court below cites *Murphy* v. *Penniman*, 66 Atl. Rep. 282, in support of its view that the Commissioner of Banking and Insurance should have incorporated in the releases a provision reserving the right to sue the appellants. His failure so to do is declared to be in violation of the Chancery order of December 30, 1913.

Said order provides (*inter alia*) that the Commissioner "be and he hereby is authorized to complete and carry out the compromises and settlements by reason of any liability of any persons for losses or damage caused or produced to said Roseville Trust Company by any act of commission or omission of said persons while acting as directors or officers of said Roseville Trust Company * * * *in the amounts and upon the terms and conditions set forth in said contract* between said Commissioner of Banking and Insurance and said Mutual Bank of Roseville * * * above referred to * * *." It then goes on "and expressly subject to the provisions of said contract that no release in pursuance of such compromise shall acquit or relieve any such person of or from liability for money due Roseville Trust Company either on notes, overdrafts or instruments of indebtedness," etc., etc. (Vol. III, state of case.)

Now, said contract does provide that the releases shall be absolute releases; *it does not provide that they shall contain a reservation of right to sue others;* it does provide for a reservation that the releases shall not operate to discharge the persons released in certain particulars.

The releases contain that reservation — those are the "terms and conditions" referred to in the contract. Those are the "terms and conditions" referred to in the order.

Nobody at the time of framing that contract and that order had any other "terms or conditions" in mind. If the framers of that contract and order were negligent in considering the *legal effect* of that for which they provided, that fact cannot be used to defeat our discharge from liability for our alleged negligence — a discharge which flows from the absolute nature of the releases specifically provided for.

The Chancellor had before him two matters for approval on December 30, 1913—one, the approval of a contract for sale of assets; the other, the compromises therein referred to.

They were both in the same cause; he disposed of them by one order.

The releases to be given by the Commissioner are described with great accuracy in that order. The releases given, correspond exactly with that order.

Mutual Bank of Roseville, which is a party to the "contract" mentioned in the opinion below, is not a party to this suit. There is nothing to show that it ever complained of the form of those releases or that it is entitled to relief.

For over one year after those releases were given the Commissioner and the Mutual Bank of Roseville remained silent and gave no indication of an intention to sue these appellants. Then the Commissioner sues and does not "fully and fairly state the facts" in this regard (page 216, line 24). When we confront him with the facts and push home the legal consequences, he alleges that the releases do not correspond with the pertinent order; when we examine the order we find that it exactly describes the releases and describes them as they were actually given.

Now we are told that a contrary intention can be spelled out of a contract to which the releases were not parties, that the Commissioner of Banking committed an act *ultra vires* in executing those releases. This question of *ultra vires* is not set up by Mutual Bank which is not a party to the litigation; it is set up by the Commissioner to defeat his own act.

Surely the claim of *ultra vires* must have some limits.

Were the Mutual Bank of Roseville a party to this suit we would show that it recognized the validity of the claims of these appellants as creditors of Roseville Trust Company, claiming sundry amounts due it from said Trust Company *over and above all counterclaims;* that Mutual Bank accepted assignments of such claims of appellants as valid unimpeachable claims; that it stood by and let us repose in the belief that our claims were as made by us, and as accepted by them.

POINT XIX.

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

McBride v. *Scott,* 132 Mich. 176, 178; 93 N. W. 243; 61 L. R. A.

The law is very ancient.

> "If two are bound by an obligation, and the obligee releases to one of them proviso that the other shall not take advantage of it, the proviso is void. Lit. Rep. 190."

Note 171, page 112, Co. Litt., Vol. II, Prudential Law Library. The case referred to in Littleton's Reports is *Everard* v. *Herne.*

One may be bound by the legal consequences of one's acts in a case like this even if one does not perceive those legal consequences.

Munyon v. *French,* 60 N. J. L., at page 12.

In *LaMonte* v. *Lurich,* the Court of Chancery and this Appellate Court decided only the following with respect to the question now under consideration: that since it did not appear that a "technical release" was given, the motion could not prevail.

The language of the Court of Chancery was:

> "The liability of the directors of the Roseville Trust Co. is a joint and several liability. The agreement made with those who have settled is not, as far as appears, a technical release * * * ."

What follows is subjunctive in character and therefore dictum. *LaMonte* v. *Lurich,* 86 N. J. Eq. 26.

We now have before us all the facts — the releases under seal, the knowledge that Odell and Sexton (whose liability, if any, is more pronounced than that of these appellants) were *released.*

The reasoning of *McBride* v. *Scott* requires, we submit, that these appellants be declared discharge by virtue of the discharge of Odell and Sexton.

POINT XX.

The defendant Lurich filed his proof of claim against Roseville Trust Company with the Commissioner of Banking—in accordance with the statute. Such proof alleged an indebtedness due from the Trust Company to Lurich; further that affiant knew of "no set off or other legal or equitable DEFENSE to said claim"; said claim was examined and allowed by the Commissioner as just; also it was paid.

These facts, we insist, now preclude complainant from asserting that Lurich at the time of the allowance of such claim and especially the payment thereof was liable to the company for the causes alleged in the bill of complaint herein.

The facts are in part proved by a written stipulation (Vol. III, page 1483); the testimony relating to the same is transcribed on page 1317, line 20, to page 1318, line 25, of the state of the case.

In point of fact Lurich filed *three* proofs of claim; two of them are of diminished importance because one was on behalf of a *partnership* and the other concerned the *joint* account of C. C. Lurich and Geo. R. Ford as Trustees.

The third, however, was filed by Lurich as an individual.

Such third proof of claim is substantially of the following form (the original is in possession of the complainant):

PROOF OF CLAIM.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Personally appeared before me the undersigned, a Notary Public in and for the County aforesaid, C. C. Lurich, who being duly sworn says that Roseville Trust Company

of Newark, N. J., is justly indebted to him in the sum of One hundred and fifty-one dollars and ninety-three cents, upon the following claim, to wit:

Balance due on open account subject to check * * * $191.53. All of which is due and payable to him alone, he having given no endorsements or assignments of the same or any part thereof; and he further says that he knows of no set off or other legal or equitable defense to said claim, or any part thereof; that deponent is the claimant and that the facts stated in this affidavit are within the actual knowledge of deponent and that he is duly authorized to make this proof.

(Name) CHARLES C. LURICH,
(Residence) 197 North Maple Ave.,
East Orange, New Jersey.

Sworn and subscribed before me
this 18th day of November, A. D.
1913.

Witness my hand without seal.

GASTON G. L. VALLE,
Notary Public,
State of New Jersey.

That proof of claim (see stipulation aforesaid, par. 3 and 4) was duly presented to the Commissioner in accordance with the provisions of Chap. 171 of the Laws of 1913 (P. L. 1913, page 283; 295 to 286) after the notice to present proofs, according to said statute, had been given. No notice of rejection—referred to in said statute—was given to defendant.

The pertinent portions of said statute read as follows:

"If the commissioner doubts the *justice* and validity of any claim, he may reject the same and serve notice of such rejection upon the claimant either by mail or personally * * * An action upon a claim so rejected must be brought within six months after

> service * * * At any time after the expiration of the date fixed for the presentation of claims the Court of Chancery may by order authorize the commissioner to declare out of the funds remaining in his hands, after payment of the expenses, one or more dividends * * * Objections to any claim not rejected by the commissioner may be made by any party interested by filing a copy of such objections with the commissioner, who shall present the same to the Court of Chancery at the time of the next application to declare a dividend, and said court may then dispose of such objections or may order a reference for that purpose and should the objections to said claim be sustained by the court or a referee, such claim shall not be allowed by the Commissioner until the claimant shall have established his claim in a court of competent jurisdiction."

1. The Court will note from the above that the Commissioner must reject a claim if he "doubts" its "*justice and validity.*"

2. Any person in interest who disapproves the Commissioner's action with regard to a claim may secure judicial action.

3. Upon rejection of a claim an action must be brought to establish it.

* * * * * *

The words "justice and validity" employed by the statute as the test of approval, are as broad as can well be imagined. The force of the word "justice" is illustrated by these cases dealing with the words "just set offs": *State Bank* v. *Receivers,* 3 N. J. Eq. 266, at 271; *Receivers* v. *Paterson,* 23 N. J. L. 283.

Plainly, if complainant's position in this suit with respect to defendants' negligence were well founded, Lurich's claim would not have been just

and valid. Lurich had deposited moneys on open account with the Trust Company, while he was a director; the funds of the Trust Company became enormously depleted while he was such director; complainant charges that this was due to his negligence—defendant's own wrong; part of those funds consisted of Lurich's deposit on open account; the depletion far exceeded in size his own account with the bank.

Would it be "JUST" to allow and pay his account out of the funds which he had depleted through his own wrong, before he made good the amount of the depletion—at any rate sufficiently to restore the losses of all innocent persons.

The principle that is involved is, in one aspect, like that of *Crane* v. *De Camp,* 22 N. J. Eq. 616, where the Court of Errors said:

> "If a person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion and must separate his own property or lose it, if the obligation of keeping an account rests upon him." See also Brooms Legal Maxims, star page 291.

We say that the principle laid down in the case of *Crane* v. *De Camp* is *much like* the principle we invoke. Really it is the *same.*

The principle is "*Nullus commodum capere potest de injuria sua propria.*" No man should take advantage by his own wrong (Co. Litt. 148b)—which is allied to the principle "*Ex dolo malo non oritur actio,*" no man will be allowed to found any claim upon his own iniquity.

Many and various applications of these principles are treated in Brooms superb work, "Legal Maxims," Chapter V, start page 279, *et seq.*

Lurich's claim filed with the Commissioner was unjust, *if* complainant in this case has proved the allegations of his bill of complaint. The facts upon which that bill of complaint rests were fully known in December, 1913, at the time the Commissioner filed his petition to sell all the assets to the new bank (q. v.). According to complainant's present contention, he *should have rejected* Lurich's claim, which was one of the claims referred to in said petition. Such rejection could have been made at any time within six months after filing of the claim—so the statute provides.

Instead of rejecting it, the Commissioner approved it, Lurich received payment of his dividends, and not until a year and a half after December, 1913, did the Commissioner choose to assert (see this brief, *supra*) any claim of liability on Lurich's part.

Can the complainant be allowed to blow *hot* and *cold* in such a manner.

The principle of law is well established that "*allegans contraria non est audiendus.*" The principle is illustrated by a variety of cases. Broom's Legal Maxims, start page 169, *et seq.*

* * * * * *

Either Lurich's claim was not just — when made; in which event it should have been neither approved nor *paid out of the very fund he is now alleged, by his negligence, to have depleted.*

Or Lurich's claim was good—in which event this present suit, which necessarily involves an assumption that it was not good, should fail.

* * * * * *

At one time in the course of this case the suggestion was thrown out that Lurich's claim could not be disallowed, because *this suit* involves a

counterclaim for unliquidated damages. Counterclaims have nothing to do with the matter. Lurich's claim — if complainant's present suit is well founded — was intrinsically unjust and could have been defeated, upon action brought by Lurich. The defense would have been, as above noted, founded upon the general principle that no man will be permitted to establish a claim which would have been paid but for his own fraud or tort.

The Trust Company in due course would have paid Lurich's claim had its funds not become depleted—now attributed to Lurich's neglect. To permit him to successfully sue the Trust Company for the recovery of money which it can not pay him because of his own iniquity and fault, is allowable neither at law or in equity.

* * * * * *

If I should loan $2,000 to a friend, with the privilege of drawing against him to the extent of $2,000, on demand, and he should mingle my money with his own in his safe, and I should set a burglar to work to rob his safe; could I, after the burglar had succeeded, demand back my $2,000?

Plainly not, for *nullus commodum capere potest de injuria sua propria.* Indeed one cannot plead necessity as a ground for taking human life, where the necessity is of one's own creation. *State* v. *Agnesi,* 104 Att. 300. In that case the principle was applied without even citation of authority.

Whether the wrong of which I am guilty is causing another to rob my friend's safe, or is negligently permitting the burglar so to do—the consequences to me must be the same. Also they must be the same whether the suppositious loan

to my friend has some of the characteristics of a bailment or not. *Campbell* v. *Watson*, 62 N. J. Eq., bottom of page 407, top of page 408.

While it is true that the duties and therefore the status of directors of a trust company are now defined by Section 12 of the Trust Company Act, and so any attempt to denominate them trustees or bailees is in effect judicial legislation —because they are officers having a statutory status, yet when we enter the realm of remedies, *analogies* are necessary in order to work out the problems of justice involved.

So it is not improper, we believe, to consider directors of a trust company for the purpose of this point as bailees, or quasi-bailees.

Indeed, when we refer to *Campbell* v. *Watson* (which was decided prior to the adoption of Section 12 of the Trust Company Act) we find Vice-Chancellor Pitney stating, with reference to bank directors, as follows:

> "They are undoubtedly said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any BAILEE entrusted with the care or management of the property to another." (62 N. J. Eq., top of page 430.)

Again Vice-Chancellor Pitney said:

> "Directors are to be looked upon as *bailees* of the property. And as they are persons generally having an interest in the stock, they are not bailees who derive no benefit from their undertaking, and therefore to be held responsible for slight neglect, but they act in relation to a bailment beneficial to both parties."

Perhaps, therefore, it may be possible to say, directors of a trust company are quasi-bailees or bailees whose functions and duties are defined by statute.

This view may gain weight upon perusal of the following cases which supplement one another:

Marr v. *Marr,* 66 Atl. Rep. 162, at 183;

Savage v. *Miller,* 56 N. J. Eq. 432, esp. at 440.

In *re Marr* v. *Marr,* it is said:

"A director of a corporation is not a trustee in the strict sense. The title to the corporate property is in the corporation. But the duties which the director is required to perform for the corporation which he represents are in many respects similar to the duties of a trustee, and his relation to the corporation is, in general, essentially that of a trustee's. He is not, in consequence, allowed that freedom to contract with his corporation which a stranger would enjoy. In Stewart *vs.* Lehigh Valley R. R. Co., 38 N. J. L. 522, it is shown that his trust relationship to his corporation is such as to render his contracts made with it voidable to the extent that such contracts cannot be enforced, as express contracts, against the will of the corporation. He may loan money to his corporation or perform personal service for his corporation and the obligation for the payment of the money loaned, or for the payment of reasonable compensation for the service performed, will arise by operation of law, but cannot exist by force of the express contract. Gardner *vs.* Butler, 30 N. J. Eq. 702, 721."

The status of a director who has an open account with his own Trust Company is therefore entirely different from that of an ordinary creditor.

His open account as creditor is subject to the conditions which flow from his status as quasi-bailee or bailee.

When his funds are deposited by him and mingled with the other funds of the bank, they

together constitute one fund, of which he is one of the bailees or quasi-bailees; and before he can subtract or claim *his own,* he must account for the bailment or fund to the extent to which it is *not his own*—provided that he can be charged with a tort or wrong or neglect by which the fund has become diminished or lost.

As to equitable defense at law, see *Youngs* v. *Little,* 15 N. J. L. at page 4, last paragraph.

* * * * * *

When the Banking Commissioner was confronted by Lurich's claim, two courses were open to him; one was to reject the claim (because he doubted its "justice and validity") the other was to approve the claim (because its justice and validity were beyond his doubt).

The Commissioner determined to adopt the second course.

He made an ELECTION.

He confirmed that election by causing a dividend to be paid to Lurich out of the funds which now it is alleged Lurich depleted.

Can the Commissioner now be allowed to repudiate that election.

That he cannot is illustrated by a variety of cases, of which we cite a few:

Barnes v. *Taylor,* 27 N. J. Eq. at 266;

Browning's Executor v. *Rittenhouse,* 40 N. J. L. 230;

Crook v. *First National Bank,* 83 Wis. 31.

A trustee in bankruptcy may elect not to take certain property of the bankrupt. This election may be evinced by any action inconsistent with evidence of intention to take.

Mesirov v. *Speiden & Co.,* 97 Atl. Rep. 161.

"It is well settled that a trustee in bank-

ruptcy may refuse to take possession of onerous or burdensome property, and that, when he elects to reject, the title to such assets remains in the bankrupt, and that if he does not elect to take within a reasonable time, it is deemed an election to reject." (*ib.*)

The doctrine of election is strikingly referred to in *Dodd* v. *Wilkinson* (41 N. J. Eq. at 500) where the Court of Errors said:

> *"If the corporation had been able to insist that the defendant's act in making the loan was beyond the scope of their authority, and had repudiated that act, and sued its agents for a conversion of its property or in any form for a restoration of the trust fund, then the settlement with Fisk and Hatch would have afforded them a conclusive defense, for it would have been totally inconsistent with such a position."*

* * * * * *

The payment of Lurich's claim, and the lapse of time evinced a clear intention to relinquish the alleged claim against him now prosecuted in this suit.

Stimis v. *Stimis,* 54 N. J. Eq. 17, at 22.

That involved the case of an express trust; with respect to which the rules are more severe than in the case of an implied trust.

In equity the doctrine *"vigilantibus et non dormientibus leges subveniunt"* is peculiarly applicable.

Besides which *"Expedit republicae ut sit finis litem,"* Court of Errors in *Hendrickson* v. *Hendrickson,* 42 N. J. Eq. at 661.

* * * * * *

By the allowance of Lurich's claim the status of a creditor of the insolvent corporation was impressed upon him, or was acknowledged with

respect to him. Now it sought to hold him chargeable as a trustee, accountable for funds of which part were, with knowledge or notice of all the facts, voluntarily paid into his hands, as a creditor.

* * * * * *

This Court has not the slightest evidence before it that the Commissioner was not fully alive to the legal *effect* of the allowance and payment of Lurich's claim.

However, if the Commissioner was not fully alive to such *legal effect,* that cannot alter the result.

Atwater v. *Underhill,* 22 N. J. Eq. 600;
Munyon v. *French,* 60 N. J. L. 12.

* * * * * *

POINT XXI.

Certain minor charges of negligence considered.

A large part of the proofs were taken up in an endeavor to fasten upon these appellants or some of them certain charges of negligence, which the Court below either expressly found without basis or not actionable or else found not worthy of remark.

Inasmuch as the structure and rationale of the decree below necessarily eliminates all of these charges which were found untenable, we are not bound to deal with them, in the absence of a cross appeal against the appellants. We cannot anticipate, however, the claims which will be made by complainant-respondent in his brief, nor the view of this Court with respect to any new matter therein; so we will touch upon these fea-

tures discarded below, soliciting the right to file a reply brief if necessary.

We treat these features under sub-heads as follows:

(a)

The directors when dividends were declared honestly believed the condition of the Trust Company to be as the statements before them showed; they did not knowingly violate or permit to be violated their statutory duty. Hence the Vice-Chancellor properly held that they were not liable.

(b)

A similar statement may be made about "loans permitted while the reserves were depleted." Only now does the audit of Cloran show this depletion. The statute relating to reserves was designed to protest against a possible "run on the bank" by depositors, to insure a sufficient amount of liquid assets to meet emergencies, etc., etc. The actual, but unknown, depletion of reserves did no injury to this institution.

(c)

The failure of the board of examining committee to discover the misdeeds of Smith was charged below as an item of negligence against all the board notwithstanding their assured and well grounded belief that the committee was functioning properly.

The statement of the claim carries its own refutation.

"Here again it should be observed that trustees are not liable for the acts of their co-

trustees, unless they connive at them or are guilty of negligence conducive to their commission." *Briggs* v. *Spaulding* (*supra*) at page 163.

(d)

The fact that two of the appellants "attested" some of the semi-annual reports made to the Banking Commissioner rendered from time to time, is no ground for liability. These reports were sworn to by Smith and Odell; and the appellants simply "attested" them as witnesses; they did so—it is not disputed—relying on Odell and his sworn verification and in the full belief that the statements were correct.

They did not "knowingly" or "wilfully" subscribe false reports. *State* v. *Clark,* 29 N. J. L. 96; *Felton* v. *U. S.,* 96 U. S. 702.

The statute requires that such reports shall be under oath of the president (or vice-president) and treasurer; also they shall be "attested by the signatures of three directors." (Comp. Stat., Vol. IV, page 5661, Sec. 16.)

These reports are statutory in character and hence the statutory rule of duty hereinbefore discussed applies.

No liability of any kind can be attributed to these two appellants involved.

Yates v. *Jones National Bank,* 206 U. S. at 179-180;

Thomas v. *Taylor,* 224 U. S. 881;

Chesborough v. *Woodward,* 224 U. S. 72.

Each report shows the condition of the institution on a given day, specified in a written requisition by the commissioner; which day, thus specified, is some day *prior* to the date of the requisition. The only possible basis for the report,

therefore, is that of the books of the institution. No independent examination of assets and liabilities by a committee to discover how they stood on the given day—which is *a preceding day*—is possible.

(e)

The failure of the examining committee to report assets which in their opinion should be carried on the books at less than their face value.

The doubtful assets were all the subject of discussion in the correspondence with the Commissioner, a copy of which was attached to the bill of complaint and is part of the printed state of the case. They were also known from independent discussion by the board and executive committee.

This alleged failure was purely technical and is not responsible for Smith's defalcation.

(f)

It is claimed that Smith was engaged in outside enterprises; the directors knew of this and that this should have opened their eyes.

The fact is that the only appellant who had such knowledge was Munroe.

The Vice-Chancellor ignored complainant's contention in this regard.

Lurich and Keim both testified that they had no knowledge of "outside enterprises" (page 1305, lines 15 to 18; page 1303, line 30, to page 1305, line 25; page 1368, lines 18 to 25).

See Lurich's answer to interrogatory 191; also state of case, page 1670, middle, to page 1673, top; page 1708, top, to middle of page.

(g)

The complainant below claimed that beginning with January, 1913, there was a marked falling off in the aggregate of deposits, while the number of depositors was increasing; that this should have led to the detection of Smith's villainies.

Undoubtedly the reason why the learned Vice-Chancellor, in his filed conclusions, ignored this claim is found in the fact that the fall in deposits in 1913 was a subject of the most earnest concern and activity on the part of the directors; that this decline was attributed by them to the withdrawal of certain accounts and the general financial condition then prevailing (during the first year of President Wilson's administration).

These known factors, especially the general financial condition, acted like a red herring across the trail or scent, and prevented all possibility (from a practical standpoint) of directing attention to the unknown contributing factor involved in Smith's manipulations.

The testimony shows the earnest and thoroughgoing consideration of this matter (pages 263, line 18, to page 266, line 10; page 270, line 20, to page 274, line 12; page 1161, line 28, to page 1162, line 35; page 1269, line 10, to page 1270, line 18). See also appellant Lurich's answers to interrogatories 195, 196, 197, 198 and 199, always remembering that Lurich was answering from unaided memory four years after the event.

The witness Dunn's statement is worth quoting here:

> "Q Did you know that during the period that deposits were increasing the number of depositors almost doubled?"

"A Oh, yes, I made special inquiry as to that."

"Q Did you make any verification of the fact as reported that deposits were decreasing or did you accept it from those printed reports?"

"A Oh, no; I talked it over with all the directors; they all talked it over at the meeting; several meetings."

* * * * * *

"A Oh, no; I knew money was tight and that there was a great stringency that time in the money market."

* * * * * *

"A Oh, no; it was not the printed reports that convinced me; all of the directors and officers of the bank consulted and discussed it, and I did believe it."

* * * * * *

"A All of the directors were greatly concerned about it, and so much so that they made a move to go out and try to get new accounts in, because all the accounts, new accounts were small, some savings accounts of only one dollar and other *litt lheousehold accounts that a house wife* would have of less than $5.00 or $10.00 balance, and that our large depositors were withdrawing their money" (pages 1268-1270).

The discrepancy between the "number of depositors" and the "aggregate of deposits" did not assume its present significance in 1913. That it is in no event, not even now, necessarily significant is shown by the following table in which the "average amount of deposit" is also shown.

All figures in that table are taken from Exhibit C. 1461 (Vol. III, state of the case), and represent sundry dates taken from that exhibit at random.

Date	Number of Depositors	Aggregate of Deposits	Average Amount of Deposit
July 11, 1911...	2,361	$560,000.00	237
Nov. 21, 1911...	2,601	560,000.00	215
Dec. 26, 1911...	2,549	601,000.00	236
Feb. 20, 1912...	2,667	642,000.00	241
June 12, 1912...	2,918	772,000.00	265
Nov. 13, 1912...	3,163	804,000.00	254
Jan. 14, 1913...	3,151	760,000.00	241
Feb. 25, 1913...	3,240	780,000.00	241
Mar. 12, 1913...	3,262	760,000.00	233
May 13, 1913...	3,349	695,000.00	207
June 10, 1913...	3,400	710,000.00	209
July 8, 1913...	3,450	690,000.00	200

The last column—the important column—is not shown in Exhibit 1461 and represents the calculation of counsel. The "expert" made no attempt to tabulate and set forth the average deposit in preparing Exhibit C. 1461.

The Examining Committee having reported nothing wrong in May, 1913, as a result of its investigation then, while the condition of decline was in progress, and a perfectly natural probable and efficient cause for such decline being existent and known to the Directors, can they be said to have been negligent because they did not refer this decline to a cause known to us now but unknown to and unsuspected by them then—can they be said to be negligent because they were unable to "smell out" Smith's delinquency and from the unknown premise of that delinquency reason back to the known fact of the decline—can they be said to be negligent for actually referring that KNOWN decline to KNOWN OR APPARENT CAUSES which received their earnest attention.

If there had not been known to the Directors the efficient cause of a tight money market and they had neglected to give the matter their best consideration, the situation might be different.

POINT XXII.

Defendants were all depositors and stockholders. In one case—that of Mr. Odell, the deposit was $41,000 at the time the bank closed. Mr. Odell was interested in Claflin & Co., which kept large deposits with the bank—at least during most of its history. Complainant ignores that if **ALL** these Directors were negligent, they were **ALL** as negligent with regard to **THEIR OWN PROPERTY** as the property of strangers entrusted to the bank.

Vice-Chancellor Pitney, in *Campbell* v. *Watson* (62 N. J. Eq. 406), declares that the first measure of diligence in the case of bank directors is as follows: "The same attention which ordinary, prudent, diligent men pay to their own affairs."

That the personnel of the directorate was excellent, was (during the hearing) openly stated by the Court, and is indicated by the conclusions filed below. Is it to be believed that twenty high-grade, experienced men would—where their own property was concerned—be fools enough to entrust their property to a patently untrustworthy person? *And yet—necessarily—the directors, taken as a whole, gave to the property of all the depositors the same care that they gave to their own property invested in the bank.*

This factor, of the immediate personal pecuniary interest of the directors *in the result of their decisions* respecting Nones and during the whole history of the bank, we respectfully suggest, cannot be ignored upon this review.

POINT XXIII.

Smith at the time of the Nones affair owned stock of Roseville Trust Company of a value of $25,800; the loans to Nones were far less than this in amount; the large interest which Smith held almost precluded the possibility of a judgment of untrustworthiness by the Directors.

At the very outset of Smith's examination as a witness for complainant appears this testimony:

> "Raymond E. Smith, sworn."
> "*Direct examination* by Mr. Hinds."
> "Q You were the secretary and treasurer of the Roseville Trust Company? A Yes, sir."
> "Q When did it first come to your attention that the Trust Company was being organized? A I think it was in the spring of 1908."
> "Q You were one of the subscribers to its stock? A Yes, sir."
> "Q To what extent? A Why, when the bank opened for business I think I had one hundred and seventy-two shares; something like that."
> "Q At the par value of $50? A Of $150."
> "Q Of $150 each? A Yes."
> (Page 715, lines 15 to 25.)

This produces a total of $25,800.00.

Is it necessary to argue this point?

It is true that he had "borrowed" on *some* of the stock (*ib*). But, if that fact had been known to the directors (which it was not) it would have only served to demonstrate his keen interest in the institution.

POINT XXIV.

Appellants' conduct taken as a whole displays diligence, not negligence.

Even the Vice-Chancellor at one point (page 212) was impelled to say:

> *"It is to be noted that this case differs from most of the reported cases to which my attention has been directed.* In the Watson case, for example, there was no attempt at supervision or examination. Here there was an honest effort on the part of the committees to do their duty. The executive committee met weekly. The examining committee met semi-annually and made an examination that seemed to it to be sufficient."

Let us take for example the case of Lurich, one of these appellants, as illustrated by his testimony. What is true of him is true of all these appellants.

The testimony of Lurich reflects his unflagging zeal, his close and earnest attention to every duty that devolved upon him, his willingness and desire to assist on every occasion, his keen-eyed interest in the affairs of the Trust Company which led him to criticize even the slightest appearance of what might be questionable; his constant attendance at meetings of the board, of the executive committee, at which the affairs of the bank were discussed for hours on each occasion with the utmost care and minuteness—in a word, a devotion so complete and thorough as to deserve employment of the word consecration.

Of course, from the lapse of time, and absence of contact with the Trust Company's affairs and records, Lurich—like all the witnesses—was unable to recall the details of fact, which at the time of their occurrence had not become fastened in his memory, because not associated with the

expectation that they would ever be subject to legal inquiry—because not associated with anticipation that the Trust Company would become insolvent.

On the other hand—like in the case of the purchase by Smith's father of a garage, or the removal of Jennings from the teller's window—where the event was unusual or involved Lurich's individual or sole participation, we find his memory extremely clear.

And those events are the touchstones, those are the criteria by which can be tested the collective or agglutinative facts of his general experience and conduct as a director during the five years of the Trust Company's existence—collective or agglutinative facts, the *details* of which are now lost and which only remain in memory in the form of a composite picture.

In our endeavor to function properly and aid the Court, let us try to cast Lurich's testimony into the form of a brief connected narrative.

Lurich in 1908 had been for over twenty years engaged in the real estate business in Roseville. His business was large and successful (1289, bottom).

This "neighborhood institution"—as complainant's brief below properly calls it—was formed, Lurich purchasing about $1,000.00 of its stock (7 shares at $150).

His knowledge as a real estate expert would make him, as director, a valuable asset to the Trust Company. He became such. How he entered upon the discharge of his duties is well shown in his own words: "I myself had my own reputation in that little local place of Roseville at stake, to see that I would not commit any overt act whereby anyone could point a

finger at me, so that I could continue to make my living there'' (page 1334, lines 8-12).

He had known many of his co-directors for years—Odell, cashier of Claflin & Co.; big merchants like the Banisters and Fairlie; Mr. Bell, formerly head of the U. S. Secret Service (1291).

He had visited Odell at the Claflin office theretofore, had observed his conduct and connection there, knew his church connections and high standing in the community, and so was led to suggest and possibly bring about the selection of Odell as president of the new Trust Company (pages 1291, line 20, to 1292, line 15).

Surrounded by men such as these and having the confidence in their integrity and ability, which they deserved, he was willing to give his service without compensation in building up and assisting in the management of the infant institution.

After a skeleton upon which the structure of the Trust Company's activities might be built had been framed in a proper set of by-laws, and proper persons of standing and ability have been assured as president and vice-president, the incorporators were confronted with the selection of the treasurer, or active paid officer of the institution.

His choice was not left to any star-chamber proceeding. Various candidates presented themselves in open meeting and the preference of every one in interest was permitted full expression. It developed that Smith was first choice, and Smith antecedents were carefully canvassed. Such canvass disclosed nothing but what was commendable; the recommendation and praise from every source assured that in Smith the Trust Company would have a treasurer whose

ability and probity were beyond doubt—page 1296, line 18, to page 1294, line 12 (see also Munroe's testimony).

After Smith's election as treasurer came the question of a proper system of bookkeeping. Under the directions of Mr. Bataille, one of the directors, who was an experienced banker, a system was devised, which met with the approval of the Banking Commissioner.

That system we have hereinbefore fully considered.

The Trust Company now commenced operations.

Lurich was at once made a member of an *appraisal committee* and attendance committee. He continued to be such during the life of the institution. Lurich, at his own expense, would, whenever occasion required it, make a tour of inspection with other members of the committee, who, as he, had special faculties in connection with appraisal of real estate.

Matters moved along smoothly until the Nones episode. Then came to the fore this question: "Shall we discharge Smith (a man whom we have just selected because of his unblemished character and splendid record) because of an amiable discretion, the result of too great zeal? The matter was debated for hours at a meeting which filled every chair in the directors' room (page 1297, bottom); it was the longest board meeting in the history of the institution (page 1295, line 32); Lurich was impressed with Smith's HONESTY (page 1296, lines 29-30); Mr. Lurich remembers that William H. Banister, the man "from Missouri," the man who "had to be shown everything clearly" (page 1296, top), was strongly in favor of Smith's retention (page

1661, top). "After having discussed everything pro and con" the jury of twenty able and conscientious men who were to judge the facts, and who all had part of their own capital invested in the institution, unanimously decided that Smith was honest and entitled to their full confidence.

Upon what principle can any court today review that judgment of those twenty conscientious men, who gave the matter full consideration?

For about two years after the Nones episode things moved smoothly. Odell came every morning to the bank; Monday evenings as well; Odell worked on the bank's business at home (1302, lines 18-31; also 1307, top). Apparently he was fulfilling his full duty of supervising the work of Smith and the other officers, countersigning checks of the Trust Company, where their issuance was necessary (pages 1335, line 23, to 1336, line 35). Lurich went to the bank nearly every day; he saw *Odell* there; he knew that Odell was careful in every respect; he heard him instruct the examining committees with great care (1302, lines 15 to 30); the appearance of these committees he knew was to be a surprise (1316); he knew of the arrangement by which the state examinations and those of the committee were to alternate (1315 and 1316, first two lines); he knew the examining committee were desirous of performing their task well; they called on him to assist them in connection with examination of abstracts and mortgage papers (1311); he met them on one occasion in the vaults of the Fidelity Trust Company, examining securities; he knew that the state examinations were actually made, because of correspondence with the Banking Commissioner, the rendering of bills for "services," and his own

personal inspection (1315); he did not view the work of the *bank examiners* as perfunctory; let us quote his own words: "Because the State Banking Department, I looked upon as the right and proper parties to conserve the poor people's interests in our banks in this state; they have expert accountants, or supposed to have expert accountants, to go and examine these accounts; they are very well paid for that, so they can hire the best of talent for that. Why shouldn't I rely upon their statement * * *" (page 1333, lines 20-40). He was a constant attendant at directors' meetings (page 1291, top). He familiarized himself with the method of other institutions (answer to interrogatory 187), especially Fidelity Trust Company (page 1310, lines 20-42).

In short, he actively saw, appreciated, understood and knew from his constant contact with his institution, and by comparison with the work of other institutions, that there was being exercised that check and control of the operations of his institution which the law and prudence and custom required; he saw an apparently zealous and careful president, an apparently efficient examination committee, whose work cooperating with that of the state examiners should insure, so far as is humanly possible, against malversation on the part—not of Smith, for he was not the only employee of the bank—but on the part of Smith and all the other employees. (See page 1325, lines 1 to 20.)

What he saw and appreciated and understood and knew was not the knowledge, appreciation and understanding of a mere spectator, but of a constant participant in practically every directors' meeting. The activity of the directors at their meetings apparently secured the commenda-

tion of the Banking Department (answer to interrogatory 187).

Lurich's activity and keen-eyed attention to the welfare of the institution was by no means limited to directors' meetings.

On one occasion Lurich heard a rumor that Smith had purchased a garage on Central avenue, near 9th street, in Newark. Lurich at once went to Smith, repeated the rumor and told Smith, "I don't think that the board of directors would stand for, you acting as secretary of this bank and running another business on the outside" (page 1304, lines 12 to 25). Smith informed him that the garage had been purchased, as a bargain, for his father; that the bank would not lose a minute of his time in that connection. Lurich investigated Smith's account and found it to be absolutely correct (answer to interrogatory 191; also page 1305, lines 1-15, transcript).

On another occasion Lurich, after first remonstrating, procured action to be taken because of Jennings' discourtesy to Hebrew customers of the Trust Company (pages 1305, line 28, to 1306, line 30).

In order to increase the business and popularity of the Trust Company, Lurich sought to inaugurate a certain method in imitation of the Fidelity Trust Company (page 1310, lines 20 to 40); his interest led him to suggest the scheme for getting new business described on page 1307 of the transcript, and to take the time and trouble necessary to put such scheme into operation.

In the face of such proof—which may be duplicated in the case of each appellant, is it not fair to say the zeal and devotion of these appellants cannot be discarded because of what occurred

unbeknown to them, by the hidden collusion between the employees of the bank, by the failure of the chairman of the examining committee and the bank examiners to discover the evidences of Smith's frauds, by the failure of Mr. Odell to discover those frauds, despite his daily contact with Smith and the books of the institution?

The catastrophe occurred not because of any act or omission of these appellants, but in spite of their zeal and devotion.

POINT XXV.

The decree below should be reversed and the bill of complaint dismissed, with costs.

OTTO A. STIEFEL,
Of Counsel with Appellants,
Harvey Mott, Charles C. Lurich,
William T. Benjamin, William C.
Keim and G. Rowland Munroe.