

N. J. Court of Errors and Appeals.

<hr/> <i>Between</i>	}	<i>On Bill.</i>	
DANIEL DODD, AND OTHERS,			10
<i>Appellants,</i>			
<i>and</i>			
GEORGE WILKINSON, RECEIVER,			
<i>Respondent.</i>			
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ARGUMENT FOR RECEIVER. 20

STATEMENT OF FACTS.

George Wilkinson, as receiver of the Newark Savings Institution, filed his bill against the appellants, who were its managers, to compel them to make good certain losses which the Institution sustained while they managed its affairs.

To this bill the managers, except Hugo Fraentzel, who has answered, demurred—some for defect of parties as well as want of equity, others for want of equity. 30

The case (as admitted by the demurrer) is this.

The Newark Savings Institution was incorporated February 25, 1847. By the charter of incorporation its affairs were to be conducted by twenty-five managers, who were themselves to fill all vacancies in their number. (p. 5, l. 5.) They were to choose one of their number president, and had power to appoint such other officers as to them should appear necessary, (p. 3, l. 16.) and to make by-laws. 40

By the fourth section of its charter it was authorized to "receive as deposits all sums of money which may be offered for the purpose of being invested, in such sums and at such times and on such terms as the by-laws shall prescribe, *which shall be invested accordingly*, and shall be repaid to the depositors at such times and with such interest and under such regulations as the board of managers shall from time to time prescribe."

10 By Section 5 the rate of interest to be allowed depositors, was to be regulated by the Institution, "so that they (the depositors) shall receive a ratable proportion, as near as may be of the profit," deducting expenses and a reasonable surplus or contingent fund.

By Section 6 the managers were to receive no emolument for their services. But this section was subsequently repealed, and it was provided that "all compensation to be allowed managers should be first determined upon by the board of managers at their meetings." Under the
29 act as thus modified the president, Daniel Dodd, received for five years prior to May 15, 1884, an annual salary of \$4,000. A. Bishop Baldwin, one of the managers and vice-president, received at first \$600, and afterwards \$1,000, with \$8 per week additional, and the other managers \$3 per day for each day's service, exclusive of attendance upon board meetings, but inclusive of attendance upon committee meetings. (p. 13, l. 2, *et seq.*)

The Institution could issue no stock. It possessed and could possess no capital other than the deposits of
30 the depositors. Its managers were entitled to no part of its earnings or surplus except by way of compensation for services rendered as just stated. (§ 14 of Bill.)

By Section 35 of the savings bank act, (R. S. 1065, § 35,) it is made the duty of the managers of all Savings Institutions, by a committee of not less than three of their number, on or about the first day of January of each year, "thoroughly to examine the books, vouchers and assets of such savings bank and its affairs generally, and to
40 make a report based upon such examination, verified by

the oath or affirmation of a majority of the managers, making the same to the secretary of state." This report was to state "the cost, par value and estimated market value of all investments, designating each particular kind of security, and the amount loaned upon the pledge of securities, with a statement of securities held as collateral for said loans." (p. 5, l. 22.)

By section seven, of the charter, the Institution could invest only in the public stocks of the United States or of this State, and in bond and mortgage on unincumbered real estate. By supplement of March 5, 1850, it might also invest in the public stocks of New York, and in certain other designated States, and in the stocks of certain cities. By supplement of February 9, 1859, it was authorized to invest in the stocks and bonds of "the several States," and in the bonds "issued by the several counties and cities in the different States," and it might also "make temporary loans upon personal securities, with pledges of collateral securities at least equal to the amount loaned, to an amount not exceeding at any time of twenty per centum of the whole amount of the assets and securities of the said corporation."

These several provisions relative to investments were repealed by act of April 5, 1878, P. L. 393, which provided that it should not "be lawful * * * for any savings bank or other savings institution, whether chartered or incorporated under a general or special act of the legislature of this State, and any provision contained in the charter, or any supplement thereto of such savings bank, or savings institution, to the contrary, to invest the money deposited with the same in any manner except as follows": The investments not prohibited were the following: (1.) Stocks and obligations of the United States. (2.) Bonds of this State. (3.) Bonds of any State that has not defaulted in the payment of any part of either principal or interest, within ten years previous to the investment. (4.) Bonds of any city, town, county or village of this State, and certain interest-bearing obligations. (5.) Bonds

of the cities of New York, Brooklyn and Philadelphia.
 (6.) Bonds secured by mortgages; and (7,) real estate under certain restrictions.

By said act of April 5, 1878, it was also provided that it should not be lawful for any savings institution to loan the money on deposit upon notes, bills of exchange, or drafts, excepting upon the additional pledge of certain collateral securities, "which collateral security or securities shall be of the same nature and character as those
 10 "in which the money deposited may be invested as "directed in the first section of this act, or the capital "stocks of National or State banks, or other corporations of this State, which have not defaulted in the "payment of interest dividends within two years next "preceding the time of such loan, and then only to the "extent of ninety per centum of the par value of such "collaterals, and provided, that the total amount of such "loans shall not exceed fifteen per centum of the whole de-
 "posits held by such institution."

30 A violation of the above provisions is made a criminal offense.

This act was slightly modified by the act of March 25, 1881, which provided that not more than eighty per cent. of the whole deposits should be invested in bond and mortgage, instead of seventy per cent., as prescribed in the act of 1878. (P. L. 1881, p. 286.)

To complete the reference to legislation on this subject reference may be made to the act of March 22, 1883,
 30 (P. L. 1883, p. 132,) which seems to have been passed in ignorance of the above acts of 1878 and 1881, but has no effect upon them, so far, at least, as the questions presented by this bill are concerned.

Thus much as to the legislation.

The by-laws provide (*inter alia*) for a funding committee of four members, of which the president and vice-president shall be *ex officio* members, this committee to
 40 moneys deposited in or belonging to the Institution as

they shall deem proper, and in accordance with its charter, and at their discretion to sell, dispose of or exchange any of the securities in which the funds of the Institution may be invested, (p. 8, l. 5.) They also provide for an auditing committee of five members, which shall examine the cash securities and accounts of the Institution and report their condition at every regular quarterly meeting of the board in January, April, July and October, (p. 7, l. 11; p. 8, l. 22.) To the president is given the custody of the "books, papers, funds and assets, and the direction of the persons employed, * * * and generally of its executive business, subject always to the action of the board." 10

For many years the stated meetings of the board had been held monthly, (p. 6, l. 34; p. 7, l. 1,) but on September 12, 1883, and less than a year prior to its failure, the by-laws were so amended that these meetings were only required to be held quarterly. (p. 8, l. 32.)

The history of the Institution, so far as it is shown by the bill, was this: Shortly after its incorporation it began to transact business and continued to do so, with a very short intermission, occurring in December, 1877, until May 16, 1884, (p. 6, l. 28,) when it was enjoined (p. 33, l. 14,) in consequence of insolvency. A receiver was appointed on June 7, 1884, upon bill filed against it. 20

It is proper to state as one of the facts in the case that on December 12, 1877, the Institution presented a petition to the Court of Chancery, praying that it might be decreed to be a trust, whose administration should thereafter be under the control of the Court. (page 9.) An order was made and subsequently modified, under which, as a matter of fact, the Institution professed to be acting, and thereafter two accounts were kept, one of which was styled the old, embracing all depositors who had made deposits prior to December 12, 1877, and the other of which was styled the new, embracing all depositors who had become such since that time. (§ 19 of bill.) 30

Since the decision of this Court at its last term in the case of *Una vs. Dodd*, no liability could be imputed to 40

the managers for having violated the orders of the Court made in the course of that proceeding, but the proceeding itself, as a fact in the case, explanatory of the acts of the managers and of the way in which they have kept their accounts, could not be properly omitted from the bill, even if drafted since that decision.

In the year 1881 the managers entered upon that course of illegal conduct which finally resulted in the ruin of the Institution, (§ 20 of bill.) The bill shows a series of illegal acts on the part of the managers, extending from August of that year to the time of the failure, of a character so striking that it will be impossible for any manager to say he had no knowledge of the way in which the Institution was being conducted. Had only a single loan been shown, in consequence of which a loss directly resulted, most of the managers would doubtless have disclaimed knowledge of it or concurrence in any course of conduct which led to it. But the unlawful loans here shown cover so long a period, are so enormous in amount, and appear in such numerous shapes, that to aver ignorance of them or of the lax policy which permitted them, would be in itself a confession of such gross negligence as would affect them with liability on that ground alone.

The allegations of this character, however, are rather introduced to anticipate possible defences. On this general demurrer they may be passed by without further comment.

The facts, then, in regard to these loans, so far as now material, are these :

On August 1, 1882, the Institution held to the credit of the new account certain United States bonds, viz :

4	per cent. bonds,	amounting to	(par value)	\$1,550,000.
4½	" " " "	" "	" "	425,000.

Total	\$1,975,000
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On August 9, 1882, the funding committee took the following action, as appears from their minutes :

" The sale of four per cent. and four and a-half per

cent. bonds at best rates was agreed to, and *the loaning of the proceeds upon collateral ordered.*"

This resolution was read at a meeting of the full board, held on September 13, 1882, and thereat approved, (p. 22, l. 1.)

On August 1, 1882, the deposits to the
 credit of the old account amounted to. \$1,516,736 88
 To the credit of the new account..... 5,506,841 43

Total, (comprising all the deposits of the
 Institution, p. 22, l. 25).....\$7,023,578 31 10

Between Aug. 1, and Aug. 10, the deposits to the credit of the new account were increased \$60,000; those to the credit of the old account were diminished \$114,000.

Between the same dates, and for several months thereafter, the amounts loaned upon notes, bills of exchange, or drafts, with the additional pledge of collateral security, was \$1,126,649.85, or 15.6 per cent. of the whole deposits held by the Institution. 20

Under the foregoing resolution, there was sold in the month of August alone bonds of the par value of \$979,000; and there was lent on pledge of collateral, out of the proceeds of the sale and other moneys, to Victor Newcomb, (p. 24, l. 5,) \$350,000; to E. H. Harriman & Co., (p. 24, l. 21,) \$270,000; to Fisk & Hatch, (p. 26, § 26,) \$660,000; total, \$1,280,000. Or more than 16 per cent. of the whole deposits of the Institution in addition to the 15.6 per cent. already outstanding.

And the allegation of the bill admitted by the demur- 30
 rers is, that from the time of the passage of this resolution to May 15, 1884, (the date of the failure) the funding committee, with "the consent of the managers, constantly loaned from at least thirty per centum to fifty per centum of the total deposits of said Institution on collateral security, in direct contravention" of the act of 1878, (P. L. 394,) which provides that "it shall not be lawful for any savings institution in this state to loan
 "the money on deposit with the same or any part thereof
 "upon notes, bills of exchange, or drafts, excepting upon 40

“the additional pledge of collateral security or securities, (naming them) * * * ‘provided that the total amount of such loans shall not exceed fifteen per centum of the whole deposits held by such Institution.’”

The third section of the act prescribes that a violation of any of its provisions by the managers or officers shall be a misdemeanor, subjecting the guilty persons to fine and imprisonment.

10 At the time when the \$660,000 was loaned to Fisk & Hatch there had already been loaned to them \$458,599.85—making a total of \$1,018,599.85, or 14 per cent. of the total deposits.

The amount thus lent was, in October, 1882, increased to \$1,600,000, and in January, 1883, to \$1,750,000.

In the last-named month the managers entered into an agreement with Fisk & Hatch that the money thus lent should remain in the hands of that firm “right along, say
20 “quired to meet extraordinary or unexpected demands,” from the depositors of the Institution, the firm paying interest thereon at the rate of five per cent. as a permanent rate, and keeping at all times in the city of New York, in a box belonging to them, the said firm, of which they alone had the key, and to which they alone had access, a sufficient amount of good securities to cover the amount with ample margin.

This money remained in the hands of Fisk & Hatch until March 29, 1883, when the managers requested
30 the firm to convert it temporarily into bonds of the United States, to answer a temporary purpose. To this the firm consented and reported to the Institution that they had purchased bonds with this and other money of the Institution, to the par value of \$2,700,000. Of these, as soon as the temporary purpose for which the money was directed to be converted was answered, three per cent. bonds of the par value of \$1,000,000, and four and a half per cent. bonds of the par value of \$200,000, were sold in April, 1883. All the residue of the bonds,
40 (*i. e.*, bonds of the par value of \$1,500,000,) remained

until August 15, 1883, by permission of the managers, in the hands of Fisk & Hatch, *who had the privilege of using them* in lieu of the money agreed to be lent under the January agreement. On August 15, 1883, a million threes were taken to Newark, but the unsold four and a half per cent. bonds, (the par value of which was \$500,000,) were allowed to remain in the possession, use and control of Fisk & Hatch until their failure on May 15, 1884, as an equivalent in part for the money agreed to be loaned in January. (§ 26 of bill.) 10

This part of the transaction was trebly illegal. It was illegal because a sale of United States bonds had been ordered and made in August, 1882, to enable the managers to make loans on collateral at a time when the limit of 15 per cent. had already been exceeded; and this 15 per cent. limit continued to be very largely exceeded down to the time of the failure of the Institution. (p. 23, l. 15.) It was also illegal, because by the agreement of January the managers were not only to lend the money, but were also to allow the securities securing that money to remain in the hands of the borrowers, who had the sole custody of them, (p. 27, l. 5,) and who in fact used and changed them as often as it suited their convenience to do so. (p. 29, l. 27.) Thus they took no real or substantial collateral whatever. And moreover many of the collaterals so remaining in the borrowers' hands were unlawful collaterals, *i. e.*, collaterals which the act of 1878 forbade the managers to take. 20

We now come to the second branch of the transaction 30 with Fisk & Hatch. The bill shows that after the temporary purpose of the conversion in March, 1883, of money into bonds had been answered, the managers began again to lend money to the firm subject to the terms of the January agreement, in addition to the loan of the \$500,000 four and a half per cent. bonds as above explained. These loans increased as the Institution withdrew or sold its other bonds. On April 30, 1883, the money so lent amounted to \$225,000, and on July 31st of the same year, to \$506,000. This amount was grad- 40

ually increased until on February 29, 1884, it amounted to \$987,000, when it was again, to answer the same temporary purpose for which the conversion in March, 1883, had been directed, for a few days, converted into bonds of the United States, but these bonds were almost immediately reconverted into money, and this money again lent to Fisk & Hatch on April 30, 1884, the amount thus lent being then \$851,000, and at the time of the failure, (May 15, 1884,) \$845,532.04.

10 This part of the loan is open to precisely the same objections as the former, but is of less importance in the case (\$845,532.04,) as it was repaid by Fisk & Hatch to the receiver.

There is still another branch of the transaction with Fisk & Hatch, which remains to be noticed.

20 Although the resolution of August 9, 1882, authorized a sale of all the United States bonds then in the hands of the Institution, the managers did not in fact sell all; \$580,000 four per cent. bonds remained and were registered in the name of the Institution. Yet notwithstanding this registry, at the request of Fisk & Hatch, they were, with the consent of the funding committee, in the autumn of the year 1882, lent to that firm. On January 15, 1883, (the bill, by a clerical error, says 1884,) the funding committee purchased \$320,000 additional four per cent. registered government bonds, and these bonds they also, immediately after their purchase, lent to Fisk & Hatch. All the bonds so lent, to the par value of 30 \$900,000, were lent without security, and were never returned to the Institution. In fact they were never demanded until the day the firm failed. (p. 29, § 29 of bill.)

From the above statement it appears that on May 15, 1884, Fisk & Hatch were chargeable with money of the Institution to the amount of \$845,632.04, and also with :

4½ per cent. bonds of the par value of..	\$500,000 00	
4 " " " " " "	900,000 00	
They were also chargeable (p. 31,) with other 4½ per cent. bonds purchased by them on March 27, 1884, of the par value of.....	556,000 00	
And 4 per cent. bonds purchased May 1, 1884, of the par value of.....	80,000 00	
The sum total of these bonds being.....	\$2,036,000 00	10

The bonds and money together constituted more than one-half the assets of the Institution, and had all been pledged, used or otherwise disposed of by Fisk & Hatch. (p. 32, ll. 1, 6.)

Fisk & Hatch's failure caused the failure of the Newark Savings Institution. Its assets on May 15, (other than those in the hands of Fisk & Hatch,) amounted to \$3,118,837.40, and its liabilities (exclusive of current debts,) to \$6,156,534.28.

The receiver was first temporarily appointed May 16, 1884, and subsequently on June 9, 1884, his appointment was continued and confirmed. After his appointment he made diligent efforts to obtain payment of the firm's liability to the Institution, but after frequent interviews with them and inquiry into their financial condition, he found that he could not by any legal proceedings recover the value of the bonds and money due from them, and that, if he sued, they would make an assignment, in which event he would receive little or nothing, owing to the insignificant amount of their assets. They enjoyed, however, considerable business reputation and credit, and informed him that if he would release them they could borrow a sum sufficient to enable them to pay him the money they owed, viz., \$845,632.04; and that only on that condition could they do so. The receiver being satisfied of the truth of their representations, joined with them in executing the paper writing of May 29, 1884, (p. 34,) which, it is claimed, has discharged the managers. Its provisions and effects will be considered more fully hereafter.

It is sufficient now to say that it purports to be an unqualified sale by Fisk & Hatch to the receiver of certain securities enumerated in a schedule annexed to it, which securities consist principally of Chesapeake and Ohio stocks and bonds, and a like sale by the receiver to that firm of the government bonds for which they were accountable. That such was not its real character is apparent from the fact that the receiver did not then have those government bonds to sell Fisk & Hatch, 10 having previously converted them to their own use, and also from the fact that the securities enumerated in Schedule A, had already been transferred by that firm to Daniel Dodd, the president of the Institution, "on account of their aforesaid liability to it," (p. 32, l. 10,) so that the firm were no longer owners of them.

The loss arising from the failure of the firm to return the government bonds and money in full, exceeds the sum of \$400,000. (p. 33, l. 2.)

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POINTS.

Since the case of *Williams vs. McKay*, it cannot with any plausibility be asserted that the negligent and unlawful acts charged against the managers do not show a cause of action. The various objections to complainant's bill are, therefore, reducible to three. It is said:

1. That the bill is defective for want of parties.
2. That the agreement of May 29th is a bar to any
- 30 suit against the managers.
3. That the suit is premature.

These objections will be considered in their order.

I. Are Fisk & Hatch necessary parties to this suit?

Most of the cases cited by defendants in the Court below tend merely to show that they were (outside of the agreement of May 29) *proper* parties—that is, that no objections could have been successfully urged against their being joined as parties. This is a very different 40 thing from showing that they are *necessary* parties.

The following cases cited on the argument tend merely to establish this.

Consett vs. Bell, 1 Y. & C. 569.

Lord Montford vs. Lord Cadogan, 17 Ves. 485.

Salomon vs. Laing, 12 Beav. 377.

Lund vs. Blanchard, 4 Hare, 9.

Hanson vs. Worthington, 12 Md. 418.

In *Lewin on Trusts*, *846, it is said: "If co-trustees commit a breach of trust and a third party reaps the benefit, he must also as a *quasi* trustee be made a defendant, since he is liable to be sued by the *cestui que trust*, and the equities between himself and the co-trustees ought to be settled so far as is practicable." 10

That this is the ordinary rule is not denied. It is no more than a deduction from the still more general rule that all persons immediately or consequentially affected by the plaintiff's demand, must be made parties in order that the entire controversy may be settled as far as practicable in a single suit. And both these 20 rules are only rules of convenience; whenever there seems to be a convenience in departing from them, courts of equity do not hesitate to do so.

Thus where conveyances are made in trust to entangle affairs and make it difficult for the mortgagor to redeem, it is not necessary to make all the persons interested in the trust, parties.

Yates vs. Hambly, 2 Atk. 237.

If a party entitled to administer refuses to take out administration himself, and prevents any one else from doing so, he will not be allowed to object to a suit being proceeded with because a personal representative is not before the Court. 30

D'Aranda vs. Whittingham, Mos. 84.

Where there are several executors or administrators the rule may be dispensed with, if any of them are not amenable to the process of the Court, or if they have stood out process to a sequestration.

Dan. Chan. Pr. 298, (1st Amer. Ed.)

So if the parties are numerous the Court, on a very familiar principle, will not require all to be brought before it.

And the rule as above stated by Lewin was, with all its exceptions, found to be so inconvenient in practice that it was by the 32d order of August, 1841, provided "that in all cases where plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the
10 Court, as parties to a suit concerning such demand, all the persons liable, but the plaintiff may proceed against one or more of the persons severally liable."

This order is found in 5th Beav. 294, and is held to apply to the case of trustees. The very fact that the Court had power by *order* to change the rule, demonstrates that it was a rule relating to a matter of practice merely, which the Court had power to change without the aid of the legislature.

20 The very case of *Munch vs. Cockerell*, 8 Sim. 219, decided five years before the order was made, and which is the principal authority relied upon in support of the rule, shows how flexible it was. In this case there were two sets of trustees: first, trustees under a settlement of 1778; second, trustees under a settlement of 1791. The bill was filed by the representatives of a *cestui que trust*, under the second settlement, charging the trustees under the first settlement with having failed properly to secure a certain fund which they had allowed to remain in the
30 hands of P. & Co. up to the time of their failure, and charging the trustees under the second settlement with having neglected to take that fund into their own hands, after they had been decreed to be entitled to it, and when they might have procured its transfer to them at any time. Only the surviving trustees under each settlement were made parties. On demurrer it was held that the executors of the deceased trustees under the second settlement were necessary parties, but that the executors of the deceased trustees under the first settlement were not. Now
40 it is manifest that if the rule were inflexible all the trus-

tees—as well those under the first as under the second settlement—should have been before the Court.

McGatchen vs. Dew, 15 Beav. 84, is another illustration of the flexibility of the rule. It was there held, that if a person entitled to a share of a fund standing in the names of trustees, make a new settlement and appoint new trustees who commit a breach of trust in which the old trustees are also implicated, the *cestui que trust* under the last settlement may have relief against the new trustees without making the old trustees parties. Here¹⁰ the persons who were active in committing the breach of trust were Styleman and North, the trustees under the old settlement, but they were not made defendants. The new trustees were merely chargeable with non-feasance. The Master of the Rolls said: “The infant plaintiffs may proceed against *their* trustees without making other persons, who have also committed or joined in the commission of the breach of trust, parties.”

In *Walker vs. Symond*, 3 Swan. 75, Lord ELDON said: 20
“Where three trustees are involved in one common breach of trust, a *cestui que trust* suffering from the breach and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees.”

In *Bailey vs. Inglee*, 2 Paige, 278, Chancellor WALWORTH said: “If a trustee has parted with the trust fund the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with the trustee, at the election of the 30 complainant.”

Finally it is said in *Lewin on Trusts*, *846, “If a person invested with a fiduciary character be guilty not of a mere breach of trust or non-performance of a civil obligation, but of a *tort* or *delictum*, that is a fraudulent or wrongful act, the remedy might always have been pursued against that person only, without making those who confederated with him also parties.” Surely the acts charged by the present bill are *wrongful* within the mean- 40

ing of this passage, when the statute has made them *criminal*.

It is by no means clear, then, that even if this were the case of a private trust, confided to individuals, it would be necessary to join all the trustees implicated in the breach, much less such trustees and strangers. The agreement made with Fisk & Hatch would make a suit against them difficult, if not impossible; and this fact alone, where the Court may exercise its discretion in the matter
 10 of parties, would incline it to adopt that more liberal practice which has in its support so many precedents and so much high authority. The case in hand is, however, that of a *corporate* trust; and in cases of this class it has been uniformly held that the wrong being severable, all the wrongdoers need not be made parties.

Charitable Corporation vs. Sutton, 2 Atk. 400.

Attorney-General vs. Wilson, 1 Cr. & Ph. 1.

Stainbank vs. Fernley, 9 Sim. 556.

20 *Seddon vs. Connell*, 10 Sim. 81.

Cunningham vs. Pell, 5 Paige, 607.

Heath vs. Erie R. R., 8 Blatch. 347.

If it be unnecessary to join all the directors who are guilty of a breach of trust, though it be a breach of trust committed jointly by those who sustain the same trust relationship toward the persons injured, *a fortiori*, is it unnecessary to join directors and third persons, who are strangers to the *cestuis que trust*, and still more unnecessary
 30 is it to join the managers and Fisk & Hatch in one suit, where, as it will be shown, the wrongful acts charged against the managers are separate and distinct from those charged against Fisk & Hatch.

If the question of parties is at all dependent upon the question whether the managers have a right of action for contribution against Fisk & Hatch, then the following cases show that in the case of breaches of trusts like the present, there is no contribution as between wrongdoers.

Charitable Corporation vs. Sutton, *supra*.

40 *Attorney-General vs. Wilson*, *supra*.

And cases cited by the Vice-Chancellor in his opinion. (p. 62 of case.) See also *Newman vs. Fowler*, 8 Vr. 89.

The reason of this rule is well expressed in *Andrews vs. Murray*, 33 Barb. 354, as follows :

"In actions for joint torts a joint liability exists and a recovery may be enforced against any of the defendants. The party paying such claim has no right to contribution from the other defendants, even although by the payment he has relieved them from their liability. The principle on which these decisions are made is that whenever the liability arises, *ex delicto*, there is no contribution. Either of the trustees might have avoided this liability by attending to the duty imposed upon him by the statute. He cannot charge any other trustee with the consequence of his own negligence. The statute imposes the duty on each, the liability attaches to each, and the policy of the law is to leave each one to the consequence of his own negligence, so as to insure stricter attention to the provisions of the statute on the part of each of the trustees, which might not be the case if such negligence could be divided among the whole."

It is further urged that Fisk & Hatch are primarily liable, and the managers only secondarily ; and for that reason Fisk & Hatch are necessary parties. But it is too clear for argument that those who are primarily liable to the *depositors* are those whom the law has assigned, and who have voluntarily and for compensation agreed, to guard the depositors' interests. The case of *McGatchen vs. Dew*, 15 Beav. 84, is an authority on this point ; so is also *Thompson vs. Harrison*, 2 Bro. Ch. *164. And it is very doubtful whether, in this species of breach of trust, (so far as the depositors are concerned,) there is any such thing as primary and secondary liability. Says the Master of the Rolls, in *Wilson vs. Moore*, 1 Mc. & K. p. 9, l. 43, "It is a misapprehension to suppose that any persons concerned in a breach of trust are *primarily* liable. All parties to a breach of trust are *equally* liable." This insistent is moreover completely met by the above cited decisions relating to

breaches of trusts committed by directors and managers of corporations.

II. The question of parties being thus disposed of, we are next to consider whether the agreement of May 29th is a bar to the suit against the managers.

In order to a correct understanding of this question we will consider (1) the nature of the Newark Savings Institution; (2) the relation of its managers to it and its depositors; (3) the relative position which these managers and Fisk & Hatch occupy toward the receiver.

(1.) What the Newark Savings Institution is depends entirely upon what the charter makes it. It is authorized by the fourth section of that instrument to receive as deposits "all sums of money which may be offered for the purpose of being invested, in such sums and at such times and on such terms as the by-laws shall prescribe, which shall be invested accordingly," *i. e.*, by and in the name of the Institution. Section five prescribes what the managers shall do after the money has been so invested by the corporation. "It shall be the duty of the managers to regulate the rate of interest to be allowed to the depositors, so that they shall receive a ratable proportion, as near as may be, of the profits, after deducting therefrom all necessary expenses and a reasonable surplus or contingent fund."

The obligation which rests upon the Institution is therefore twofold. First, to invest all deposits in the name of the corporation. Second, to so regulate the rate of interest accruing on the deposits invested, as that all the depositors shall receive a ratable proportion of the profits, after deducting expenses and a reasonable surplus.

In the strictest sense, then, is the relation between the Institution and its depositors that of trustee and *cestui que trust*. In the former is lodged the legal title; in the latter the beneficial interest. There is imposed upon the Institution, by its charter, an express, active trust.

As this matter was discussed at length in my argument in the contempt case, I here do no more than refer to it. The conclusion which I reached on this point was approved of by Mr. Justice DEPUE in the opinion he delivered in that case.

(2.) We will next consider the relation of the managers to the Institution and to the depositors. In general, the relationship existing between the directors and the corporation is that of agent and principal. But there is this peculiarity about the case of a corporate trustee. If it commit a breach of trust, the act which constitutes the breach, while *in law* the act of the corporation, is *in fact* the act of the individual acting in its behalf. Now the rule is that the person who participates with the trustee in the dissipation of trust property is himself liable in equity as constructive trustee. It necessarily follows that, in the case of a corporate trustee, like the Savings Institution, if the corporation is liable to the depositor, so must also in exactly the same measure and proportion the manager be liable, not only to the corporation, as it undoubtedly is, but also, in equity, by force of the foregoing rule, to the depositor. 20

who does the wrongful act

In *Hun vs. Carey*, 82 N. Y. 65, it was said that the relation between the manager and the depositor "is similar to that of trustee and *cestui que trust*;" and in *Williams vs. McKay*, 13 Stew. 189, it was expressly decided by this Court that the relation embraces all the essential characteristics of a trust, and that consequently the managers are liable to account to the depositors in a court of equity as trustees. 30

(3.) We shall next consider the situation which these managers and which Fisk & Hatch occupy toward the receiver. That the receiver is the representative of the depositors as well as of the corporation, is decided by the above case of *Williams vs. McKay*. Says the Chief Justice: "The receiver represents not only the corporate body, but likewise the depositors and creditors." He combines in himself, therefore, the right of action 40

which the depositors and the Institution each had against the managers. Now, the right of action in the present case sprang from the duty which the Institution and its managers owed to the depositors under the charter. The right of action against Fisk & Hatch sprang from a different source. The law had not constituted *them* the guardians of the depositors' interests. It was the duty of the corporation and its managers to obey the requirements of the charter and of the law, and when they disobeyed them and a loss ensued, their liability arose out of their disobedience. The liability of Fisk & Hatch—residents of another State, subject to a different law, arose on other grounds. For instance, the act of 1876 before referred to, required that not more than 15 per cent. of the whole deposits of the Institution should be loaned on collateral. If the managers loaned more they were guilty of what the statute deemed a flagrant breach of trust, and which it punished criminally as a misdemeanor. But Fisk & Hatch in accepting the loan were not guilty of any breach of trust whatever. They were not bound to know what the total assets of the Institution were, nor what had already been lent on collateral. *Mutual Benefit Life Insurance Co. vs. Elizabeth*, 13 Vr., p. 242. If they obtained a loan of money and failed to return it, they would be liable on that ground, but not because the statute was violated. If having the custody of trust funds, knowing them to be such, they made an improper use of them, they would also be liable to the Institution and its receiver on that ground.

At this point, therefore, in the argument, it becomes important to determine what are the precise grounds upon which the receiver is seeking to hold the managers; for if it should appear that they are substantially different from those on which Fisk & Hatch could have been held, the agreement of May 29, relied upon as a bar, will have no pertinency to the case. If a bar at all, (which is denied,) it can only be so on the assumption that the breaches of trust from which Fisk & Hatch are

released are the identical breaches of trust in respect of which it is sought to hold the managers.

Now, I think it is clear that the breaches of trust committed by the managers, for which the receiver seeks to hold them, are substantially different from the wrongful acts of Fisk & Hatch.

So far as respects the money lent, the liability of the managers is rested (1st) on the passage of the illegal resolution of August 9, 1882, whereby it was resolved to sell the government bonds, and loan the proceeds on collateral; (2d,) on the sale of the bonds pursuant to that resolution, and the loan of the proceeds to Fisk & Hatch, in violation of the statute which prohibits loaning more than 15 per cent. on collateral. Fisk & Hatch as has just been shown, by merely accepting the money lent did not become parties to either of these illegal acts; (3d,) on the managers' disobedience of the act of 1868, in taking as collateral for this loan, bonds and stock of foreign railroad companies. But it would be going far to say that Fisk & Hatch, residents of the State of New York, were bound to know that the general act of 1878 forbade this. The bare leaving these collaterals, such as they were, with Fisk & Hatch as their custodian, seems also to have been a breach of trust on the part of the managers alone. They were obliged to entrust the custody of these bonds to somebody, and if the agents entrusted were, under the circumstances, improper ones, did those agents become, by the mere act of acceptance, wrongdoers equally with the managers?

On the other hand, the wrongful acts of Fisk & Hatch were not participated in by the managers. Fisk & Hatch used the collaterals deposited with them, but not jointly with the managers (p. 29, § 28.) On May 15, 1884, they were unable to return either the money borrowed or the bonds substituted for a part of it, or the collaterals which secured it, but the managers had had no part or lot in their wrongful conversion or in the profits arising therefrom. The wrongful acts, therefore, for which the managers have made themselves answerable to the de-

positors in respect of the January loan and its subsequent modifications, are distinct from those for which Fisk & Hatch are responsible.

As to the loan of the \$900,000 government bonds, Fisk & Hatch knowing, as they must have known, that they were trust funds, and could not lawfully be used for the purposes of their business, concurred with the managers, at the inception of the transaction, in the same breach of trust—but the managers derived no profit
 10 from their subsequent user. The wrong done by the managers in this transaction consisted altogether in the wrongful delivery of the bonds to Fisk & Hatch—the wrong done by Fisk & Hatch consisted chiefly in so disposing of them as to be unable to return them when called upon. In this wrongful disposition the managers took no part.

Having thus obtained a precise view of the relative situation of the parties, and of their respective wrongful
 20 acts, we are prepared to consider how they are affected by the agreement of May 29th.

Both Fisk & Hatch and the Institution failed on May 15, 1884.

The firm then owed the Institution \$846,632.04 for money loaned, and they should have held bonds of the par value of \$2,036,000, their market value being \$2,329,600. (p. 31, l. 29.)

They were unable to repay the money or return the
 30 bonds, having previously “pledged, sold or otherwise disposed” of them. They collected together, however, a number of miscellaneous securities, which they valued at \$2,328,468.47, “and transferred them to the president “of said Institution on account of their aforesaid liability to it, in lieu of said bonds.” Out of securities valued by said firm at \$818,138 47, there was actually realized by the receiver \$821,225.16. These were of course the available securities readily convertible into money. The value put upon the residue of them “ex-
 40 “ceeded their true market value at the time of said trans-

“fer by at least the sum of \$400,000, and has exceeded
“their true market value by at least that sum ever
“since.”

As for the money due, they did not attempt at that time to make any provision for its repayment. The allegation of the bill as to their ability to pay it and to make up the deficiency of \$400,000 on the bonds, is this:—Their property “was insignificant in amount and inadequate even to the payment of a small percentage of the debt owing to said Institution alone.” (p. 33, 10
l. 38.)

Such was the situation of affairs when the receiver took possession. He found the firm without property but in the enjoyment of considerable credit. After due consideration, he, “by advice of counsel, and as the only means of obtaining from them * * any further sums of money or other valuable thing,” executed the agreement of May 29th. This agreement we shall now consider. The different clauses of this ingenious production are not only at variance with the facts of the case, 20
as shown *dehors* the instrument, but also with themselves. It recites that Fisk & Hatch, having received from the Institution bonds of the par value of \$2,036,000, are accountable not for *them* but for their *market value*; that they are also accountable for \$845,632 in money, and that they had delivered to the Savings Institution certain securities mentioned in Schedule A, *in lieu of the above bonds*. It further recites the appointment of Mr. Wilkinson as receiver, and that it has been agreed to 30
settle the *differences arising out of said indebtedness* in manner thereafter stated; and then instead of providing for the payment of that indebtedness, to our astonishment, declares that Fisk & Hatch sell the securities mentioned in Schedule A to said receiver, in consideration of the receiver’s selling the aforesaid bonds to them.

It concludes with a further recital, to the effect that whereas Fisk & Hatch have paid to the receiver \$845,632.04, with interest, which sum was due upon open account, “It is mutually understood and agreed by and 40

"between the parties hereto that all matters in difference
 "whatsoever between the parties hereto and between the
 "parties of the first part (Fisk & Hatch) and the Newark
 "Savings Institution are at an end and definitely ad-
 "justed hereby."

On a consideration of this agreement in connection with the facts as they existed when it was entered into, it is apparent :

10 *First.* That the recital with reference to the accountability of Fisk & Hatch for the market value of the government bonds is true, but only for the reason that they had already wrongfully converted them and could not therefore account for them in specie.

20 *Second.* That the sale by Fisk & Hatch of the securities mentioned in Schedule A, in consideration of the sale to them of the government bonds, was a pure fiction, (1,) because the securities mentioned in Schedule A had two weeks before been "transferred" by Fisk & Hatch to the president of the Institution "on account of their
 "aforesaid liability to it, in lieu of said bonds," (p. 32, l. 13,) and (2) because the bonds, as even the recitals showed, had all, at least as early as May 15, "been
 "pledged, sold or otherwise disposed of" by the firm, (p. 32, l. 5,) so that there was in fact nothing for this bill of sale to operate upon.

30 *Third.* That the agreement does not purport to do anything more than adjust the matters in difference between the receiver and the Institution, on the one hand, and *Fisk & Hatch* on the other—not any matters in difference between the receiver or the Institution on the one hand, and the managers on the other.

Fourth. That the agreement does not contain technical words ~~for~~ release.

40 The case then stands thus: The managers and Fisk & Hatch commit wrongful acts by which great loss results. The Institution and its receiver have a right of action against all who have caused that loss. The

receiver gets out of two of the wrongdoers the uttermost farthing they are able to pay. Then he proceeds against the others, and they, instead of making satisfaction, set up the agreement of May 29th, as a bar to the complainants' case.

They set it up in various ways. First, they say the agreement shows that the debt of Fisk & Hatch to the Institution has been completely paid. But if we look simply at the agreement itself, we are informed by it that Fisk & Hatch were accountable first for the money they then had, viz., \$845,632.04; and second, for the market value of the government bonds. The money was actually paid, but the only way in which it is pretended that they met their accountability for the market value of the government bonds, was by a sale to the receiver of the securities enumerated in Schedule A. These, however, they had completely transferred to the Institution two weeks before, and these, the bill shows, were in fact worth \$400,000 less than they were scheduled at, and \$400,000 less than the bonds they were intended to replace. So that it is idle to contend, in the teeth of the allegations of the bill, that their indebtedness was really paid in full.

The next contention of the managers is that the receiver having, by the agreement of May 29th, parted with his title to the government bonds, and voluntarily accepted the scheduled securities in lieu thereof, must be deemed to have accepted them by way of accord and satisfaction, and is therefore estopped from proceeding against the managers. Now, if the premises upon which this contention rests were correct, the conclusion would no doubt follow. The difficulty is that these premises are without foundation in fact. The bill shows that at the time of the supposed sale, the government bonds had been pledged, sold or otherwise disposed of by Fisk & Hatch, so that the receiver had nothing to sell. It is suggested, however, that because the bill charges in the alternative that the bonds were *pledged*, sold or otherwise disposed of, the receiver may still have had an

equity, and that that equity may have passed by the sale. But the agreement itself negatives this view of the matter, for it expressly avers that at the time when it was entered into Fisk & Hatch were accountable, not for the bonds, but for their market value, which could not have been unless they had been completely converted. Moreover the agreement did not purport to convey title to the equity of redemption, but to the bonds themselves. And this fictitious sale did not prejudice the managers, 10 for the receiver did not part with anything valuable; on the other hand he obtained nothing which he did not have before.

Now, to establish a plea of this character, it must be shown that something was obtained which possessed value. "An accord," it is said in *Bacon's Abridgement*, (Title, Accord and Satisfaction,) "must appear to be advantageous to the party, otherwise it can be no satisfaction. Therefore, in an action for trespass for taking the plaintiff's cattle, it is no good plea to say that there was 20 an accord that the plaintiff should have his cattle again, for this is not any satisfaction." Here nothing was received in satisfaction of the government bonds. True, Fisk & Hatch paid \$845,632.04 in money, but that was solely applicable by the express terms of the agreement itself to the money due upon the open account. (p. 36, l. 10.) It was merely giving back to the complainant that which was his. The *supposed satisfaction* was the scheduled securities, but these securities had been already transferred to the Institution on account (so the bill alleges,) of the liability of Fisk & Hatch, for the improper 30 disposition of the bonds. Consequently there was no real satisfaction.

There is, however, a broader and truer view to take of this transaction—a view which, looking through the *form* ~~form~~, regards the substance, and that view is this: The receiver finding that Fisk & Hatch were utterly insolvent and that he could not obtain payment of any part of his claim by a resort to legal proceedings, took another 40 course, far more beneficial to the Institution and to the

managers themselves. Fisk & Hatch as a *sine qua non*, required an agreement which would seem to be full satisfaction. This the receiver consented to sign in the full conviction that by so doing he would get \$845,000 in cash, and that by refusing so to do he would indeed retain his right to sue—a right utterly worthless—but would get nothing. Could he, under these circumstances, hesitate to take the money offered on the terms it was offered? What would have been his position with respect to these managers even, had he refused a sum of money so enormous? Did he not thereby reduce the liability of those managers \$840,000? Was he to allow a pure fiction which the firm deemed important because of its white-washing effect, to stand in the way of saving to the depositors so large a portion of their deposits? So far from having any cause of complaint these managers may well felicitate themselves upon the successful conclusion of a negotiation so skillfully conducted as to have been the means of saving them from utter and hopeless financial ruin.

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Viewed in its true light the transaction was simply this: A debtor owing two debts, and having no property applicable to the payment of either, agrees to pay one of them in full, by a resort to his credit, if that credit can be bolstered up by an agreement which shall have the double effect of preventing further suit, and of representing his past transactions in a light favorable to his integrity, but not in consonance with the real facts. It is a case of *tabula in naufragio*—it is the case of an agreement to take a part because of the impossibility of getting the whole. And more than this, an agreement to take a part, in satisfaction of that part only, for the payment of the money, is expressly alleged to be in satisfaction of the money debt, and of that alone.

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In this view of the matter will equity declare that the scheduled securities which Fisk & Hatch had already given up at the time the agreement was signed, were a real satisfaction for the loss resulting from the wrongful disposition of the bonds?

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The parties themselves did not design an accord and satisfaction by the form of their agreement; what they did design was, the *semblance* of a sale. Will equity be content to convert this semblance into another, when looking at the facts as they are, it finds not satisfaction, but an utter failure to make it?

It is next urged that there has been a ratification. But a ratification of what? Surely it will not be contended that the receiver ratified the passage of the resolution of August, 1883, or the conversion of bonds pursuant to that resolution, or the act of Fisk & Hatch in converting to their own use the property of the depositors. This would be mere nonsense. If it be only meant that the receiver ratified the act of Dodd in taking the scheduled securities from the office of Fisk & Hatch on May 15th, then I say he did ratify and ought to have ratified it. The allegation is (p. 32, l. 10,) that Dodd, finding the bonds gone, took in lieu thereof, *on account* of the firm's liability, such assets as they were able to turn over to him, not that he took them as an equivalent for, and in full satisfaction of, those bonds. Counsel said, *arguendo*, in the Court below, if my agent wrongfully disposes of my property to a stranger, and I afterwards accept from that stranger what is deemed an equivalent for the goods disposed of, I ratify my agent's act and cannot afterwards hold him for them. This is true, but not applicable. Dodd did not sell the bonds to Fisk & Hatch. What he did do, was wrongfully to permit them to be used by that firm, on the understanding that they were to return them.

Will it be said that the receiver ratified this? If he did not, the doctrine of ratification does not apply, and the argument comes back to the question of accord and satisfaction already disposed of.

The next insistent of the defendants is that the agreement of May 29th operates as a release to Fisk & Hatch, and therefore to the managers.

To sustain this position it must be shown—

1st. That the agreement in question is a technical release under seal.

2d. That Fisk & Hatch and the managers were guilty of the same wrongful acts.

It is well established that a release to one of two or more joint obligors or joint *tort-feasors* discharges the others, and may be pleaded in bar by all. It is also, on the other hand, equally well established that a covenant not to sue can be pleaded only by him with whom it is made, and in *Line vs. Nelson*, 9 Vr. 360, Mr. Justice VANSYCKEL says that an examination of the cases "will show a marked tendency to construe covenants as agree- 10
ments not to sue, so as not to frustrate the intention of the parties by giving their contracts a wider effect than was contemplated by them."

That they may not frustrate the intention courts of ^{law} ~~equity~~ have adopted this rule, viz., that a release of one of two joint contractors, to have the effect of discharging the other, must be a *technical release under seal*. (*Line vs. Nelson, supra*; *Crane vs. Alling*, 3 Gr., 423.) The rule is as applicable to torts as to contracts.

But, the agreement under consideration is not a technical release. This is its language—"It is mutually 20
"understood and agreed by and between the parties
"hereto, that all matters in difference whatsoever be
"tween the parties hereto and between the parties of the
"first part, (*i. e.*, Fisk & Hatch,) and the Newark Savings
"Institution, are at an end, and definitely adjusted
"hereby."

~~Now~~ It is not a technical release, for it does not contain technical words of release. If it does not, then in 30
construing it the rule is simply to have regard to the
intention of the parties.

The leading case on the subject is *Lacy vs. Kinaston*, 1 Ld. Raymond, 688. There the covenant was to indemnify and save harmless from all debts and sums of money, bonds, contracts and securities contracted or entered into alone or jointly. HOLT, *C. J.*, said: "This covenant is not in its nature a defeasance, because it wants words to be a defeasance, and since there are no such words here it must be understood to be a defeasance 40

from the nature of the thing, and not the words, *and the consequence of that would be to leave Lacy without remedy.* So here the covenant is not in its nature a release, because it wants words of release, and the consequence of so construing it would be to leave the receiver without remedy for the balance due to the Institution.

10 In *Dean vs. Newhall*, 8 Term Rep. 168, defendant was surety for Taylor on a bond. Taylor made an assignment, and plaintiff, who was his creditor, with other creditors, covenanted "that they would not sue, arrest, implead or prosecute Taylor * * or his or their goods, * * and in case any of said creditors should sue, those presents *should be a sufficient release and discharge to all intents and purposes, both at law and in equity.* * * and Taylor and his administrators *should be and were thereby acquitted, released and discharged* against them, the said creditors," &c.

20 Lord KENYON said: "The last case, *Lacy vs. Kinston*, to be sure removes all difficulty on the subject, and is a direct authority in favor of the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff cannot be doubted. *Even if the defendant had succeeded here a court of equity would have given the plaintiff full relief.* But I am glad to find by the two cases cited by the plaintiff that we are fully warranted in deciding in favor of the plaintiff on legal grounds."

30 In *Crane vs. Alling*, 3 Gr., 423, and *Couch vs. Mills*, 21 Wend., 424, the covenant was very like that in *Dean vs. Newhall*. In the last named case, NELSON, C J., said: "To construe it (the covenant,) into a technical release of all, would be carrying the obligation beyond the obvious intent of the parties. If it had been intended to be so understood, more direct and pertinent language would have been used, clearly indicating the intention to embrace all the promissors."

40 In *Goodnow vs. Smith*, 18 Pick., 414, the suit was on a note given by S. & A.; the proof was that before it

became due it was agreed between plaintiff and S., that if S. would pay half and give him another small note plaintiff would exonerate and discharge S. from the payment of the other half. S. paid half and gave the note. Held—no release to A., though binding upon S.

Now, the language of the covenant in the cases just cited, more nearly resembled that of a technical release than it does in the case in hand; but it was allowed only to operate as a covenant not to sue. The rule of law, then, may be stated to be that if it does ^{not} appear to be the intention to release, the instrument will be construed as a covenant not to sue, (*Brown vs. White*, 5 Dut., 504.,) *Solly vs. Forbes*, 2 B. & B. 38, *Thompson vs. Tack*, 3 Man. Gr. & Sc. 540. (See *Morris vs. Robinson*, 3 B. & C., for an analogous case.)

Courts of equity go still farther. Thus, in *McIntyre vs. Williamson*, 1 Edw. Ch. 34, it is said to be a strong rule of equity, that a general release shall be confined to what was under consideration at the time of giving it. And in *Kirby vs. Taylor*, 6 John. Ch., 252, it is said: "The doctrine on this subject" (*i. e.*, in a court of equity,) "would seem to be that a release" (*i. e.*, a technical release,) "is to be construed according to the intent and object of it, and that intent will control and limit its operation."

According to the doctrine of these cases (which is in accordance with the above quoted remark of KENYON, C. J., in *Dean vs. Newhall*), even had the agreement been a technical release, equity would have dealt with it in such a way as to limit its operation according to the intent of the parties.

Having regard to these distinctions, is there any difficulty in the present case?

The agreement is between Fisk & Hatch and the receiver. The managers are not parties to it, nor so much as named or referred to in it. The receiver having "matters in difference" with Fisk & Hatch, and the managers settles his differences with Fisk & Hatch by an

and more especially when one considers the Sul matter as it is for a breach of trust is strictly speaking neither a breach of contract nor a tort—may sometimes be both the one, & some the other. And Equity applying the legs 40 mile by analogy would take care to apply it as

agreement which in terms relates to them only ; but does not get complete satisfaction. Why is he deemed to have *intended* anything more than he did, viz., to settle all matters of difference between those who were parties to that instrument? Why should this Court create an artificial intention, not discernible in the instrument itself, for the purpose of relieving culpable managers, who have as yet, made no restitution? The agreement does not profess to settle the *debt*, but only the differences between Fisk & Hatch and the receiver arising out of the debt. (See p. 34, l. 34 ; p. 36, l. 20.) Any differences arising there ^{as} between the managers and the receiver are left untouched.

All the foregoing argument has proceeded on the assumption that the wrongful acts of the managers and of Fisk & Hatch were the same ; but it has already been seen that they were essentially different.

The matter in difference with Fisk & Hatch under the agreement of January, 1883, was simply their failure to return money borrowed, (for a part of which bonds were afterwards substituted.) The matter in difference with the managers was their breach of trust (1) in passing the resolution of August 9 ; (2) in selling government bonds pursuant to that resolution, and (3) in loaning the money contrary to the statute, in none of which breaches, as has already been shown, were Fisk & Hatch at all implicated. Now, the receiver settled the matter in difference which he had with Fisk & Hatch, by an agreement which did not, as we have seen, operate as a technical release—but suppose it had so operated, could it have had the effect of discharging other matters in difference, of a different nature, existing between the receiver and other persons? It will not do to say that the debt (including in that term the breaches of trust) was released and therefore all who owed it were released also. To find out what was released we must turn to the instrument itself, and we there find that it is not the debt which is released, but only the differences arising out of that debt, and not all differences, but only those subsisting

between the receiver and the Institution he represented and Fisk & Hatch.

The question in this aspect of it is still one of intention. Was it the intention to release the managers? Now, if it was, in what word or sentence of the agreement does it appear? If it does not appear, how can it be said that an agreement, which in terms settles only matters in difference between the receiver and the firm, settles also other matters in difference between the receiver and the managers? The instrument itself not being a technical release, carries with it, so to speak, no presumption of release as to other persons not parties to it. It carries with it the contrary presumption—*expressio unius exclusio est alterius*. The whole matter may be briefly summed up thus: The receiver, by an instrument not a technical release, settles all matters in difference between himself and Fisk & Hatch, and thereby procures only a partial satisfaction of his claim. At the time of the settlement he has also matters in difference between himself and the managers, of which he can avail himself to satisfy the residue of that claim, unless the agreement of May 29 be a settlement of them also. It in its general frame implies no settlement, nor does it express one. Consequently it is no bar.

There is still another answer to the defendants' insistence that the managers were discharged by the agreement.

In *Hill on Trustees*, *525, it is said that a deed of release "must be made with full information of all the circumstances, and of the full extent of the liability of the trustees." Here the allegation of the bill is, (p. 39, l. 3,) "that at the time of the execution of said paper writing, your orator was ignorant of the aforesaid breaches of trust and illegal acts which rendered said managers responsible to your orator as aforesaid, and that said breaches of trusts and illegal acts were then denied and concealed by them, and your orator has only been able to discover the same after a long continued and diligent examination of the books and records of said

Institution." It was argued in the Court below that he must have had knowledge—but why? The acts charged were not such as were apparent at first blush. He had had no time to make an examination, and if he did not know the facts, and the managers denied and concealed them, then, even if those managers had been parties to the agreement, the receiver would not have been bound—much less is he bound when they are not parties to it.

10 III. It is next urged by the defendants that the suit is premature. It was said in the argument in the Court below that no cause of action would arise until it was ascertained that there was a deficiency, but the argu-
 20 ment in support of this contention fails to distinguish between the cause of action and the amount of loss. The cause of action arose at latest when Fisk & Hatch wrongfully converted the bonds, and this took place at some period of time anterior to May 15. *Then*, both the managers and Fisk & Hatch were liable for the
 20 entire market value of the bonds taken. If subsequently the receiver took, in partial satisfaction of his claim, stock and bonds of the Chesapeake & Ohio Railroad Company, surely this could not affect his original right of action. Having this right of action, he has a right to sue.

It would be monstrous to hold that when a receiver has been obliged to accept unsaleable securities from a wrongdoer because he can get nothing better, that his right of action is by the acceptance postponed till they are completely disposed of. Shall the receiver be put to
 30 the alternative, either of sacrificing them or risking the interposition of the bar of the statute of limitations?

But there is no practical difficulty about this matter. When it is referred to a master to state the account, the stocks and bonds can be valued and the managers be parties to the valuation, or they can at any time accept the offer of the bill, which tenders to them all the securities transferred by Fisk & Hatch, remaining in the receiver's hands, on payment of the fair market value of
 40 the government bonds. (p. 40, l. 25.)

IV. Another question which concerns Abner Reeve's estate alone, remains to be disposed of. Did the cause of action abate as to him, at his death?

The authorities on this question are so numerous and uniform that little need be said about it.

At law the cause of action survives both in actions, *ex contractu* and *ex delicto*, in the latter case by force of the act of March 17, 1855, *Ten Eyck vs. Runk*, 2 Vr. 428; *Tichenor vs. Hayes*, 192. This Court is asked to establish a different rule in equity, and that too in cases when the deceased is called upon to respond for property wasted. 10

Courts of equity have uniformly held that for the breaches of trust of the deceased, his personal representatives must respond.

Garth vs. Cotton, 3 Atk. 751.

Lord Montford vs. Lord Cadogan, 17 Ves. 485.

Perry vs. Knott, 4 Beav. 180.

London Gas Light Co. vs. Spottiswoode, 14 Beav. 264. 20

Ingram vs. Thorp, 7 Hare, 67.

Rawlins vs. Wickman, 3 De Gex and Jones, 304, 322.

Turquand vs. Marshall, L. R. 6 Eq. 112, 121.

Ashurst vs. Mason, L. R. 20 Eq. 225.

And they are equally liable, whether the deceased have or have not made a personal profit out of his breach of trust. 30

Munch vs. Cockerell, 8 Sim. 219.

Walsham vs. Stainton, 1 De G., J. and Sm. 678, 690.

Dixon vs. Dixon, 9 Ch. Div. 587.

If it be claimed that Reeve died before Fisk & Hatch disposed of the bonds, and is not for that reason responsible, I answer that the wrongful acts of the *managers* had all been perpetrated before his death, and that his

estate is responsible for the loss which resulted from those acts, whether it occurred before or after his decease.

Dixon vs. Dixon, supra.

10 The case cited by counsel, like *Peek vs. Gurney*, L. R. 6 H. L. 377, and *Phillips vs. Homfray*, 24 Ch. Div. 439, are cases of pure tort, cognizable at law and decided on legal rules. They would have been differently decided under our statute. They are expressly distinguished from cases of breach of trust as to which the rule is admitted to be the other way.

FREDERIC W. STEVENS.

March Term, 1886.

1886

N. J. Court of Errors and Appeals.

Between
DANIEL DODD, AND OTHERS,
Appellants,
and
GEORGE WILKINSON, RECEIVER OF
THE NEWARK SAVINGS INSTITUTION,
Respondent.

On Appeal
from Decree
Advised by
Vice-Chan-
cellor Bird

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Points of JOHN R. EMERY, for the Appellants,
Executors of Abner S. Reeve.

FIRST POINT.

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In common with the other appellants, the executors of Reeve insist that the demurrers to the bill should be sustained and the bill dismissed, for the reasons set forth in the general points relied on by the appellants.

They especially insist (1) that the bill is prematurely filed, (see *First Point* of General Points for appellants,) and (2) that in equity no decree could be made holding the managers liable for losses on the alleged improper loans of money and bonds to Fisk & Hatch, except upon the terms and conditions that on making good those losses, the loans and rights of action against Fisk & Hatch should be transferred to the managers, for their reimbursement; and that as the bill discloses that Fisk & Hatch have been released by the receiver from all liability upon the loans, no *equitable* decree can be made against the managers; and they further insist that the allegations in the bill setting out facts upon which it is claimed as a legal proposition that the release does not so operate, *are of no effect whatever*, as the basis of an

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equitable decree, for the reason that *the bill permits the release to stand* in favor of Fisk & Hatch, instead of seeking its cancellation, and no equitable decree can be made without restoring to the managers who make good the alleged loss, the right of action upon the loans against Fisk & Hatch. (See *Second Point* of General Points, for appellants.)

If, however, the Court hold that the settlement with Fisk & Hatch did not discharge all liability of the managers for making the loans, then it is also specially claimed by the executors of Abner S. Reeve, that his estate cannot be held liable for the alleged neglects and mismanagements set out in the bill, for two reasons, viz. :

SECOND POINT.

(1.) That it appears by the bill itself that all losses which were sustained by the acts committed during the lifetime of Mr. Reeve, have been paid and satisfied in the settlement by the receiver with Fisk & Hatch.

It is not claimed that the amount received by him in settlement was expressly applied by either party to any special losses, but this not having been done the executors now claim that inasmuch as some of the acts of the managers complained of, from which loss is alleged to have resulted, were committed after the death of Mr. Reeve, it will be necessary for the Court to make an application of the amount received in settlement, and that this application must be made upon the usual principle of applying the payments to the debts of Fisk & Hatch as they occurred in order of time. And the executors further claim that it appears by the face of the bill that if application is thus made all the losses resulting from loans, either of money or bonds to Fisk & Hatch, during the lifetime of Mr. Reeve, have been paid.

Reeve was not a manager at the time of the application to the Chancellor in December, 1877, but was elected on February 13, 1878, and died January 7, 1884. (Bill, p. 15, ll. 15-19.)

(1.) The *loan of money* to Fisk & Hatch, which at the time of Reeve's death was outstanding, (par. 27, p. 28, l. 38, to p. 29, l. 3, \$506,000 on July 31, 1883, and gradually increased to \$987,000 on February 29, 1884,) was all paid in March, 1884, (p. 29, l. 3, &c.) and the loan which was outstanding at the time of the failure was made April 30, 1884. (*Ib.*, l. 12, &c.)

The agreement as to the conversion into bonds in 1883, (par. 26, p. 27, l. 28,) does not extend to, and is not alleged to have been made in reference to this loan 10 of April, 1884, and this loan has been altogether paid, as appears by the bill, (par. 35, p. 38, l. 36, &c.) so that Reeve's estate is under no liability for this.

The time and amount of the loans of bonds made to Fisk & Hatch are recapitulated in the bill, (par. 31, p. 31, line 8, &c.) as follows :

(1.) \$900,000 4 per cents, as stated in par. 26, being \$580,000 loaned in the autumn of 1882, (p. 29, l. 31,) and \$320,000 loaned on January 15, 1884, (p. 30, l. 2, &c.) 20 This was after Reeve's death.

(2.) \$500,000 4½ per cents, as stated in par. 22, being loaned either in April or August, 1883.

(3.) \$556,000 4½ per cents, purchased March 27, 1884, after Reeve's death.

(4.) \$80,000 4½ per cents, purchased May 1, 1884.

The loan due from Fisk & Hatch at the time of the settlement was about \$845,000, but in the settlement the 30 *money paid* was expressly appropriated by both parties to the discharge of this debt. (*Bill*, p. 34, l. 5, &c.)

As to the loss on the loans of bonds, it appears by the bill that the total amount of bonds loaned was \$2,036,000 par value, and \$2,329,600 market value on May 15, 1884, the day of settlement; (p. 31, l. 26, &c.) and that the whole loss on the loans is \$400,000, (par. 32, p. 32, l. 36, values fixed at filing bill.) Taking, therefore, the value of the securities at either \$1,600,000 or \$1,900,000, 40

market value, if the principle of application to the loans in the order of time is applicable, it will appear that all losses on the loans alleged to have been made in the lifetime of Mr. Reeve, viz., \$580,000, (1882,) \$500,000, (1883,) have been settled, and that the loss on the \$320,000 loan, (1884,) has also been made good.

As to the legal rules on the subject of application of payments to one debt rather than to another, where more than one debt exists, and neither of the parties, (debtor or
10 creditor,) have made the application at the time of payment, and where the Court must make the application after controversy has arisen, there can be no dispute as to the general rule that where the debts are of the same legal character the payments must be applied to extinguish the debts according to the order of the time when they were incurred, and beginning with the earliest. See,

1 *Am. Lead. Cases*, 4th Ed. 287, 5th Ed. 353, in notes to *Mayor, &c., vs. Patten* : "In such cases, (where debts
20 are of different dates,) in the absence of all appropriation by either party, the earliest charges, as they are first due, are paid in preference to later ones." Citing—

Livermore vs. Rand, 6 Foster, 91.

Parks vs. Ingram, 2 *Ibid.* 283.

Thompson vs. Phelan, *Ibid.* 350.

Milliken vs. Tufts, 31 Maine, 500.

Also, 1 *Wait's Actions and Defences*, 177, and cases cited.

Also, *Munger on Appl. of Paym.* p. 102.

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As to the applicability of the rule in cases of payments of this character, I insist, that if the managers are not held to be entirely discharged by the settlement which discharged Fisk & Hatch, then the general rule above stated is applicable and must be applied upon the following principles :

(1.) The managers must be held entitled to the benefit
40 of any payments which have been made by Fisk & Hatch,

in whatever character the payment was received, whether as the discharge of several successive debts, or as an accord and satisfaction for several successive torts.

Satisfaction by one of several wrongdoers, whether total or partial, enures to the benefit of all. As to total satisfaction by one of several, see 6 *Wail's Actions and Defences*, 418, and cases cited, *inter al.*, *Strong vs. Holmes*, 7 Conn., 224; *Ellis vs. Bitzer*, 2 Ohio, 89; *Thurman vs. Weld*, 11 Ad. & Ell. 453. As to partial satisfaction being satisfaction *pro tanto* as to all, see *Merchants' Bank vs. Curtiss*, 37 Barb. 317. (And the fact that the managers are entitled to the benefit of Fisk & Hatch's payments is in itself a strong support for the position that if Fisk & Hatch are discharged from liability for all the loans, they also are discharged.) 10

(2.) If the partial satisfaction or discharge of the several illegal loans by Fisk & Hatch does not discharge the whole liability on all the loans, then it necessarily results that the payment must be applied *in some way*, and according to some principle, by the Court, inasmuch as it appears that the losses are the result of loans made at different times and under the management of different persons. 20

(3.) As between each other, the managers in this case stand in the relation of trustees or sureties during stated periods of time, viz., their tenure of office, and the creditors in this instance, having taken from the debtor a sum in general payment of a series or succession of liabilities, without appropriating to any special loss, the Court, after controversy has arisen, should apply the payments to the liabilities in the order of their occurrences. And the rule should specially be enforced as against liabilities incurred after the death of a manager has ended his control or management of the affairs of the Institution. 30

If Fisk & Hatch had given different sureties annually for the return or repayment of money borrowed each year from the bank, would not a general payment on account 40

be applied to extinguish the debts or loans in the order of their occurrences?

This point (in reference to the application of payment,) was insisted on before the Vice-Chancellor, but was not noticed in his opinion.

THIRD POINT.

The *second* ground specially relied on by the executors
10 of Reeve, is the insistence that in equity the estate of a deceased director cannot be held liable for an alleged wrongful act, unless his estate has benefited by the act.

The claim or demand made by the bill in this case is in substance a demand based on the neglect of the managers in the investment or custody of the funds of the bank, from which neglect loss has occurred. Whether called a breach of duty, breach of trust or simply negligence, the nature of the claim is not questionable, and it is a claim for the improper investment of the funds, by
20 the managers, who were charged by law, or statute or otherwise, with certain duties in relation to the investment.

Now, in respect to the bank (and the receiver as its representative,) the managers, so far as the proper performance of the duty of investment and custody is concerned, are the *agents* of the bank, and the liability in this respect is essentially that of agents and not that of trustees. The fund which these managers, *as agents*,
30 loan, may in some respects be considered as trust funds belonging to the Institution, so as to charge persons dealing with the agents with the liabilities attaching to those dealing with trust funds, but the managers were not *trustees* of the trust funds belonging to the bank.

In *Smith vs. Anderson*, E. L. Rep., 15 Ch. Div. (Ct. of Appeals, 1879;) the distinction is clearly stated, BOWEN, J., p. 275: "To my mind the distinction (between a director and trustee,) is essential and founded in the very
40 nature of things. A trustee is the man who is the owner of the property, and deals with it as principal, as owner

and as master, subject only to the equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. A director never enters into a contract for himself, but for his principal, for whom he is acting," &c.

In *Thompson's Liability of Officers*, p. 357, it is also said with reference to liability for negligence: "With respect to the liability of the directors of a corporation to the corporation itself, it is supposed that we must recur for the solution of all questions which may arise, to the general doctrines which govern the liability of agents and mandatories," and many cases are cited. 10

In *Hun vs. Cary*, 82 N. Y. 79, which was an action against the directors or managers of a savings bank for improper investments and management, it was held that in respect to this duty the directors were agents, and that the claim was in its nature one purely of unliquidated damages in tort.

If this be the true nature of the claim, viz., one sounding in damages for a tort of the deceased committed in his lifetime, I then submit that *the estate* of Mr. Reeve is not liable, since it is not claimed that his estate derived any benefit from the alleged wrongful act. 20

The true principle in such cases is, I claim, laid down in the leading case of *Peck vs. Gurney*, E. L. Rep. 6 Eng. and I. App. 377, (1873) cited in full in *Thomp. Liab. Off.*, pp. 309, 349. This was a decision in the House of Lords on an appeal from a decree of the Master of the Rolls, dismissing a bill filed by the appellant against the directors of a company and the executors of one deceased director, to compel them to make good the loss which he had sustained by reason of purchasing 2,000 shares in the company on the faith of a prospectus issued by the directors and the deceased, which contained material misrepresentations, and also suppressed material facts. 30

The bill was dismissed by the Master of the Rolls solely on account of delay in instituting the suit. The 40

questions in the case are stated by Lord CHELMSFORD, (*Thompson Liab.* p. 318,) and after holding that the directors were answerable, either at law or in equity, for the misrepresentations (*Ib.* p. 326), upon the question of the liability of the estate of the deceased director, says, (p. 327,) "There can be no doubt that if an action at law had been brought by the appellant, instead of this proceeding in equity, the executors could not have been held liable, and in the exercise of a concurrent jurisdiction by
 10 courts of law and equity, both courts ought to proceed upon the same principles," and the rule at law is stated to be as laid down by Lord MANSFIELD, in *Hambley vs. Trott*, Cowp. 376, "Where property is acquired which benefits the testator there an action for the value of the property shall survive against the executor." And on p. 328 he says: "Mr. Gibbs' estate derived no benefit from the misrepresentations to which he was a party, and therefore, his executors, *who can only be answerable for his acts in respect of his estate*, cannot be made liable
 20 for the wrong done to the appellant."

This case was approved and followed in the later case of *Phillips vs. Homfray*, E. L. Rep. 24, Ch. Div. 439, (Court of Appeals, 1883,) where there is an elaborate review of all the equity cases, from the earliest down.

In *Phillips vs. Homfray*, the wrongful act complained of (see E. L. Rep., 24 Ch. Div., 454,) was a trespass of decedent in using the ways and passages under complainant's farm for transporting coal, &c., and the damages
 30 were claimed to be measured by the amount he would have to pay for such use. The Court below (Mr. Justice PEARSON) held that this was a case in which the decedent's estate had derived a profit by the wrongful act, and therefore in equity his estate was liable. All the cases are examined, pp. 454-466, BOWEN, *L. J.*, for the Court, holding that the estate was not liable; BAGALLY, *L. J.*, p. 476, agreed on the general principle, but held that the estate was liable because it derived a
 40 profit.

The earlier English cases, if they are inconsistent with these later cases of *Peek vs. Gurney*, and *Phillips vs. Homfray*, are overruled, and *it must be borne in mind* that at the time of the decisions in *Peek vs. Gurney* and *Phillips vs. Homfray*, the statute of 3 and 4 *William*, 4 Ch. 42, § 2, was in force, which provides that "an action may be maintained against the executors or administrators of any person deceased, *for any wrong committed* by him during his lifetime to another *with respect to his property*, real or personal," &c., (1833.) With these statutes 10 in force the courts held that the torts or breaches complained of were not actionable at law.

The above English cases and the statute in force at the time they were decided, are referred to at length because the decision in *Tichenor vs. Hayes*, 12 *Vroom*, 193, (Supr. Ct. 1879,) upon the construction of our statute of 1855, relating to actions against executors, which is relied on by the Vice-Chancellor in his opinion as conclusive of the question, (p. 66,) was to some extent 20 founded upon the supposed construction of the English statute of 3 and 4 *William*, above set out. (See opinion of Chief Justice BEASLEY, pp. 200-201.) The case of *Peek vs. Gurney* was not referred to, and the *Phillips vs. Homfray* case was subsequently decided, and so far as the *Hayes* case rests on the construction of the English statute, these late English cases must materially modify the authority of the decision in *Tichenor vs. Hayes*.

The case of *Tichenor vs. Hayes* was taken to the Court of Errors upon writ of error, and the question of the liability of the executors was fully argued by Mr. T. N. McCarter, and the case of *Peek vs. Gurney* there referred to. The decision went on another point, however, viz., that there was no final judgment, and no expression of the Court was made upon this point, so that the question is open for argument before this Court, although the Vice-Chancellor may have felt himself bound by the decision of a co-ordinate Court. 30

If, for the decision of this case, it should be necessary to examine the *Tichenor vs. Hayes* case, I submit that 40

case was wrongly decided upon the point now in question, and that by a true construction of the act of March 17, 1855, P. L. 340, Rev. p. 396, § 5, the statute is confined to cases of *damages to specific property*, and does not extend to acts causing general pecuniary loss, and that the true rule is the one established by the courts of England and the courts of other States on analogous statutes. Our statute is that of March 17th, 1855, (P. L. 340,) incorporated in the title "Executors and Administrators." Rev. 396, § 5, as follows :

10 "5. Where any testator or intestate shall, in his or her lifetime, have taken or carried away or converted to his or her use, the goods and chattels of any person or persons, or shall in his or her lifetime have committed any trespass to the person or property, real or personal, of any person or persons, his or her executors or administrators shall have and maintain the same action against the executors and administrators of such testator or intes-
20 tate as he, she or they might have had or maintained against such testator or intestate, and shall have the like remedy and process for the damages recovered in such action as are now had and allowed in other actions against executors or administrators."

The question arises upon that portion of the statute providing that "where any person in his lifetime shall have committed any trespass to the person or property, real or personal," the action shall survive against the
30 executors, and the point at issue is whether this statute, fairly construed, refers to "trespasses" or injuries to *specific property*, or whether it embraces any wrongful act in consequence of which the general pecuniary estate is injured.

In the case of *Ten Eyck vs. Bunk*, 2 Vroom, 428, which was an action for damages occasioned by the defendant, in his lifetime, having flowed back water over plaintiff's land, it was held that the word "trespass" was not to be
40 confined to the technical legal meaning of the word as

distinguished from "actions *in the case*," or indirect injury, but was equivalent to "tort," and it was held that the cause of action survived under the statute. The injury here was to specific property—real estate—and the injury to the property, caused by the intestate, was a matter capable of convenient proof. The remarks in the case of *Ten Eyck vs. Runk*, "that the effect of the act was to give a right of suit against the personal representatives of a deceased wrongdoer *for any injurious act of a sueable nature*," must be read in the light of the 10 circumstances of the case, and are *obiter* and of no effect, as a substitute for the precise words used by the legislature in the act itself.

In *Tichenor vs. Hayes*, the action was in form an action on the case for the deceit of the decedent, and his negligence as attorney, by reason of which it was claimed that the plaintiff had sustained a general pecuniary loss. It was held in the case that the action survived, and that the act liberally construed, as it should be, intended by 20 "trespasses," any "*wrongs*" to the property, and that such wrongs were not confined to wrongs to specific property, but included any wrongs by which the general estate was injured or lessened. The reason upon which the judgment was based, its *ratio decidendi*, was that the statute should be construed not strictly, "*but with the utmost latitude of interpretation*," in view of its being a remedial act, (p. 198,) and that the same liberality should be used in the construction of this act, as in the 30 construction of the old act of *Edward 3*, Ch. 7, *de bonis asportatis*, &c. Our answer to this position in reference to the rule of construction, is (1) that it is opposed to the well recognized rule that statutes in derogation of the common law are to be construed strictly. See—

Sinnickson vs. Johnson, 2 Harr. 144.

Tinsman vs. Railroad Co., 2 Dutch. 167.

Potter's Dwarries' Statutes, p. 185, 192.

Jacob vs. The United States, 1 Brock. 253.

Surft vs. Luce, 27 Me. 286.

Barrett vs. Copeland, 20 Vert. 249.

As to extending in these days the scope of an act by "construction," after the fashion of the courts with the old act of Edward 3d, it is a sufficient answer to say, that the conditions and facilities for legislation have changed so radically, that there is now neither reason nor safety in the courts assuming to extend any acts of the legislature beyond their *fair, natural*, proper meaning, construed rather with the purpose of ascertaining the intention of the legislature, than with the purpose of supplying
 10 the supposed defects of the acts.

But (2) the rule of the common law that for a *personal* wrong, the remedy against the wrongdoer, *as well as the reason of it*, is accurately expressed by Chief Baron Gilbert in the title "Executors." (*Bacon's Abr. "Executors, P. 2, of Personal Torts,"*) as follows:

"The taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, as far as there are assets, but doth
 20 not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, *for none can tell how they might have been discharged or answered by the testator himself.*" Citing—
Plowden, 181.

As to answering to the debts of the deceased, and undertakings that create debts, it must be borne in mind, that *upon contracts* there can be no recovery, either before or after the death of the promisor, unless it is proved that there was a *consideration for the contract*, the consideration
 30 being usually a *benefit* to the promisor's estate. The exception to this rule was that when the contract was executed with certain formalities, a seal, &c, it was binding without any consideration. See *Aller vs. Aller*, 11 Vr. 450, for an examination of the rule in reference to contracts. So that in all cases where estates were held by reason of *contracts of the deceased*, the court was able to see, before giving judgment, either that he or his estate had received a benefit, or that he had under his seal agreed to perform some act. As to the
 40 *discharge* of the contract, this must arise by action of

the promisor himself subsequent to its creation. And it was therefore no hardship or injustice to hold his estate liable on the contract, unless he had left for his own protection, a sufficient proof in discharge of the liability he had created. But as to *torts* or *wrongs*, for these a person was liable in his lifetime, whether he received benefit or not. The only question was, did he commit the wrong or injury, and the rule of the common law that he should not be held liable after his death, because—
 “none can tell how they might have been discharged or
 answered,” shows that Courts, in the absence of any
 proof of benefit to the decedent’s estate, were not willing
 to hold the estate to answer alleged wrongs, as to which
 decedent could not be heard. And the exception or quali-
 fication to the rule which was soon developed, shows that
 this was the true reason of the disinclination of the courts
 to cast upon estates the burden of the decedent’s alleged
 wrongs, for ever since the case of *Hambly vs. Trott*, Cow-
 per, 376, the rule has been that if *the estate of the deceased*
was benefited by the wrongful act, the action survives 20
 against his estate.

Lord MANSFIELD, in this case, says: “Here, there-
 fore, is a fundamental distinction; it is a sort of injury by
 which the offender acquires no gain to himself at the ex-
 pense of the sufferer, as beating or imprisoning a man,
 &c., then the person injured has only a reparation for the
delictum in damages to be assessed by a jury. But when,
 besides the crime, property is acquired which benefits
 the testator, then an action *for the value of the property* 30
 shall survive against the executor. As for instance, the
 executor shall not be chargeable for the injury done by
 his testator, in cutting down another man’s trees, but for
 the benefit arising to his testator for the value or sale of
 the trees liable.”

“So far as *the tort goes* an executor shall not be liable,
 and therefore it is that all public and private crimes die
 with the offender, and the executor is not chargeable, but
 so far as the act of the offender is *beneficial*, his assets ought 40

to be answerable, and his executor, therefore, should be charged."

This distinction is adopted universally.

Pope vs. Gibbs, 9 Wend. 29.

U. S. vs. Daniel, 6 How. 11.

2 *Addison on Torts*, (Dudley & Bailey's Ed.,)
1127.

3 *Waite's Act. & Def.*, p. 252, Sec. 5.

- 10 In *Phillips vs. Homfray*, *supra*, all the cases at law and in equity, since *Hambly vs. Trott* are examined, and the equitable rule declared to be that for a wrongful act (not being an injury to specific property under their statute,) which did not benefit the deceased, his executors are not answerable.

The whole course of decisions in England and in other States on analogous statutes, show that the construction of our statute as adopted in *Tichenor vs. Hayes*, stands alone.

- 20 In *England*, under the act of 3d and 4th William, above, which is more extensive than ours,

See *Tuycross vs. Grant*, L. Rep. 4 Com. Pl. Div. 40, Ct. of App., 1878, where *Peek vs. Gurney* was recognized, and the wide distinction insisted on between actions *by* and actions *against* an estate, for wrongs or injuries.

- 30 *General Statutes*, Chap. 127, § 1, in Massachusetts, on similar statute, providing for survival of actions "for damage done to real or personal estate," the statute has always been held to be confined to cases of damage to specific real or personal property, and does not extend to acts causing general pecuniary loss.

Latest cases :

Cummings vs. Bird, 113 Mass. 366.

Leggatt vs. Moulton, Mass. 332.

Conly vs. Conly, 121 Mass. 350.

- 40 In Vermont the statute directs the survival of "actions of trespass and trespass on the case for damages done to

real and personal estate." In *Barrett vs. Copeland*, 20 Vt. 244, on action against constable for damages sustained by a false return; *held*, action must be brought for damages done to *specific property*.

The above cases from other courts sufficiently establish, I submit, the general inclination of the courts to construe statutes of a similar character *according to their plain, natural meaning*, when applied to the condition of the common law at the time of their passage. And I also submit that the construction of the act of 1855, by the application of any other rule or principle is erroneous, and especially that the "*extreme latitude of interpretation*" adopted in *Tichenor vs. Hayes*, was erroneous. 10

The present case is one where considerations based on the *reason* of the old common law maxim, "*actio personalis moritur cum persona*," are of great weight. In any conflict *between the managers* as to their several responsibilities, the temptations and influences to shift all possible responsibility on the estate of a manager who cannot be heard in *answer* or *discharge*, would be such as should make this Court hesitate to establish *by construction*, a liability of estates which the statute has not clearly imposed. 20

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New Jersey Court of Errors and Appeals.

BETWEEN	}	On Demurrer to Bill and Ap- peal from Chan- cery.
DANIEL DODD AND OTHERS,		
<i>Appellants,</i>		
AND		
GEORGE WILKINSON, RECEIVER OF THE		
NEWARK SAVINGS INSTITUTION,		
<i>Respondent.</i>		

Points for appellants, George F. Reeve and Frederick C. Reeve, executors of the last will and testament of Abner S. Reeve, deceased.

I.

The bill in this cause was filed by George Wilkinson, receiver of the Newark Savings Institution, for the purpose of recovering from the late managers of that institution alleged losses by reason of the alleged fraudulent neglect of said managers, and shows:

1. That the Newark Savings Institution was incorporated under and by the act of the Legislature of New Jersey, approved February 25, 1847, and was thereby empowered to acquire, hold, and enjoy real and personal property, to sell, and in every manner, to dispose of such acquired property.
2. That said institution should be conducted by twenty-five managers, of whom twenty should be residents of the city of Newark, and the majority of such managers should be a quorum to do business, with power to appoint officers

who should be under oath for the faithful performance of their respective duties, &c.

3. That said corporation was empowered to receive deposits of money, make investments of such deposits and pay interest, and was also empowered to accept and execute such trusts of every description as might be committed to it by will or otherwise, or transferred by order of any court.

4. That it should be the duty of the managers to regulate the rate of interest to be allowed to depositors, so that the depositors should receive a ratable proportion of the acquired profits after deducting necessary expenses.

5. That no emolument whatever should, directly or indirectly, be received by the president or managers for their services, &c., and other matters regulating said corporation under said act, under which said corporation was subsequently organized.

6. That by a supplement to the above mentioned act of incorporation, approved February 9th, 1859, so much of the original act as prohibited compensation to managers for actual services performed by them for said corporation should be, and was thereby, repealed.

7. That on the twelfth day of December, 1877, the then managers of said corporation, filed their petition in the Court of Chancery of New Jersey, therein and thereby praying among other prayers that the then future administration of said corporation, should be placed under the *control* of the Court of Chancery of this State, so long as should be deemed necessary to promote the interest and insure the permanency and prosperity of that institution—which prayer of said then managers was granted, and by the order of the Chancellor of this State, bearing date the day and year last above stated, it was, among other things, *ordered* that the administration of said corporation and in-

stitution and its fund, was under the control of that court and fully justified to exercise such control, and by said order also directing the management and disposition of said fund in the then future.

8. After the above order, Abner S. Reeve was elected a manager of said institution, on the thirteenth day of February, 1878.

9. By a supplement to an act entitled, "An act concerning Savings Banks," approved April 2, 1878, the Chancellor of this State was authorized to make order restraining payment of deposits or interest thereon on certain information, such corporation from the time of making such order to be and continue the ward of the Court of Chancery; empowering thereby the Chancellor to appoint receiver or receivers, in his discretion, and directing that said last mentioned act be favorably construed, *but not made retrospective* concerning any similar order made by the Chancellor having the same object in view as conferred by this act.

10. Abner S. Reeve was one of the funding committee of said institution from about the thirteenth day of May, 1878, to the time of his death.

11. Abner S. Reeve departed this life on the seventh day of January, 1884. His will was admitted to probate by the surrogate of Essex County, on January 19, 1884.

II.

The appellants, George F. Reeve and Frederick C. Reeve, executors of Abner S. Reeve deceased, submit that their demurrer filed to the said complainant's bill of complaint should be sustained for the following reasons.

FIRST.

WANT OF JURISDICTION OF THE COURT OF CHANCERY IN MATTERS SOUNDING IN DAMAGES OVER ITS EMPLOYEES.

1. Abner S. Reeve, in his lifetime, from the thirteenth day of February, 1878, until his death, was one of the managers of the Newark Savings Institution, during all which period that institution was in charge of and under the control of the Court of Chancery; said deceased in the administration of that institution, simply acted as an employee and servant of that court, not as an officer of the court over whom the court exercises special jurisdiction; if therefore said deceased failed in the proper performance of his duty as such employee, an action by the Chancellor, as in cases by the ordinary in suits on administrator's bonds, might be maintained in any court of record in this State, where, on a proper case, a judgment would be obtained.

BUT,

It cannot be successfully contended that an employer, whether a court or individual, can exercise the power of sitting in judgment of its or his employees and assess such pecuniary damages, whether guilty of delinquency or error of judgment, upon the defendants as may seem proper by the party or court who seeks such pecuniary benefit; such action, if allowed, would not only be against the policy of our constitutional rights, but in contravention of equity and justice.

FOR,

It is the fundamental rule in the administration of justice, that a person cannot be judge in his own cause, and so held in Broom's Legal Maxims, 109.

Reg. v. Justices of Hertfordshire, 6 Q. B., 753.
Schroeder v. Ehlers, 2 Vroom, 50.

State, Winans et als., Pros. v. Crane, Collector, &c., 7 Vroom, 398, and references by Chief Justice.

2. The complainant in this cause by his bill seeks to enforce, before an incompetent tribunal, an alleged claim which is based upon, and had its origin under, an illegal appointment—because

The assumption by the Court of Chancery of the control and management of the Newark Savings Institution under and by virtue of the order in that behalf, dated December 12, 1877, and all acts under the same, were without legal authority and held to be null and void.

Una, et als. vs. Daniel Dodd, et als. Decided by the Court of Errors and Appeals at its November term, 1885.

3. And because no loss to the Court of Chancery or to the complainant, by reason of any act done or performed by said Abner S. Reeve while acting as the agent of the Court of Chancery or its officers, is made apparent by the complainant's said bill of complaint.

4. No fraudulent action or acts are charged against Abner S. Reeve while thus acting as agent of the Court of Chancery in the management of the Newark Savings Institution, shown or insisted upon by the complainant in and by his said bill of complaint—the only charge made and attempted to be made, and only in a very vague and uncertain degree, is that the said Abner S. Reeve while thus employed had, by reason of error in judgment, been guilty of an alleged breach of trust towards his employer.

III.

FOR WANT OF NECESSARY PARTIES.

1. Because by the complainant's said bill it is alleged, that the managers of the Newark Savings Institution had wrongfully placed the principal portion of the assets of said institution in the custody and under the control of Harvey Fisk and Alfrederick S. Hatch, composing the firm of Fisk

& Hatch, at the same time showing and alleging that said firm of Fisk & Hatch were aware and knew of the position of said managers towards said institution, and that the money and bonds delivered to said firm were the property of said institution held by said managers in trust.

This position is not denied by the complainant, in fact, it is admitted by the bill.

And, therefore, these appellants respectfully insist that the said Harvey Fisk and Alfrederick S. Hatch are necessary parties to said bill of complaint and should, as parties thereto, be brought before the court, for

When a person knowingly deals with an agent of a disclosed principal, such person is responsible to the principal and must answer his demands whether actual fraud is shown or not, for which reason said Fisk & Hatch should have been made, and are, necessary parties to said suit.

If trustees commit a breach of trust and the third party obtains the benefit of it, they must be joined as defendants in a suit by the cestui que trust.

Burt v. Dennett, 2 Bro. Chy., 225.

Consitt v. Bell, 1 Y. and Col. Chy., 569.

Williams v. Allen, 29 Beav., 292.

If trustees convey the property to a third person, with notice of the trust, or without consideration, such third person may be sued by the cestui que trust, AND must be joined with the trustees in a suit for relief by the cestui que trust.

Montford v. Cadogan, 17 Vesey, 485.

Salomans v. Laing, 12 Beavan, 377.

Hanson v. Worthington, 12 Md., 418.

Abbott v. Reeves, 49 Penn. St., 494.

Hutchinson v. Reid, Hoffman Chy., 317.

Bailey v. Inglee, 2 Paige, 278.

Bush v. Bush, 3 Strob. Eq., 377.

Lund v. Blanshard, 4 Hare, 28, and note.

Meyer v. Montriou, 9 Beav., 521.

All parties in interest in the subject matter of the suit, and who are necessary to the *protection of other parties to the suit*, are necessary parties.

Hicks v. Hathaway & Campbell, 4 C. E. Green, 183.

Van Keuren et als. v. McLaughlin & Mallory, 6 C. E. Green, 163.

Pence et als. v. Pence et als., 2 Beasl., 257.

Robinson et als. v. E. M. Davis et als., 3 Stockton, 302.

Wright v. Wood, 12 Jurist.

IV.

The bill is filed prematurely, as no loss has as yet been shown or in anywise disclosed by this bill.

The complainant's allegation in his bill of complaint is simply on his part a presumptive loss, at the same time the bill discloses a gain upon a portion of the assets held by the complainant—*see page 32 of printed bill*—and on that page admits that no loss has been ascertained.

Hence this action is premature.

Sherman v. Lanier, 12 Stewart, 255.

These appellants therefore submit and respectfully insist that before these appellants can be called upon to answer the complainant's bill in this cause as to his alleged presumptive losses, if any, to the complainant, and to respond to subsequent precuniary damages, the complainant is bound not only by mere suggestion to aver that there may be a loss eventually, but must first satisfy the court and establish beyond a reasonable doubt that there exists an actual loss and to what extent—no such disclosure having been made by the complainant, these appellants should be absolved from answering said bill.

The complainant in his position as receiver acted arbitrarily towards the managers and these appellants, for the reason that he disposed of all the assets of the Newark Savings Institution and released Fisk & Hatch, without the knowledge or consent of the managers of that institution.

It is a well settled principle of law that no person can take advantage of his own wrong.

In this behalf, it is worthy of note that the complainant assumed charge of the Newark Savings Institution and of its assets, and forthwith entered into negotiation with Fisk & Hatch, received what that firm offered him, and, by his release to them, destroyed every prospect of any recovery from that firm in the future.

Thus giving no opportunity to the parties, whom he now seeks to hold responsible in pecuniary damages, to save themselves from such calamity, but arbitrarily prevented them from such right, and in addition, destroyed all future claim or demand that could possibly be asserted by the managers against Fisk & Hatch.

And these appellants submit that in justice and equity the complainant before assuming the position he did in that behalf, should first have notified the managers of that institution and these appellants, of the proposition made to him by Fisk & Hatch, and obtained their consent or given them the opportunity to save themselves from loss or injury by receiving the assets and supplying the moneys represented by the same, leaving all right of action against Fisk & Hatch free and open to those managers.

Nothing appearing or being shown by the complainant in his bill, that he offered such option to the managers or these appellants, and that although asking equity, he had by his action as receiver failed to act equitably, these appel-

lants should not be called to answer said bill, as, by the complainant's showing, he cannot in equity maintain his bill.

When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the other.

Jackson v. Ludeling, 21 Wall, 616.

VI.

Ratification of managers' acts by receiver of Savings Institution, the complainant, and his release to Fisk & Hatch.

1. Because the Court of Chancery, by its order of December 12, 1877, assumed control of the Newark Savings Institution, and thereafter allowing the then managers and such others as were subsequently selected by them, to constitute such managers and agents of the said court.

Subsequently, it is alleged, that those managers were derelict in their management, and it so appearing to the Court of Chancery, that tribunal thereupon created an officer of that court, viz., the complainant, receiver of the Newark Savings Institution, who, on assuming that position, and by virtue of the power and authority vested in him as such officer of that court, on May 29, 1884, executed the bill of sale and release set forth (on pages 33, 34, 35 and 36, of printed bill); and thereby, as these appellants submit, ratified all the actions of the managers of said Newark Savings Institution, prior to the last mentioned date.

2. Such sale and release were executed by said receiver by advice of counsel, and in order to be legal and binding upon all parties interested must have been made by and with the knowledge and authority of the Chancellor.

The complainant alleges in his bill of complaint that

the Newark Savings Institution, as well as Fisk & Hatch, were insolvent at the time of the compromise with, and discharge and release by him to, Fisk & Hatch.

In such case, if existing, it is held

That an assignee in bankruptcy must, before he can lawfully settle any dispute, controversy, or make any compromise affecting the estate of the bankrupt, apply to the court by petition to enter into such compromise.

In re John Graves, 1 B. R. 237.

And if the assignee attempts to arbitrate or compromise without pursuing that course, the agreement will be binding on him in his individual and not in his representative capacity.

Blight v. Ashley, Pet. C. C. 15.

In this cause the complainant acted as the agent of the Court of Chancery, and whether he had the previous proper authority from that court to conclude the alleged compromise with Fisk & Hatch or not, either his principal whom he represented or the complainant in his individual capacity is liable for loss, if any, growing out of that transaction, and the managers are and were by that compromise and release of the complainant, absolved from further liability, for the reasons:

1. That the complainant, acting in the capacity of representation, was either remiss in his duties, *or*

2. Bound his principal by his acts, *and*

3. The principal, receiving the proceeds of such compromise, ratified the act of the agent.

The latter proposition is too well established to need any elucidation.

And as Powell, J., in Thorold vs. Smith, 11 Mod. Rep., 108, said: "No modern practice will alter the old law," and an adoption in part is an adoption in toto.

In this case the Court of Chancery adopted the act of its officer in the making of the compromise with Fisk & Hatch, and the giving of the release set forth in the complainant's bill, and hence it cannot ratify that part which is beneficial and reject the remainder; consequently that contract and release by the receiver, adopted by the court, is an estoppel of all further controversy of, and regarding all prior transactions between the managers and Fisk & Hatch.

It is an adoption and ratification of the managers' acts by the complainant and of the court whom he represented, AND if the act of that court in assuming charge of the Newark Savings Institution was illegal, the appointment of the complainant as receiver, cannot have any legal effect so far as the managers are concerned.

The law in respect to ratification applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent.

Kelsey vs. National Bank of Crawford Co.
69 Pa. St., 426.

Smith vs. Sheeley, 12 Wallace, 358.

Norris vs. Cook, 1 Curtis, 464.

Marshall vs. Williams, 2 Biss, 255.

Armony vs. Hamilton, 105 Mass., 103.

Clark vs. Meigs, 10 Bosw., 237.

Johnson vs. Jones, 4 Barb., 369

Hanks vs. Drake, 49 Barb., 186.

Hall vs. Van Ness, 49 Penn. St., 457.

All contracts by a receiver are subject to ratification by the court, with the undoubted power to vacate or modify such contracts and to direct the making of another agreement; but will not exercise such power without notice and without hearing the contracting parties.

Mooney v. British Commercial Life Ins. Co.,
9 Alb. Pr. N. J., 103.

VII.

That neither these appellants, as executors of Abner S. Reeve deceased, nor the estate of said deceased, can be held liable for any alleged or actual tort said to have been committed by said deceased.

And in this case no allegation that said deceased had received any benefit from the alleged dereliction on the part of the managers of said institution is shown—hence in 1873 in *Peek v. Gurney*, 6 House of Lords, 377, held that proceedings for the deceit by a director of a company whether at law or in equity, is of a personal character, and the estate of a deceased director not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it.

Nor does the complainant disclose by his said bill what claim or demand he has or expects to make against these appellants, as executors of Abner S. Reeve deceased, or against the estate of said deceased.

VIII.

These appellants also submit and insist that all the transactions set forth in the complainant's bill, from and out of which the complainant alleges his apprehension of ultimate loss, took place and were had and consummated subsequent to the death of Abner S. Reeve, and that therefore neither these appellants as executors as aforesaid, nor the estate of said deceased, can be held for any of the acts of the managers of said Newark Savings Institution, which occurred and were consummated months after the decease of said Abner S. Reeve deceased.

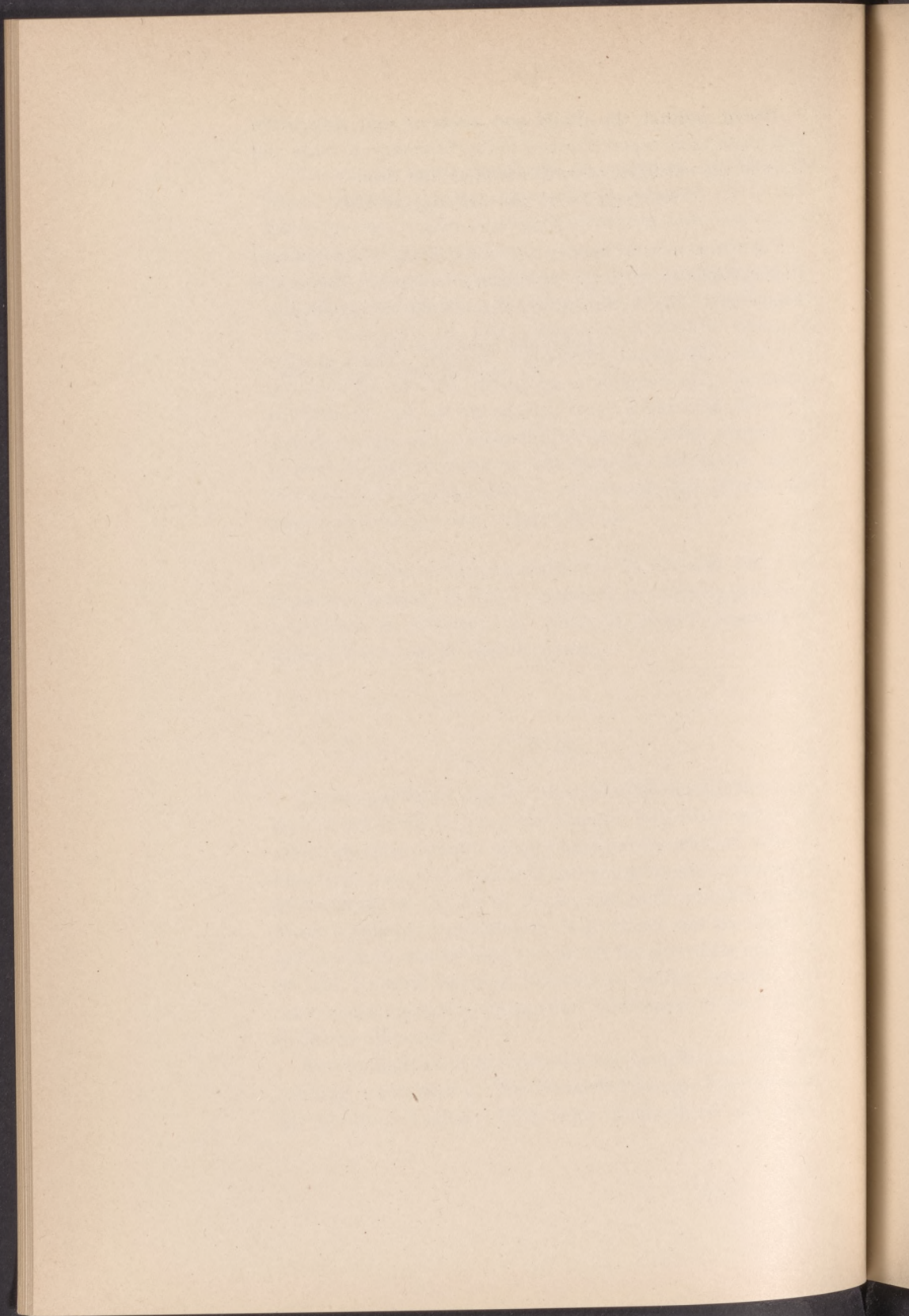
And in addition it is shown by the complainant that the funding committee of the Newark Savings Institution in the month of January, 1884, after the death of said Abner

S. Reeve, audited the affairs and assets of said institution and made their report thereon to the Secretary of State and showed the existence of such assets at that time.

See page 30 of printed copy of bill.

For which several reasons above set forth, it is submitted that the demurrer of the appellants, George F. Reeve and Frederick C. Reeve, executors, etc., should be sustained.

CHARLES BORCHERLING,
Counsel of said Appellants.



New Jersey Court of Errors and Appeals.

BETWEEN

DANIEL DODD AND OTHERS,

Appellants,

AND

GEORGE WILKINSON, RECEIVER OF THE

NEWARK SAVINGS INSTITUTION,

Respondent.

On Appeal from
decree advised
by Vice Chan-
cellor Bird.

POINTS FOR APPELLANTS,

being general points relied on by all appellants, in common.

FIRST POINT.

The action of the Receiver is prematurely brought, for the reason that it does not appear from *the facts* stated in the bill that any loss has yet been sustained by reason of the alleged illegal loans or investments.

As to the loans to Joseph A. Halsey, Stephen H. Condict and E. H. Harriman & Co. p. 18, l. 14 to p. 19, l. 32; and to Victor Newcombe (par. 22, p. 24, l. 1, etc.) E. H. Harriman & Co., (par. 22, l. 17, etc.) on securities alleged to be unauthorized—there is no allegation or pretence that these loans were not paid, or that there was any loss on any of these loans; as matter of fact they were all paid.

The only claim of loss is on the transactions with Fisk & Hatch, (par. 26, p. 26, l. 23 to par. 33, page 33), and as to these transactions—the money of the institution on deposit with them—\$845,632.04 (p. 31, l. 30) was paid to the complainant on his settlement with them (par. 34, pp. 33, l. 30, etc.) The only claim of loss is in reference to the Uni-

ted States bonds belonging to the institution, which Fisk & Hatch should have returned to it, amounting to \$2,036,000 par value, and \$2,329,600 market value, (par. 31, p. 31, l. 8-30) in lieu of which they had transferred to the institution *on account* of their liability (par. 32, l. 12) the securities valued by them at \$2,327,968.47 (schedule A, p. 36-38,) and which securities Fisk & Hatch afterwards conveyed absolutely to the complainant as Receiver on May 29, 1884, upon receiving from him absolute title to the United States bonds belonging to the institution, and a release of all claims—(par. 34, p. 33-38).

A portion of these securities received from Fisk & Hatch had been disposed of by the Receiver before filing the bill—from which he realized \$821,225.16 (see bill, par. 32, p. 32, line 20, etc., also schedule B, p. 43,) being \$3,086.69 more than the valuation fixed on them by Fisk & Hatch in schedule A, (\$818,138.47). (*Ibid*). The residue of the securities, valued by Fisk & Hatch at \$1,510,330, remain in the hands of the Receiver unsold (see bill, p. 32, l. 29, etc., and schedule C, p. 43, etc.)

The only *allegation of fact* in the bill in reference to these unsold securities is in par. 32, p. 32, l. 32, “that the value put on these last named securities by said firm exceeded their market value at the time of the transfer (May 15, 1884,) by at least \$400,000, and has exceeded their true market value by at least that sum ever since.” (Bill filed January 9, 1885).

There is no allegation that before he realizes on them, or should realize on them, the value will not equal the alleged deficiency, or that the valuation was so excessive that there was no reasonable expectation of reaching it. From the fact that the Receiver has not sold them, and that the court has not ordered their sale, the inference is fair that their fair or reasonable value has not yet been reached, and that when it is reached and sale is made, there may be no loss whatever to the institution.

The allegation in the bill, p. 32, l. 36, etc., that “the loss to the institution arising from the failure of said firm to

return said government bonds and money in full * * * exceeds the sum of \$400,000," is a mere inference or prophecy, from the statement of fact *in the same paragraph*, which is above set out, and is not, and cannot be taken to be separate and independent statement of fact, which should be taken to be admitted by the demurrer.

Under the decisions in New Jersey, the loss from an improper management of trust funds must have actually taken place before the trustee can be held liable to make it good.

See *Sherman vs. Lanier*, 12 Stew., 255, (*Prerog. Court*, 1884), where it was held that a trustee who had invested trust funds on a second mortgage could not be held liable for loss before the amount of the loss, if any, was ascertained by sale of the property.

Also, *Porter vs. Woodruff*, 9 Stew., 174, (*Vice-Ch. Van Fleet*, 1882), where, on a bill filed by a principal to hold her agent liable (*inter alia*) for making an improper or insecure investment of her moneys, on second mortgage, relief in this respect was refused, because (p. 186,) no loss had been sustained on the investment, nor was any attempt made to show that the complainant must invariably or would probably suffer loss.

No rule is better settled either in legal or equitable pleading than that a cause of action must exist unconditionally at the time a bill is filed. If anything is to be done before the liability can be determined, it must be done before the action will lie. If a loss is to be the result of a difference in values of property, and a pecuniary recovery is claimed, is it not an essential prerequisite that the difference in value shall have been ascertained before suit brought; will it be sufficient to state argumentatively that a loss has been incurred?

While the suit progresses, a rise in the value of the stock may demonstrate that there is no cause of action. That would be the effect of a rise of a few dollars in the price of the Chesapeake & Ohio securities.

The prayer for an account does not change the aspect of the bill, for the bill must show an actual loss and an account is never taken to ascertain *whether a cause of action exists.*

SECOND POINT.

There is no equity or basis for an equitable decree in the complainant's bill, for the reason that the bill discloses that Fisk & Hatch, to whom the alleged illegal and improper loans of money and bonds were made, have been released and discharged by the Receiver from liability in said loss, and the bill does not ask the cancellation of the release, but permits it to stand in favor of Fisk & Hatch, who are not parties to the bill.

Had the release not been made, no equitable decree could have been made holding the managers, as trustees liable for making the loans, *except upon the terms* that the loans and rights of action against Fisk & Hatch, upon them, should belong to the defendants held responsible for making them.

Sherman vs. Lanier, 12 Stew. , supra pp. 252, where the trustee having been charged with the whole amount of an improper loan of trust funds on a promissory note and insurance policy—which was altogether lost—it was declared, p. 252. “She is chargeable with the amount of the loan and interest. On paying the money and interest she will, of course, be entitled to the note and policy.”

Prall vs. Hamil, 1 Stew., 66, (Ch. Runyon, 1877), where bill was filed to compel an assignee of some of the securities of an estate, who had taken them with notice, as collateral security for the debts of persons having some remainder interest in the estate, and it was held that the assignee must restore the securities, but only upon the terms that they should have as security for their debt the interest of the remainderman in the securities.

Fanaille vs. Cardert, 15 Vroom, 286, (supr. ct., 1882.) In this suit the owner of premises sued an attorney who had drawn a building contract, for negligence in not filing it, by reason of which the premises became liable to a building lien in favor of a sub-contractor. It appearing that the

original contractor had been released by the plaintiffs from liability for the sub-contractor's claim, it was held (Beasley, ch. j., p. 292), that plaintiffs had relinquished their right to recovery for negligence of defendants by discharging the contractor from whom the defendants otherwise might have claimed reimbursement.

See also *Newman vs. Fowler*, 8 *Vroom*, 89, 92.

The writing delivered to Fisk & Hatch was a *release*.

It was under seal, (bill, p. 34, l. 18,) and contained the clause, (bill, p. 34, l. 18, etc.,) "it is mutually understood and agreed by and between the parties hereto that all matters in difference whatsoever between the parties of the first part (Fisk & Hatch,) and the Newark Savings Institution are at an end and definitely adjusted hereby."

Both in law and equity the instrument could have been pleaded as a release to any claims existing at its date, (May 15, 1884,) and the loans now sought to be recovered of the managers are *expressly* settled by the instrument. (See bill, pp. 34 and 35).

The instrument was intended by both parties to it *as a release*, and this *intention to release* all liability is expressly admitted by the complainant in his bill. See *bill*, p. 34, l. 5-18. Fisk & Hatch agreed to raise the money due on account, (\$845,000,) provided he (the Receiver) would immediately *execute to them a release* from all further liability, but only on that condition, etc., and that being satisfied of the truth of this, and in order to obtain the money, the Receiver signed the paper in question.

In equity this instrument would be construed to effect the intention of releasing, even if there were any question as to its being a technical release.

THIRD POINT.

Fisk & Hatch were the persons primarily liable for the breaches of trust alleged in the bill, inasmuch as they received the sole benefit from the same, and the managers, if

held liable, were entitled to indemnification from them, and their release, therefore, discharges the managers, who are secondarily liable.

Lewin on Trusts, p. 777, "A cestui que trust may preclude himself from his remedy against the trustee by executing a formal release of the breach of trust, or giving validity to the transaction by an express *confirmation*, and if the cestui que trust release the principal in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been secondarily liable," and cases cited (*in per al.*)

Perry on Trusts, Sec. 851, citing same cases; and also *Creswell vs. Dewell*, 4 *Giff.*, 465; *Bispham's Eq.*, p. 151.

Hill on Trustees, p. 582, the release of a defaulting trustee is a release of all trustees.

Blackwood vs. Borrowes, 2 *Conn. & Laws*, 459.

Thompson vs. Harrison, 2 *Brown's Rep. Ch.* 164.

In *Dorsheimer vs. Rosback*, 8 *C. E. Green*, 46, affirmed on appeal; 10 *C. E. Green*, 516, (*Err. and App.*, 1872), where administrators of an estate had improperly paid over to J. R. the distributive share of complainant, it was decreed that J. R., who had fraudulently received the benefit of the breach of trust, was first liable to refund the amount, and secondly the administrators to the trustees of the fund.

FOURTH POINT.

If in the making of loans and investments the managers are to be regarded as agents of the institution and not as trustees, then the effect of the release and the action of the Receiver was to ratify and confirm in all respects the alleged illegal and improper loans, and the Receiver, as representing the principal, cannot after such ratification of an unauthorized act of the agents hold the agents liable for the act.

Dunlap's Paleys Agency, p. 4, on the subject of acquiescence and ratification:

"Though every excess of authority is at the hazard of the

agent, the principal, by taking the benefit of his act, discharges the agent and embraces the risk himself. Thus, if an agent take upon him to put out his employer's money at interest, unknown to him and without his authority, it is at his own hazard, but the receipt of interest by the principal with knowledge is an affirmance by him of the transaction, and exempts the agent from liability if the security fail."

See also *Haughwout vs. Murphy*, 7 *C. E. Gr.*, 531, (*Err. and App.*, 1871). In this case a purchaser had a right to compel a conveyance of lands which had been conveyed to a subsequent purchaser with notice of his contract; it was held that the first purchaser by purchasing a security for the purchase money which had been given by the second purchaser, had affirmed the sale to the second purchaser. (*Depue, J.*, p. 551).

"Haughwout (the first purchaser) might have insisted upon having the land itself, or at his option pursued the proceeds of sale. He cannot have both. By accepting a security given for the purchase money, he is deemed to have affirmed the sale so far as respects the purchaser."

Citing—

Murray vs. Lyllburn, 2 *Johns. Ch.*, 441.

2 *St. Eq.*, *Sec.* 1262.

Scott vs. Gamble, 1 *Stockt.*, 218.

The alleged illegal and unauthorized acts of the managers with Fisk & Hatch, if ratified at all by the Receiver, must be ratified wholly and not in part, and the acceptance of the securities from Fisk & Hatch in full settlement and discharge of all their liabilities to the institution arising out of their dealings with its agents is a ratification of the transaction so far as the agents are concerned. That ratification is of the entire unauthorized act. See—

Dunlaps Pal. Agency * 172. 173 & cases cited.

FIFTH POINT.

The Receiver in electing to accept the securities delivered by Fisk & Hatch to the institution in full settlement and discharge of their liabilities, has precluded himself from

holding the managers personally liable as trustees. (Cases on election of remedy by cestui que trust.)

Perry on Trusts, Sec. 843.

St. Eq. Juris., Sec. 1262, 10th Ed.

Barker vs. Barker, 14 Wisc., 142, 159.

Thompson's appeal, 22 Pa. St., 17.

Lathrop vs. Bampton, 31 Calif., 22.

Oliver vs. Pratt, 3 How., 333.

SIXTH POINT.

The allegations in the bill (p. 39, l. 3 etc.), setting out facts upon which it is claimed as a legal proposition that the release does not operate as to the managers, are of no effect whatever, as the basis of an equitable decree, for the following reasons :

(1.) The allegation of ignorance of the breaches of trust set out in the bill on the part of the managers, is admittedly untrue as to the only breach of trust which occasioned the loss, viz., the loans to Fisk & Hatch. Both the Receiver and Fisk & Hatch must have known that their possession (as alleged) was unauthorized.

The contract accurately recites the legal rights and title of the parties as they were when the release was made.

The order closing the institution, and directing appointment of a Receiver, states that the loan of the bonds to Fisk & Hatch was unauthorized.

(2.) The other alleged breaches of trust, e. g., the Condict, Halsey and Harriman loans, did not result in any loss, and knowledge of them was immaterial for the purpose of the Receiver's dealings with Fisk & Hatch.

(3.) The bill closes without making Fisk & Hatch parties, or claiming that as to them the release is invalid and therefore this suit will proceed to a decree, while permitting the release to stand as a valid release in favor of Fisk & Hatch. If the facts relied on to invalidate it are sufficient for that purpose, the bill should have sought to *cancel it*. By permitting it to stand in favor of Fisk & Hatch, it stands

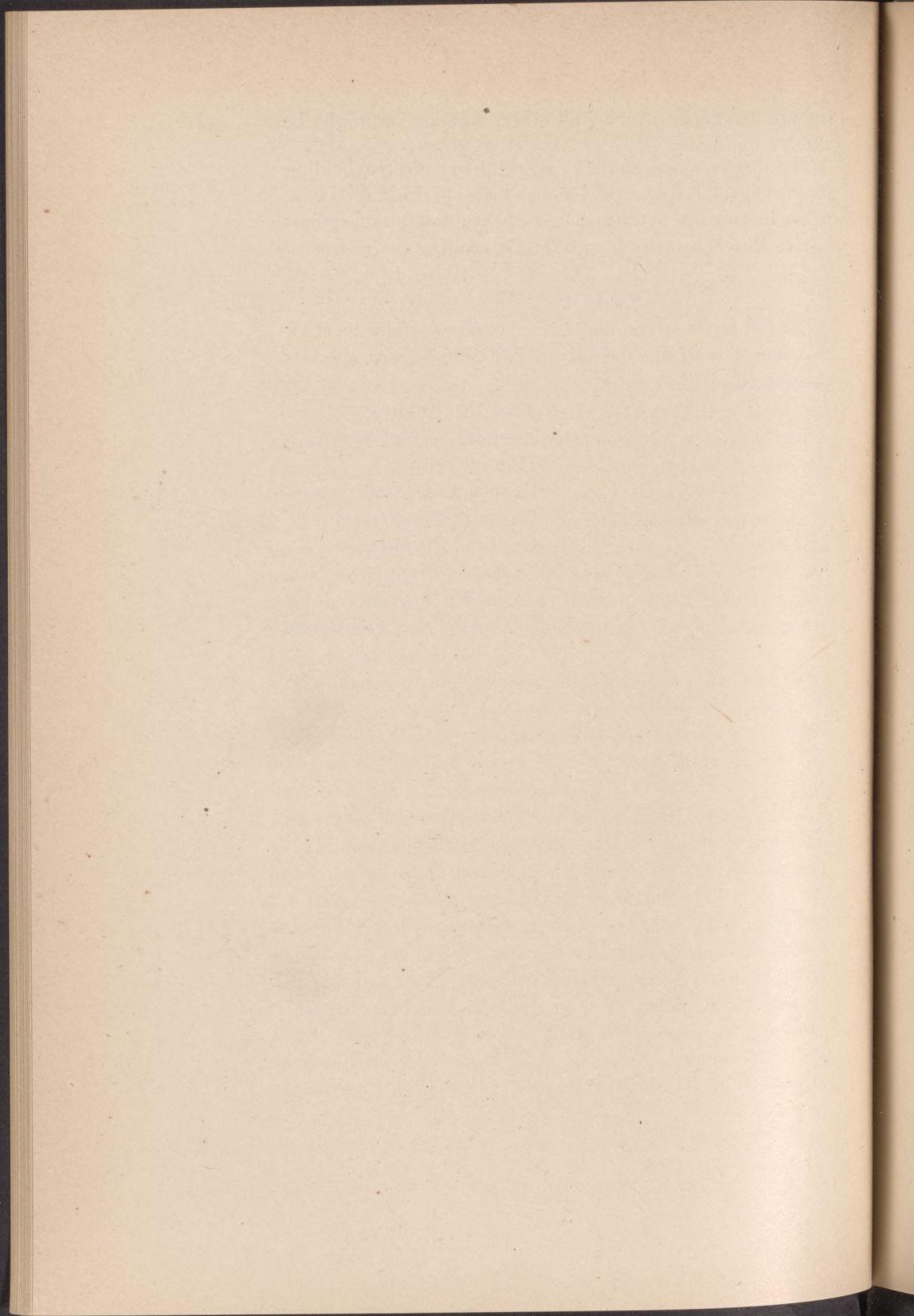
and must stand in favor of all others who are or might be affected by the release.

The Receiver has equitably no right to a decree holding the managers responsible for the loans to Fisk & Hatch, unless he restores to the managers the right of action against Fisk & Hatch, by *setting aside* and cancelling the release.

SEVENTH POINT.

The bill is vague and uncertain, because it fails to show the connection of the defendants individually with the acts complained of.

JOHN R. EMERY,
THOMAS N. McCARTER,
HENRY YOUNG,
FRED'K FRELINGHUYSEN,
CHAS. BORCHERLING.
GEO. W. HUBBELL,
TEESE & PITNEY,
JOHN W. TAYLOR,
Counsel for Appellants.



N. J. Court of Errors and Appeals.

<i>Between</i>	}	10
DANIEL DODD, AND OTHERS,		
<i>Appellants,</i>		
<i>and</i>		
GEORGE WILKINSON, RECEIVER	}	<i>On Appeal,</i>
OF THE NEWARK SAVINGS INSTI-		
TUTION,	}	
<i>Respondent.</i>		

Argument of Henry Young. 20

I appear for three of the defendants, WILLIAM T. MERCER, CHARLES E. YOUNG and BERNARD M. SHANLEY. These gentlemen were formerly managers of the Newark Savings Institution.

William T. Mercer was a manager from December 12, 1866, to May 15, 1884. He was a member of the auditing committee from May 15, 1877, to May 15, 1884.

Charles E. Young was a manager from January 19, 1878, to *Sept. 12, 1883*. He was a member of the auditing committee from Oct. 9, 1878, to *Sept. 12, 1883*. 30

Bernard M. Shanley was a manager from Feb. 13, 1878, to May 15, 1884. He served on no committee. (Pages 14 and 15, bill.)

The case comes before the Court on appeal from the order of the Court of Chancery overruling demurrer to the bill.

The respondent is *Receiver* of The Newark Savings Institution. As such receiver, he took possession of the 40

property and assets of this Institution, on the *16th day of May, 1884*, under an order of this Court. (Amendment to Section 33 of the bill.)

The statute of the State entitled "A supplement to an act entitled 'An act concerning Savings Banks,' approved April 21, 1876," *approved April 5, 1878*, (P. L. 421,) confers upon the Chancellor the power to appoint receivers of insolvent savings banks and to restrain the payment of depositors, &c., except under the order of the
 10 Court. See this act—especially Sec. 4, and Sec. 3, amended by supplement of March 11, 1880, (P. L. 192,) which see.

This act of 1878 expressly declares that no savings bank or institution for savings shall be subject, *otherwise than under this act*, to be declared insolvent, or placed in charge of a receiver; and, of course, this provision limits the power of this Court.

The legislative scheme disclosed in this law was wisely
 20 devised to prevent the loss to depositors, or persons interested, which almost invariably follows the placing of the assets of an insolvent institution in the hands of a receiver.

It was intended that *time* should be given to embarrassed institutions to work out of their embarrassments; and that, not until it was hopelessly insolvent, should a receiver be appointed.

It is apparent that the provisions of this statute were not in all respects regarded, when this complainant was
 30 *first* appointed receiver of the Newark Savings Institution.

It appears from what I have already said that Wilkinson was *first* appointed receiver on the *16th day of May, 1884*. Yet not till June following (*three weeks afterwards*) was the *petition* which the statute requires as a preliminary to such action, filed. (Sec. 1 of the bill.)

On the same day on which the petition was filed, the examination which the statute provides for was made, and on the same day the complainant was a *second time*
 40 appointed or *continued* (as the bill alleges) receiver.

The suit is brought by the receiver against the defendants as managers of the Newark Savings Institution, and it is alleged that these defendants should be called to account because they have been negligent in the discharge of their duties, and that this negligence has caused the failure of the bank.

The prayer of the bill is as follows: (page 40.) "That the said managers may be decreed to have occasioned by their neglect and illegal acts, and breaches of trust, the loss suffered by said Institution at the hands of Fisk & Hatch, and that they may be decreed to make good the same, and that an account may be taken of the losses resulting from said negligent and illegal acts and breaches of trust of said managers, or any of them, and that they may be decreed to pay the amount of the losses with which they, or any of them, are properly chargeable, and that the complainant may have such other and further relief as the nature of the case may require and as may be agreeable to equity and good conscience."

It is necessary to a proper understanding of the question before the Court that the history of this Institution should be referred to. This history, as well as the acts which are alleged to form the basis of this action, are set forth at length in the bill. The Newark Savings Institution was incorporated by act of February 25, 1847, and thereby created a body politic and corporate, capable of suing and being sued, and of holding and enjoying real and personal property necessary for the purposes of its creation. (P. L., 1847, p. 105.)

This act provided that the Institution should be conducted by twenty-five managers, elected annually, twenty of them residents of the city of Newark, and a majority should be a quorum to do business; that they should elect annually, on the *second Monday of May*, one of their number to be president; and that they should have power to appoint a secretary, treasurer and other necessary officers, who should continue in office one year and until others were chosen; and that such *officers* should have power to appoint clerks and such other agents or

servants as they might deem necessary for conducting the affairs of the corporation.

Further, that the said board of managers should, from time to time, have power to *make, ordain and establish such by-laws and regulations as they shall deem proper, for the election of their officers*, for prescribing their respective functions, and the mode of discharging the same; for regulating the time and place of the meetings of the officers and managers, and for *transacting, managing and*
 10 *directing the affairs of the institution.*

It was also enacted that the said corporation might receive as deposits all sums of money which might be offered for the purpose of being invested, in such sums, and at such times, and on such terms as the *by-laws may prescribe, which should be invested accordingly*, and should be repaid to such depositors at such times and *with such interest*, and under such regulations as the board of managers might prescribe; and that said corporation might
 20 accept and execute all such trusts of every description, as might be committed to it by any person or persons whatsoever, by will or otherwise, or transferred to it by order of any court.

The charter further provided, originally, that no emolument whatever should, directly or indirectly, be received by the president or managers for their services, nor should any manager, officer or agent of the corporation be allowed to borrow any money from said Institution, or to have any interest in any deposit, or the profits
 30 arising from the same, except it might be due for deposits made by them as trustees for the benefit of others.

By a supplement approved February 9, 1859, (P. L., p. 5,) so much of the original act as prohibited *compensation* to managers for services actually performed by them for the corporation, was repealed, and it was declared that compensation to be allowed the managers should be first determined upon by the board.

By authority of this provision the president, (Mr. Dodd,) received (Sec. 14 of bill,) for five years prior to
 40 May 15, 1884, (when the bank ceased to do business,) an

annual salary of \$4,000; the vice-president, (Mr. A. Bishop Baldwin,) an annual salary of \$600, from August 27, 1879, (when he was first appointed,) to May 1, 1881, and thereafter to May 15, 1884, an annual salary of \$1,000, and in addition, \$8.00 per week, for certain special services; and the other managers (by resolution of October 9, 1878,) received \$3.00 per day for each day's service rendered to the Institution. *This compensation included attendance at meetings of the committees of the board, but not attendance upon regular board meetings.* 10

For this last mentioned service the managers received nothing. Those members of the board, then, who were not members of committees, special or otherwise, received nothing for their services. (See p. 13, Sec. 14, bill.)

The original act *further* enacted (Secs. 5 and 6, bill,) that the managers and officers of the corporation should keep certain books and allow interest as in said act specified; and also should make an annual report to the legislature of the State under oath, of the state of the funds, but by an act approved April 21, 1876, (P. L. 1876, p. 341,) entitled "An act concerning savings banks," it is provided that it should be the duty of the managers of each savings bank, by a committee of not less than three of their number, on or before the first day of January in each year, to examine the books, vouchers and assets; and to make a detailed report, verified by oath, of its condition, investments, securities and deposits, to the Secretary of State, on or before the first day of February in each year. 20

The bill alleges (Sec. 6,) that this report has been annually made since January 1, 1879, by a committee of the managers of this Institution. 30

Such, then, are the general provisions of the charter of this Institution, (modified in some respects by subsequent legislation,) to which I now desire to call the attention of the Court.

It will have been observed that the managers are invested by this act with powers to make by-laws for 40

transacting, managing and directing the affairs of the institution. (Sec. 3, bill.) Further, (Sec. 4, bill,) that moneys received as deposits should be *invested as the by-laws prescribe.*

In accordance with the power thus conferred, the managers of the Institution adopted certain by-laws. These by-laws were in force during the whole time covered by the transactions set forth in the bill, except as hereinafter mentioned. (pp. 6-8.)

10 They provide (pp. 6-8):

(1.) That the stated meetings of the *board* shall be on the second Monday of May, and on the second Wednesday of every other month; and extra meetings may be called by the president, vice-president, or upon the written request of three managers. This by-law was amended September 12, 1883, (Sec. 8, bill, p. 8.) so that the stated meetings of the board were required to be held *quarterly*, on the second Wednesday of January, 20 April, July and October.

(2.) Another by-law provides that there shall be a president, vice-president, treasurer, an auditing committee of five members, a funding committee of four members, and the president, and vice-president *ex officio*, and also a safe deposit committee of five members, and the president and treasurer, *ex officio*.

30 (3.) A third by-law provides that the president shall have (p. 7, bill,) the custody of the common seal and of the official bonds, &c., and shall be *ex officio* chairman of the funding committee. He shall have the CUSTODY of the *books, papers, funds and assets*; and also the direction of the persons employed in the Institution, and generally of its executive business, subject to the action of the board. The power thus reposed in the president was very large. Yet, it was in conformity with that portion of the charter which authorized the managers to pass by-laws providing "for the election of officers, and prescribing their respective functions and the mode of 40 discharging the same."

(4.) It was further provided by the by-laws, that "The *funding* committee shall have power and authority" (p. 8, bill,) "to *invest* such parts of the money deposited in or belonging to the Institution, as they *shall deem proper* and in accordance with their charter, and *at their discretion to sell, dispose of, or exchange* any of the securities in which the funds of the Institution may be invested. They shall also have power to demand the payment of any bond or mortgage or *other security*, and, if necessary, enforce such payment by due course 10 of law. They may release a part of mortgaged premises, if in their judgment the remaining security is ample to secure the money loaned, and is worth double its amount. They shall keep minutes of their proceedings and report the same to the stated meetings of the board." (p. 8, bill.) *The auditing committee* shall examine all the cash, securities and accounts of the Institution, and report their condition at every regular quarterly meeting of the board, in January, April, July and October in each year." 20

It will be seen, then, that the sole power of investing the moneys of the Institution, and of *selling, disposing of or exchanging* any of the securities in which the funds were so invested, and of adopting the necessary measures to those ends, was lodged with the *funding committee*; and it was, do doubt, properly so lodged.

I speak of this now, and shall again hereafter, not for the purpose of showing that the bill does not sufficiently charge the defendants whom I represent with neglect; 30 (the case of *Williams vs. McKay*, 13 Stew., 195, settles that;) but for the purpose of showing that they were not guilty of the wrongdoing and fraudulent conduct with which the Vice-Chancellor charges them. If they, on the face of the bill, are guilty of nothing more than an ordinary breach of trust, the effect of the release of Fisk & Hatch, to which I shall hereafter refer, must be apparent so far at least as these defendants are concerned.

The Institution thus chartered soon after began to transact the business of a savings bank, (Sec. 8, bill, p. 6.) 40

and continued so to do (except during a short interval in December, 1877,) until the 15th day of May, 1884.

In December, 1877, the Institution, by its then managers (pages 9 and 10, bill,) presented a petition to this Court alleging that the deposits of the Institution amounted to about \$10,800,000, and its assets to about \$12,000,000, but that owing to the depreciation in the market value of a part of its securities, it would in the event of the sudden withdrawal of a large portion of its assets be unable to pay its remaining depositors in full; and, to prevent inequality, it therefore prayed that an order might be made restraining it from paying to any depositors more than 18 per cent. of his deposit until the further order of the Court.

The result of this application may be found in 1 *Stew.*, 552, matter of Newark Savings Institution, and order therein. (See pp. 10 and 11, bill.)

In this connection it is proper to remark that immediately following this decision of the Chancellor, came the law of 1878, p. 421, (subsequently modified by the act of 1880, p. 192,) to which I have already referred, and which conferred on the Chancellor the statutory power to adopt such institutions as wards of the Court, and enable them to work out of their difficulties under its direction; and, if that seemed hopeless, then the Chancellor was authorized to appoint a receiver and wind up the concern.

After this order of Dec. 12, 1877, was made, the bill alleges (p. 11, Sec. 12,) a new account was opened with such persons as made special deposits under it, and these deposits were invested accordingly. But the managers finding it difficult (Sec. 13, bill,) to invest all the money so received in the manner required by this order, on June 2d, 1880, presented a further petition to this Court, praying that they might invest a part of such deposits on bond and mortgage.

An order was accordingly made that the managers might invest 50 per cent. of the new deposits on approved mortgages. (See order p. 12, bill.)

What, then, was the situation? The corporation, fearing embarrassment, had sought the aid of the Chancellor, and orders were made that the new deposits should be treated as special deposits, and invested in New Jersey State bonds, United States bonds, Newark city bonds, and bonds and mortgages, and that the moneys due on the *old* account should be paid to depositors only on the order of the Court.

Observe, the controversy in this case relates only to the management of the *new account*. The bill alleges (Sec. 11, p. 11,) that 95 per cent. of the old account has been paid; and, it might have added, sufficient property remains to pay *the balance* of this account. 10

But these orders (assuming them to have been valid, and this Court, in *Una vs. Dodd*, has declared them invalid,) did not terminate the existence of the Institution. It was still continued in operation. Its working machinery remained as before. Its charter was still in force. Its *by-laws* were still in force. And these by-laws provided that, the funding committee should invest the moneys of the Institution. This appears from the bill. The funding committee, *then*, ALONE possessed this power of making investments. Other members of the board had no more to do with this matter (of investment) than outsiders. Reports of the investments of this committee were required to be made (the bill alleges) to the full board. But these reports were made of course after such investments had been consummated. 20

If, then, it appears from the bill, (as it does,) that the funding committee alone had the power of *investing* and *disposing* of the funds of the Institution, in order to charge *other managers*, not members of that committee, with a fraudulent investment and disposition of the funds, allegations must be made in the bill which show that they had, *or might have had*, knowledge of the alleged wrongful transactions *which resulted in loss*. If it be stated (as it is, p. 21,) that they *might have known* of such facts from printed statements presented to the full board, and from reports to the Secretary of State, then it must unques- 30 40

tionably appear that these statements and reports disclosed facts which would have put prudent men on inquiry ; and in the absence of such allegations the Court will say that the defendants who, it appears, did not participate in the acts *which caused the loss*, are not charged with knowledge, or the possibility of it, and should be discharged : for it will presently appear that the only act which caused a loss to the Institution was the alleged loan of the United States bonds to Fisk & Hatch, and
 10 their wrongful conversion. Yet, the bill nowhere alleges that any member of the board (outside possibly of the finance committee) knew, or could have known, of this alleged loan from printed statements, reports, or any other source disclosed in the bill.

It appears, then, from what I have said, that *by the orders of the Chancellor* the moneys deposited to the *new account* of the Institution were directed to be invested in government bonds, New Jersey State bonds, Newark city bonds, and bonds and mortgages ; and these investments
 20 —all investments—by the by-laws of the Institution then in force, were to be made by the funding committee. This power of investment was extended (they apply to all savings banks) by two subsequent acts, approved respectively April 5, 1878, (p. 393,) and March 25, 1881, (p. 286.) They are “ Acts for the better security of depositors in savings banks.”

The investments authorized by these acts are in United States stocks and bonds, New Jersey State bonds,
 30 bonds of any State in the Union that has not within ten years defaulted in payment of interest, stocks and bonds of any city, town, county or village of this State, and of the cities of New York, Brooklyn and Philadelphia, in bonds and first mortgages worth at least double the amount loaned, and in real estate requisite for the convenient transaction of the business of the bank, and from portions of which not required for its own use a revenue may be derived, and such as shall have been purchased by it at sales upon foreclosures of its mortgages.

40 These acts (or rather the first of the last-named acts)

further provide "that *loans* of money on deposit in such bank may be made upon collateral securities of the same nature and character as those in which said moneys may be invested as directed by the preceding section, and also on stocks of national and state banks, or other corporations of the state which have not defaulted within two years, but only to the extent of 90 per cent. of the par value of such collaterals; provided that the total amount of such loans shall not exceed 15 per cent. of the whole deposits."

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I have thus referred to those parts of the bill which contain a history of the Institution from its incorporation in 1847 up to the time when the orders in question were made, and incidentally to the duties and responsibilities of its managers.

I proceed now to refer to those charges of misconduct and breach of trust which are relied on to sustain the prayer of the bill.

These charges may be conveniently divided into two classes.

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(1.) The *loaning of moneys* of the Institution on *unauthorized collaterals*.

(2.) The *loaning of the United States bonds* of the Institution, to Fisk & Hatch, under an alleged understanding that Fisk & Hatch might use and dispose of them in their business as they saw fit.

(1.) As to *loans on unauthorized collaterals*, the charges, freed from the verbiage and confusing statements of the bill, are these:

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(a.) On August 22, 1881, (page 18,) a loan of \$500,000 was made to Fisk & Hatch, on the pledge of government bonds, which were at first kept in the vaults of the Institution at Newark, but afterwards "lent or entrusted" to the borrowers. The insistence with respect to this loan is, no doubt, that allowing the securities to be controlled by the borrowers, was a loan without security. This may or may not be so. We need not

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inquire. The loan was paid in full and of course without loss.

(b.) On May 13, 1882, a loan was made to Joseph A. Halsey, of \$70,000, on the security of stock of the Newark Gas Light Co., and of the Essex County and Newark City Bank. (page 18.) It does not appear that this loan was on unauthorized collateral, (act of 1878, p. 393,) but at all events it was paid in full, and was no doubt a profitable investment for the depositors.

10 (c.) On the same day (May 13, 1882,) a loan was made to Stephen H. Condit, of \$85,000, on the security of certain bank and railroad stock. (page 18.) No loss occurred from this loan. It was paid in full.

(d.) On April 26, 1883, a loan of \$800,000 was made to E. H. Harriman & Co., on stock and bonds of the Illinois Central and other railroads. (page 19.) This was paid in March, 1884, (page 19,) and on April 3d, following, a loan of \$801,575 was made to the same firm
20 on same securities. This, too, was paid in full.

(e.) On August 8, 1882, (page 23,) a loan of \$350,000 was made to Victor Newcomb, of New York city, upon the pledge of bonds of the Pennsylvania Railroad and other railroads. This was paid in full March 29, 1883. (page 24.)

(f.) On August 23, 1882, a further loan of \$220,000 was made to the Merchants' National Bank, or E. H. Harriman & Co., of New York, upon stock of the Chicago, Rock Island and Pacific Railroad Co. and other security.
30 (page 24.) This loan also was paid, March 29, 1883. (page 24.)

(g.) Loans of money, varying in amount, are also alleged to have been loaned to *Fisk & Hatch* at different times, between August 1, 1882, and May 15, 1884, when the firm failed. I need not enter into details; they would only confuse. These loans are alleged to have been made on the understanding that they should be secured by a "sufficient amount of securities to cover
40 the same with ample margin, placed in a box under

their (Fisk & Hatch's) control." (pp. 26 and 27.) Fisk & Hatch were the brokers of the Institution. They bought and sold government bonds for it, and statements of these purchases and sales were made from time to time. If a considerable sum of money had accumulated in their hands, and the funding committee deemed it proper to buy government bonds with it, they so directed Fisk & Hatch, and it was done; and the bonds so bought remained often in their hands for safe keeping. So if it were deemed judicious that government bonds belonging to the Institution should be sold to avoid a loss, Fisk & Hatch were directed to sell, and the proceeds were not immediately demanded. Without, however, entering into tedious details, it is sufficient that on May 15, 1884, when Fisk & Hatch failed, they owed the Savings Institution a deposit account amounting to \$845,632.04, (page 31,) and this was not then *secured*, as it should have been; but this balance was subsequently paid in full with interest, (p. 38, Sec. 35,) and no *pecuniary* responsibility attaches therefore to these defendants on account of this method of dealing. The loss was from a different cause. 10 20

It is alleged in the bill (pp. 21 and 22,) that the moneys by means of which at least a part of these loans were made, were procured by a sale of \$1,975,000 of government bonds in which the funds of the Institution had once been invested, that such investment should not have been changed without good reason, and that from 30 to 50 per cent. of the whole deposits of the Institution were *loaned on collateral*, in violation of the statute of 1881, which limits such loans to *15 per cent. of the deposits*. 30 But it surely will not be contended that these managers did wrong in selling these government bonds, *if they deemed it necessary to prevent a loss*; and the bill does not allege that *a sufficient reason did not exist*. In the absence of such allegation it must be presumed that the change was made *because* it was deemed for the benefit of the depositors. And, further, it is evident that no pecuniary responsibility in a proceeding of this kind attaches to these defendants for *loaning more than 15 per cent. of the*

deposits, if, as a matter of fact, (and it is a fact,) no loss occurred from such loans.

In fact, all these *loans* of MONEY were paid, and therefore all those parts of the bill which treat of the duty of the managers not to abdicate their functions, and leave the whole management in the hands of one manager, (pp. 19 and 20, 25-26,) and all those points of it which refer to the auditing committee having had knowledge of these loans and alleged breaches of trust, and as to what
 10 its duty was in the premises, are of no materiality in this suit so far as these transactions are concerned. Their sole object would seem to be to create prejudice and bias, for there is no necessary or logical connection between these transactions and that which caused the failure of the bank. In other words, no facts are stated in the bill which justify the conclusion that the loss would not have occurred if these *loans* of MONEY had not been made. On the other hand, so far as the allegations of the bill indicate anything on this subject, it is
 20 manifest that it would have been better for the depositors if all the moneys *invested in government bonds when it failed*, had been then *loaned on collateral*.

I proceed now to consider (2) the further charge of the bill as to the alleged loan of government bonds to Fisk & Hatch.

It is alleged in the bill (page 26, par. 26,) that in January, 1883, the amount of moneys in the hands of Fisk & Hatch from sales of bonds and otherwise, was \$1,750,000.
 30 Part of this only was the proceeds of the sales of the government bonds, to which reference has already been made. At that time (January, 1883,) an agreement is stated to have been made between the managers and said firm, that this money should remain at five per cent. interest in the hands of the firm "right along, say for a year, except as any part of it might be required to meet extraordinary and unexpected demands of the depositors, and that the same should be secured by a sufficient amount of securities to cover the amount with ample
 40 margin," as already stated. In March following (1883)

these moneys, *with other moneys of the Institution*, were converted into government bonds. The bonds then purchased were \$2,000,000 3s and \$700,000 4½s, (p. 27.) In April (1883) \$1,000,000 of the 3s and \$200,000 of the 4½s were sold; and the balance of the said bonds (\$1,500,000) remained with the firm, *to be used* (so it is alleged, p. 27,) *in lieu of the moneys agreed to be lent as aforesaid*, until August following (1883), when the \$1,000,000 3s remaining were returned to the Institution and placed in its vaults. The remaining \$500,000 4½ 10 bonds were allowed *by the managers* to remain in the "possession, use and control" (such is the language) of the said firm.

Subsequently other government bonds were purchased for the Institution by Fisk & Hatch, and were allowed to remain in their hands. So that on May 15, 1884, when the firm failed, there should have been in their possession for the Institution government bonds (p. 31, par. 31,) of the par value of \$2,036,000, and of the market value of \$2,329,600. But it is alleged all the said bonds had 20 been then "used and sold or otherwise disposed of by said firm in the course of their business, and were never returned to said Institution," and it was *from the failure to account for these bonds* that the loss in question has occurred, or, rather, seems likely to occur. But does it appear from the bill that the defendants whom I represent had aught to do with this agreement of January, 1883, or the *subsequent alleged loan of these bonds?*

Remember, they were not on the *funding committee*, 30 which ALONE had power to make investments. One—Shanley—was on *no committee*. The others were on the auditing committee; and the sole duty of the auditing committee was to examine the moneys and securities quarterly, and report to the board.

The bill does not allege that this alleged agreement of *January, 1883*, to loan \$1,750,000 for "say a year," OR the alleged permission to Fisk & Hatch to use these bonds in lieu of this money, *was ever reported to the full board*. Nor does it allege that such agreement or per- 40

mission, if made or given, was ever spread on the minutes of the funding committee, or in *any specific way* brought to the attention of the managers who were not clothed with the power of investing the funds. On the other hand, it is alleged, (p. 25, par. 24,) that *after 1882* "the more important loans and investments made by the Institution, and MORE PARTICULARLY the illegal loans *hereinbefore and hereinafter mentioned*, were not recorded therein."

10 This loan of \$1,750,000 to Fisk & Hatch, then, in January, 1883, and the subsequent alleged loan of government bonds in lieu of the money, *are admitted* not to have been reported to the board. How, then, could these transactions have been discovered, so far as the bill discloses, by those who had, by the constitution of the body, no voice in them?

But it is said (p. 25, par. 24,) that all the members of the board, from inquiries made and from the books, &c., had sufficient information to put them on inquiry.

20 But this allegation is not sufficient to charge these defendants whom I represent with knowledge, or the possibility of it—much less with fraud—as to this *loan of bonds* from which alone the loss occurred. To accomplish that, it should have been stated—it would have been if it were true—that statements were made at board meetings, and that the books then present indicated, that these *government bonds*, (for that is all we have to deal with,) *were in the "custody, use and control of Fisk & Hatch."*

30 It is not pretended that the books showed any such thing, or that any such statements were made. *In the absence of suspicion*, it was not the duty of these defendants to go to the vaults of the Institution to discover if the government bonds were there.

The respondent, in his loose method of stating his case, speaks in a general way of the "*managers*" loaning these bonds in lieu of the money. Admitting this to be true, still *the loan was upon the contract alleged in the bill that the money or bonds loaned should be secured by other*

40 *securities* of equal value, placed in the Institution's box

deposited in Fisk & Hatch's vault. This may have been a careless act, for which the managers who participated may be responsible, but it was not a fraudulent act, no wrong to the beneficiaries was intended—on the other hand, their *benefit* was the inducement to make it. Besides, it nowhere appears that any manager reaped any advantage to himself, or that in making the alleged contract there was any intention on the part of any manager to alienate the property of the Institution in these bonds. But it is manifest from the whole framework of the 10 bill, that this statement is intended to mean nothing more than that those managers, who did not actually concur in making these loans, might have learned of them from the minutes reported to the board meetings, and from the statements to the Secretary of State, &c. (See par. 20, p. 21.) Yet it is admitted that *the reports of the funding committee* showed nothing of the alleged loan of bonds. And it is nowhere alleged, as it should be, that the *books of account*, or the *reports to the secretary*, showed these bonds to be in “the *possession, use and control of* 20 *Fisk & Hatch.*”

I insist, then, that the bill fails in this important respect. It does not *specifically* charge those who, from the constitution and working methods of the Institution, had no voice in making these alleged loans, with knowledge of such loans, or the possibility of it, much less with fraud, as the Vice-Chancellor finds.

In paragraph 30, p. 30, it is specifically alleged that “said auditing committee had full knowledge of all the 30 illegal loans, both of money and bonds, hereinbefore particularly set forth, and of the fact that the collaterals were allowed to remain in the possession of the borrowers as hereinbefore stated.” But it is clear from *the immediate context* that this knowledge, *so far as the loan of bonds is concerned*, is predicated upon the fact that this committee made quarterly examinations of the securities of the bank. This statement immediately precedes. The allegation amounts, then, to nothing more than this, that this committee *knew* these bonds were *lent*, because when 40

they made their quarterly examinations they found them *in the possession of Fisk & Hatch*. Yet the possession by Fisk & Hatch was not in itself suspicious, or likely to excite inquiry. As bankers they had—must have had—a vault for keeping safely the securities of their dealers. If when the auditing committee went to the office of Fisk & Hatch to count the bonds of the bank, they found them in this vault, in the box of the Institution, carefully guarded and protected—and this is the fact—
 10 would not, from *this circumstance of possession*, be justified in concluding that these bonds were *lent* to the firm to be used as they thought fit in their business, or for any fraudulent purpose.

But without dwelling longer on this point I proceed to a more important branch of this inquiry.

Fisk & Hatch failed on May 15th, 1884. They had used—fraudulently—the government bonds of the Newark Savings Institution. To make good this loss they
 20 had set apart certain securities referred to in Schedule A, attached to the bill, (p. 32, par. 32, and pp. 36, 37 and 38,) and then the president of the Institution (Mr. Dodd,) was sent for. We may conceive the dismay which must have overcome him when he learned that the bonds of the Institution had been thus wrongfully converted; but under the circumstances he did what he thought was best. He took to Newark the miscellaneous securities which Fisk & Hatch had thus set apart (p. 32,) on account of their indebtedness to the bank.

30 Next day the receiver was appointed; (amendment to par. 33;) and he took possession at once of the assets and property of the Institution. What then was the legal situation?

Fisk & Hatch had taken—wrongfully—this vast property of the Institution, and used it in their business, *and received the benefit of it*. They knew this property was trust property, *and that no one could lawfully give them the right to so use it*. The receiver knew this also. Fisk & Hatch were unquestionably legally responsible, and, be-
 40 cause of their knowledge, responsible as *co-trustees*.

This principle is well recognized. Thus in *Perry on Trusts*, Section 848, it is said "If third persons have obtained all the benefit of a breach of trust, the trustees may recover from them the loss which has occurred to the trust property."

See cases cited in the note.

The same author says in Section 877, "If the trustees commit a breach of trust and third persons obtain the benefit of it, they must be joined as defendants in a suit by the *cestuis que trust*." 10

"If the trustees convey the property to a third person with notice of the trust, or without consideration, such third person may be sued by the *cestuis que trust*, and must be joined with the trustees in a suit for relief by the *cestuis que trust*."

And in such a suit Fisk & Hatch would be held *primarily* liable, and directed *first* to make good the loss.

Dorsheimer vs. Rorback, 8 C. E. Gr. 46.

Dorsheimer vs. Rorback, 10 C. E. Gr. 516.

See also, *Burt vs. Bennett*, 2 Bro. Ch. 225. 20

Fenaille vs. Coudert, 15 Vr. 186.

Praul vs. Hamill, 1 Stew. 66.

Cousett vs. Bell, 1 Y. and Coll. Ch. 569.

Perry vs. Knott, 4 Beav. 179.

Perry vs. Knott, 5 Beav. 297.

Williams vs. Allen, 29 Beav. 292.

ELECTION OF REMEDIES.

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Under these circumstances, then, the receiver might have adopted one of two remedies. (1) He might have refused to accept the property substituted in the place of the government bonds, and sued Fisk & Hatch and those managers of the Institution who were shown to have been culpable, demanding in such suit that they should answer in damages for the loss of the government bonds; or (2) he might have accepted in settlement the stocks and securities which had been substituted in the place of the government bonds, *thus recognizing them* 40

as the proceeds or equivalent, of the property improperly converted.

But the receiver could not pursue *both* remedies. *He could not take this property, and hold the trustees personally.* It matters not that the substituted property may be less valuable than that for which it was substituted. *That consideration is to be regarded in determining whether to take the property, or pursue the personal remedy.* But when once the *election* is made, the other remedy is
10 *lost.*

This *latter* course the receiver adopted. He, in formal and exact terms, (in writing,) SOLD to Fisk & Hatch the government bonds which had belonged to the Institution. He purchased of them for *the consideration of the government bonds and the payment of the open account,* these miscellaneous stocks and securities which had been substituted in their place; and he released them from all liability. (See pp. 34-36.)

20 In *Perry on Trusts*, Sec. 843, it is said "If the trust property or *its proceeds* cannot be identified, the *cestui que trust* may proceed against the trustee as an ordinary creditor; and it is said if he elects to proceed against the trustee personally, *he cannot proceed against the trust fund.*"

Judge STORY, in his *Equity Jurisprudence*, Sec. 1262, (10th Ed.) says: "In cases of this sort (*i. e.* where a trustee has invested trust funds in an unauthorized manner,) the *cestui que trust* is not bound by the act of
30 the other party. He has, therefore, an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies to which he may be entitled, either *in rem* or *in personam.*"

Docker vs. Somes, 2 Mylne and Keen, 655. "But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee of land has sold the land in violation of his trust, the beneficiary cannot insist upon having the land and also the notes given for the purchase money; for by *taking the latter* * * * *he must*
40 *be deemed to affirm the sale.*"

In *Barber vs. Barber*, 14 Wis. 142-159, the Court say :
 "If the trustee uses the funds to buy real estate in his own name, the *cestui que trust* has an election, either to hold him personally responsible for the money, or to follow it into the land and have that adjudged trust property. *But he cannot do both, and electing the one remedy is a waiver of the other.*"

In *Lathrop vs. Bampton*, 31 Cal. 22, the Court say :
 "Before a *cestui que trust* can claim specific real or personal property he must show that it is the identical property originally covered by the trust, or that it is the *fruit* or *product* thereof in a new form. The rule upon this subject is well stated by Mr. Justice LEWIS in *Thompson's Appeal*, (22 Penn. St. 17) :
 "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such." And the Court adds :
 "Where a trustee, in violation of his trust, invests the trust property, or its proceeds, in any other property, the *cestui que trust* may elect to hold the SUBSTITUTED property subject to the trust, OR to hold the trustee personally liable to him for the breach of trust. If the original or substituted property cannot be identified, the right of the *cestui que trust* to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee."

See also on same point *Oliver vs. Pratt*, 3 How. 333, where the Court says : "It is a clearly established principle in equity jurisprudence that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice. And if the

trustee has invested the trust property or *its proceeds*, in *any other property* into which it can be distinctly traced, the *cestui que trust* has his *election* either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust."

Also, *Baker vs. Disbrow*, 18 Hun. 30.

Heathcote vs. Hulme, 1 Jacob and Walker, 122.

I insist, then, that the receiver having by a *deliberate formal act* agreed in writing to take the substituted property in lieu of the government bonds, and having by the same act relinquished all claim by reason of the wrongful conversion of these bonds, cannot *now* maintain this personal suit against the managers. He has made his election, and must stand by it.

If the receiver, finding on his appointment these *substituted securities* in the bank, had gone on and wound up the bank, and, at the last, a deficiency in the assets existed, *and he had done nothing more*, he might possibly have claimed that the negligent managers should answer. Dodd took them only *on account* of Fisk & Hatch's indebtedness. But that is not this case. He has done *something more*. He has taken *title* to these miscellaneous securities and parted with his interest in the government bonds. *He has confirmed this illegal transaction, and executed a release of all claim arising therefrom*. He has said, "There is an open account of \$800,000. Pay *this* in full, and I will take these securities. Perhaps they are worth all you claim for them. At any rate I deem it the judicious thing to do under the circumstances, and I will release you from all liability for your act in wrongfully converting my bonds."

And all this he has done *without notice* to the managers. They were not consulted. They knew nothing of it until the arrangement was completed. The importance of *notice* to the managers is apparent from this, that *they* might have brought suit against Fisk & Hatch. *Perry on Trusts*, Sec. 848. "If third persons have obtained all the benefit of a breach of trust, the *trustees* may recover from them the loss which has occurred to the

trust property." And their possible liability would have furnished a strong inducement to secure from Fisk & Hatch absolute indemnity for the Institution.

Nor is the case affected by the fact that this deed of *confirmation* and *release* was given to Fisk & Hatch alone, for so long as it stands it deprives any manager who might otherwise have been held liable, from seeking indemnity from Fisk & Hatch.

It is well settled that "a *cestui que trust* may preclude himself from his remedy against the trustee by executing 10 a formal *release* of the breach of trust or giving validity to the transaction by an *express confirmation*."

EFFECT OF DEED OF RELEASE AND CONFIRMATION.

Lewin on Trusts, p. 614. This author also adds, "If the *cestui que trust* release the *principal* in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been *secondarily* liable." 20

To same effect *Perry on Trusts*, Sec. 851, "A *cestui que trust* may release a breach of trust by giving to the trustee a *formal release* or a *formal confirmation* of the transaction. A release of the *principal* in a breach of the trust is a release of all parties who would be liable *secondarily* or as sureties."

In *Bispham's Principle of Equity*, p. 151, the author says, "The remedy of the *cestui que trust* may be barred by *concurrence*, *acquiescence*, or *executing a release*, provided they are not under any disability, such as infancy, 30 coverture or the like."

So *Hill on Trustees*, page 582, says: "It has already been stated that a trustee who has been compelled to make good to the *cestui que trust* a loss *occasioned by the act of his co-trustee* is entitled to stand in the place of the *cestui que trust* as against his *co-trustee*, and to claim from him the amount which he has thus been compelled to pay. If, therefore, the *cestui que trust*, with full knowledge of the circumstances, and of the relative rights and liabili 40

ties of himself and of the trustees, makes a compromise or release of his claim against the defaulting trustee, this will operate as a release of all the trustees : for the remedy of the other trustees will then have been materially affected by the act of the *cestui que trust*. The case is very analogous to that of a creditor who releases a surety by making a compromise with the principal debtor, without the surety's consent."

- 10 The case of *Blackwood vs. Barrowes*, 2 Connor & Lawson, 476, is in point. This was a case where moneys had been invested by one of the trustees in certain securities contrary to the deed of trust, and the securities were subsequently accepted by the beneficiary. The Court said : "It appears that it was advised that some compromise should be come to. Under these circumstances an arrangement was come to by which she" (the beneficiary) "released Mr. Blackwood,"—one of the trustees.
- 20 "A deed was prepared by which the parties carried out an agreement which they had previously entered into, for releasing Mr. Blackwood, and this deed the plaintiff executed. I understand the case to be given up against Mr. Blackwood. He was liable, I think, for his neglect, and he was responsible after he had notice ; but the plaintiff chose to release him. Col. Leslie" (the other trustee,) "was clearly bound in respect of the breach of trust, and he and his representatives might have been pursued if the plaintiff had not estopped herself as she has here. I do not rely on the technical ground of a release to one trustee being a release to the other. But
- 30 if the *cestui que trust* says to one, *I release you from all liability in respect to certain securities, and I am willing to allow the moneys to rest in those securities*, the case does not seem to rest on mere technical grounds. If she had said to Mr Blackwood, I release you, but I do not intend thereby to give up my right to call upon Col. Leslie to answer for his default, I am not called on to consider what the effect would be. As the case stands at present, I look upon the release as an acceptance of the securities in
- 40 question."

In *Thompson vs. Harrison*, 2 Brown's Reports in Chancery, p. 64. George Thompson, living in town, employed his brother, John, to purchase an estate for him in the country, which he did in his own name, and part of the purchase money was advanced by him and no declaration of trust ever made. Afterwards, Jonathan Harrison, a nephew, being about to marry one Hannah Liddel, and wishing to make a settlement on her, proposed to John to settle this estate and to give him security for the value. John did so, and made a settlement of the estate on Jonathan Harrison for life, remainder to Hannah Liddel, &c., and took a bond from Harrison for the supposed value of the estate. 10

George filed his bill against John Thompson, Jonathan Harrison and Hannah Liddel, but before the hearing he released John and examined him as a witness.

The Lord Chancellor: "John being principal in the fraud, the decree must have been *in the first place* against him, although in case of his insolvency, Harrison would be liable; but *George having released him*, it is the same thing as if *he had never been made a party*, and in that case the plaintiff cannot have gone on against the nephew, who would only be *secondarily* liable." 20

The case of *Brice vs. Stokes*, 11 Ves. 319, is the leading case on the subject of *concurrence* in unauthorized investments by trustees. On the marriage of Elizabeth Sparrow with Brice, the plaintiff, a settlement was made to the separate use of Mrs. Brice, remainder to her husband surviving her, and to the issue. Mrs. Brice died without issue. The settlement contained a power to the trustees to sell certain freehold and leasehold estates, and to invest the moneys realized in government or real securities. A part of the freehold estate was sold by the trustees for about £1,300, but the money was not laid out as directed. It was retained in the hands of one of trustees, Fielder by name. *Brice* received from time to time *interest* from Fielder, and the testimony showed he knew that the fund was not properly invested. 30

The Lord Chancellor (Eldon) said: "The result of the evidence is, that with Brice's permission this money was suffered to remain with Fielder upon his personal security, and he cannot complain that this was a misapplication; permitting it with respect to his own interest."

10 *Wilkinson vs. Parry*, 4 Russell, 272. On the marriage of one of the plaintiffs with her late husband a settlement of £1,000 was made for the benefit of the wife, to be invested in stock in the names of two trustees. The dividends were to be paid to the wife for her separate use, with remainder to the children of the marriage as they attained the age of 21 years. One of the trustees, the defendant Parry, subsequently sold out the trust stock at the request of the wife, then a widow, and three of the children who had attained the age of 21 years. There were two other children of the marriage who were infants. On bill filed by the wife and the infants, praying that the trustee might be made responsible for the breach of trust committed by Parry's sale of the stock, the Master of the Rolls referred it to a master to inquire whether any and which of the parties interested
20 *consented to or approved of the sale of the trust stock by Parry.*

Nail vs. Printer, 5 Sim. 555. Stock was settled on a wife, for her separate use, for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock, and *paid the proceeds to the husband*, who afterwards became bankrupt.
30 The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. (This on the ground that she being under coverture could not give valid consent.) The wife died, having by her will appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees claiming the stock under the appointment, and praying the same relief as his wife might have
40

had. But as he had *received the proceeds of the stock sold out*, his bill was dismissed.

Smith vs. French, 2 Atk. 243, reported in *Lewin on Trusts*, p. 613. "On the marriage of Mr. Segar with Miss French, a sum of £1,000 belonging to the lady was assigned to her mother as trustee, and by indenture executed after the marriage, the trusts were declared for the *separate use* of the wife, remainder to the issue, remainder, if no issue, to the survivor. At the joint solicitation of the husband and wife the money was advanced to the husband, and, with the exception of £350, was never repaid; but the mother, who was the trustee, had threatened to proceed for the remainder, when the daughter fell upon her knees and begged her to desist, as she would release her from all claims. For seven years after the husband's death the widow lived with her mother, and made no demand, but several times offered to execute a release. The daughter then married again, and a bill was filed against the mother to make good the money lost; but Lord Hardwicke said, 'I think it comes very near the case of an infant who, contracting a debt during his minority, shows his consent to it by confirming it after he comes of age, which shall effectively bind him, though it was voidable at his election. So here a promise by the wife to release *during the coverture*, it is certain, would not bind the wife, but if after the death of her husband she repeats the promise, *it is a confirmation of it, and good.*'"

In *Harden vs. Parsons*, 1 Eden, 145, "A testator gave £400 to A, B, C and D, his executors, upon trust to invest in lands to be settled on E. The money was lent improperly to A upon the security of his bond, and lost; but as E, the legatee, had constantly accepted interest on the loan, and had neither brought his bill nor called on the executors to invest the money in land, it was held he had virtually consented, and thus estopped himself from holding the trustees responsible."

Lord Montford vs. Lord Cadogan, 17 Ves. 485. Affirmed 19 Ves. 635. "Marriage settlement of renewable 40

lease in trust for husband and wife successively for life, remainder to first son. Trustees, not having renewed, held answerable for breach of trust. The tenants for life, having acquiesced in the breach and profited by it, by receiving the *whole* rents and profits, a *part* of which was applicable to pay the expense of renewals, the assets of the husband were in the first place held applicable to make good so much as corresponded with the period of his enjoyment, and the wife was in like manner held answerable for the period of her possession. Whatever could be got from those funds to go in ease of the trustees."

- 10 See also *Trafford vs. Boehm*, 3 Atkyns, 440.
Small vs. Atwood, 2 Y. and J. 517, referred to in note 7, Sec. 851. *Perry on Trusts*.
Newman vs. Jones, Finch. 58.
Fellows vs. Mitchell, 1 P. Wms. 81.
Booth vs. Booth, 1 Beav. 125.
White vs. White, 5 Ves. 555.
29 *Morley vs. Hawke*, (cited in *Small vs. Atwood*), 2 Y. & J. 517, 519 and 520.
Life Association, &c., vs. Siddall, 3 DeG. F. & J. 74.
Buckeridge vs. Glass, 1 Cr. & Phil. 135.
Burrows vs. Walls, 5 DeG. M. & G. 233, and cases cited.
Kerr, F. & M., 1st (Amer. Ed.) 299, and cases cited.
1 *Sugden, V. & P.*, (8 Am. Ed.) 252.
Thayer vs. Gould, 1 Atk. 615.
Ryder vs. Bickerton, 3 Swanst. 80.

30 These decisions and citations sustain the position, 1st, That a *release* of one of several trustees is a release of all—and Fisk & Hatch must be regarded in this case as *co-trustees*. 2d, That *acquiescence* in an illegal investment by a trustee is a bar to suit by the acquiescing *cestui que trust*, and that it makes no difference in principle whether this acquiescence takes place *before* or *after* the illegal act. It results, then, that the receiver representing the *cestui que trust*, having by a deliberate consideration
40 ate act, accepted from Fisk & Hatch the miscellaneous

securities already referred to, *in lieu of the government bonds*, and having released them from all liability by reason of such substitution, cannot maintain this suit.

This position is conspicuously manifest from this consideration. Fisk & Hatch are *primarily* responsible for this breach of trust. They alone got the benefit of it. If no deed of release and confirmation had been given to Fisk & Hatch, and in a suit of this character they had been made parties, and the allegations of the bill proved, the decree would be that Fisk & Hatch should *first* pay 10 the amount of the loss, and those managers who were found to have been negligent, should be liable *secondarily*.

Thompson vs. Harrison, supra.

Dorsheimer vs. Rorback, “

But Fisk & Hatch are not parties to this suit, and no decree can go against them. Under these circumstances suppose the case proceeds against these managers, and that they or some of them are held liable. They cannot obtain indemnity from Fisk & Hatch. They cannot 20 obtain even contribution. Why? Because *Fisk & Hatch have been released*. If this release had not been given, not only this property of Fisk & Hatch, turned over to the receiver, would have been liable to the claim of the managers, but whatever else they then had, or might afterwards acquire—in other words, their whole property then or thereafter acquired.

The managers, by this release, are deprived of their equitable right to have the remedy against *Fisk & Hatch exhausted*, before they can be called to account; and that 30 means all *legal* means must be exhausted—not the mere *discretion* of the receiver.

If a different doctrine were held, receiver could settle as he pleased with Fisk & Hatch and release them, and hold managers for the balance. He might have settled at a loss of a million, not \$400,000, as he claims the loss may be. But it does not appear that even this loss will actually occur.

Sherman vs. Lanier, 12 Stew. 255.

Porter vs. Woodruff, 9 Stew.

Now, the ground on which this release of *one* trustee is held to *release all*, is that "the remedy of the other trustees against the trustee released, has been materially affected by the act of the *cestui que trust*." *Hill on Trusts*, already cited.

See also *Walker vs. Symonds*, 1 Swans. 77.

So *Perry on Trusts* says, Sec. 848: "Although such trustee may be compelled to pay the whole, yet if he pays the whole he may have *contribution* from the others who are implicated in the breach of the trust."

This rule is sustained by the following cases:

Lockhart vs. Reilly, 1 DeG. and J. 464. Trust moneys lent on improper securities, value of property insufficient, and securities were second mortgages. "Mr. Ellis had been the trustee, who had been guilty of the breach of trust. * * * * He was a solicitor, and Mr. Lockhart, who was a country gentleman, left the trust to his management. The Court in these circumstances declared that as between Mr. Lockhart and Mr. Ellis, the latter was bound to indemnify the former; and that the former was only liable secondarily."

See also *Cottrell's Appeal*, 11 Harris, 294; *Kyner vs. Kyner*, 6 Watts, 227.

Priestman vs. Tindall, 24 Beav. 244.

Lingard vs. Bromley, 1 V. and B. 114.

Tarlton vs. Hornby, 1 Y. and Coll. 336.

Fletcher vs. Green, 33 Beav. 513.

Wilson vs. Goodman, 4 Hare. 54.

Ex parte Shakeshaft, 3 Bro. Ch. 198.

Perry vs. Knott, 4 Beav. 180.

Attorney-General vs. Dallgars, 33 Beav. 624.

Coppard vs. Allen, 2 De G., J. and S. 177.

Knatchbull vs. Fearnhead, 3 M. and C. 122.

Pitt vs. Bonner, 1 Y. and Coll. Ch. 670.

It appears then that the managers who are held liable in this suit and pay the amount decreed against them, cannot have indemnity from Fisk & Hatch, or even contribution, so long as this release remains in force as to

them. *And this release must be held to be valid in this proceeding.*

See what the complainant says about this release, pp. 38 and 39.

No doubt the rule is that an essential to a valid release is that the *cestui que trust* must have knowledge of the facts and circumstances of the case. *Perry on Trusts*, Sec. 851.

But the position of the complainant here is very inequitable. It is this, that he procured this settlement from Fisk & Hatch by executing a release which he knew was of no validity. 10

The receiver says in effect, "Pay this open account and I'll take your miscellaneous securities for the government bonds and release you, and yet all the time I never intended to release you."

But does it not appear from the bill itself that the receiver knew the circumstances on which alone he now finds his claim for relief against the managers. If so, his general disclaimer amounts to nothing. He may not have known then that the managers or any of them had made these loans on collaterals alleged to be unauthorized, and from which no loss occurred, but that had nothing to do with this release. He did know that Fisk & Hatch had used the government bonds belonging to the Institution, and that these bonds must therefore have been in "their possession, use and control." How otherwise could they have done with them what they did? The placing of these bonds by the managers in the hands of Fisk & Hatch is the whole gravamen of the charge in the bill. He did know, too, that Fisk & Hatch owed the Institution \$845,632 on open account, and that that was entirely unsecured; and it is with these two things that the release deals. 20 30

Knowing, then, that the managers had left in the hands of Fisk & Hatch more than \$800,000 of moneys unsecured, and also a large amount of government bonds of which they (Fisk & Hatch) had the "use, disposition and control," he still releases Fisk & Hatch. What other 40

statement is there in the bill on which the complainant founds his claim against these managers? Literally nothing.

But without reference to this, *this release must be held valid in this proceeding*, and for these reasons:

(1.) The release is presumptively valid.

Portlach vs. Gardner, 1 Hare, 594.

10 And nothing is alleged which overcomes this presumption save a *general* statement entirely inconsistent with *specified* allegations in the bill and the release.

(2.) The bill does not pray that the release may be decreed to be void and of no effect. Even if it contained such a prayer, an effective decree could not be made annulling the release, *unless Fisk & Hatch were parties to the suit*. So long as this release remains good as to *Fisk & Hatch*, it bars this suit. If the managers, or any of them, are compelled to account they must have a way *im-*
20 *mediately* open to obtain indemnity from *Fisk & Hatch*, the *principals* in the alleged illegal transactions.

Thompson vs. Harrison, 2 Bro. Ch. *supra*, and *Perry on Trusts*, Sec. 876, where it is said, "If the *cestuis que trust* bring a suit against the trustees, praying for relief, all the trustees ought to be made parties, in order that, as each co-trustee is liable to the *cestui que trust*, the court may do complete justice, so far as possible, by taking the accounts once for all, and by adjusting the liabilities of the co-defendants, and thus obviate the necessity of ul-
30 *terior* proceedings and a multiplicity of suits. The co-trustees ought to be made parties for the reason that *the decree of relief to the cestuis que trust is the foundation of the relief to the co-trustees inter-se*; and if any of the trustees are not parties to the first suit by the *cestuis que trust*, they will not be bound by the decree, and the whole subject matter will of course come under litigation for the second time."

(3.) The question of the validity of the release is a question between *Fisk & Hatch* and the *receiver*, not be-
40 *tween* the managers and the receiver. If *Fisk & Hatch*

obtained it by fraud or misrepresentation it could be avoided, no doubt, in a suit brought for that purpose, in which Fisk & Hatch were parties. But the bill does not allege that Fisk & Hatch procured it by fraud or misrepresentation. The statement of the bill that Fisk & Hatch did not have the government bonds which the receiver sold to them, was probably true: but the receiver *knew* it. There was no fraud or misrepresentation in that; and that is the only fact alleged *against* THEM. So far, then, as Fisk & Hatch are concerned, 10 it would seem as if the release must stand forever; and if so, it is a complete bar to a suit against the managers. In this view, the allegations of the bill that the receiver did not know of the alleged mismanagement of this Institution *by the directors* when he executed the release, are inapt and irrelevant. The receiver was not then dealing with the managers, but with Fisk & Hatch, and unless *Fisk & Hatch* deceived him the release cannot be avoided. Suppose a bill were filed in this Court against Fisk & Hatch to annul this release, could it be contended that 20 because the *receiver* did not *know* all the facts which he alleges in his bill *against* the *managers*, it should be avoided? Certainly not, yet, so long as it did exist, it is a bar to this suit against them.

(4.) This release cannot be annulled as to Fisk & Hatch, either by the receiver or the managers, until they (Fisk & Hatch,) have been placed in the same position in which they were before it was executed. The securities surrendered must be returned, and they must be left free 30 to contest their liability unaffected by anything that has been done previously in this matter. But that is impossible. The money has been distributed among the depositors; the securities, to a large amount at least, have been disposed of and their proceeds also distributed, and the position of the parties cannot be restored.

Fisk & Hatch would never—so the bill alleges—have paid *in full* this *open account* unless they secured a release of all claims. The savings bank would have 40

been left to come in with other creditors. Under these circumstances, and with a perfect understanding, the release was executed.

10 If the receiver now seeks to avoid it, let him first restore to these people the property which he received, solely on his written promise to release them, and until that has been done, until he has placed himself right before the Court, let him not seek to undo what he has thus deliberately and solemnly done.

HENRY YOUNG.

New Jersey Court of Errors and Appeals.

BETWEEN
DANIEL DODD AND OTHERS,
Appellants,
AND
GEORGE WILKINSON, RECEIVER OF THE
NEWARK SAVINGS INSTITUTION,
Respondent.

On Appeal from
order overruling
demurrer to bill
advised by Vice
Chancellor Bird.

Brief of George W. Hubbell for appellants, Messrs. Miller, Hubbell and Watson.

The transaction set forth in the bill from which the loss to the Newark Savings Institution arises, is as follows:

On the fifteenth day of May, 1884, the firm of Fisk & Hatch, doing business in the city of New York, became insolvent, being indebted to the Newark Savings Institution in the sum of two million, thirty-six thousand dollars, in government bonds, at their par value, with which they were chargeable, and which they were unable to return, and also in the sum of \$845,632.04 in money which was without security. The bill shows that the latter sum has been paid in full with interest. At the time of their suspension, Fisk & Hatch, being unable to return the government bonds, transferred to the president of said institution, on account of their liability to it, and in lieu of said bonds, a large number of miscellaneous securities, a list of which is set forth in said bill and called schedule A, page 36 of the case. An examination of this schedule will show that certain prices were put upon each of these securities, and that according to those prices the value of the securities was equal to the value of the government bonds on account of which they were taken, by the president. It is alleged, however,

that these prices exceeded the market value of the securities, and that the difference between the true value of these securities and the market value of the government bonds, occasioned the loss to the institution, to recover which the bill in this case is filed.

It will be observed that much of the bill is taken up with the statement of various loans and transactions, but in each case the loans have been paid in full with interest, to the institution; and there is no allegation of loss or injury arising from any of them, except as above set forth. It is alleged in the bill that the government bonds, above set forth, were loaned by the managers of the institution to the firm of Fisk & Hatch without security, and that this constitutes negligence on the part of the managers, and consequently that they are accountable for all loss and injury occasioned thereby. The bill further shows, that in consequence of the suspension of Fisk & Hatch, and the loss to the institution resulting therefrom, the institution became insolvent and the respondent in this suit was appointed receiver. Upon assuming the duties of his office the receiver found the miscellaneous securities above referred to, in the vaults of the Newark Savings Institution. He immediately opened negotiations with the firm of Fisk & Hatch and made a settlement with them, by which the aforesaid miscellaneous securities were received, by the receiver, for the Newark Savings Institution, at the prices fixed in schedule A, in full payment for the government bonds with which the firm of Fisk & Hatch were chargeable, and which they failed to return; and in consideration of the passing and transfer, by Fisk & Hatch, to the receiver, of the absolute title to said miscellaneous securities, which had been theretofore held simply on account, he transferred to the firm of Fisk & Hatch the full and absolute title to the said government bonds, the firm of Fisk & Hatch paying in money the unsecured debt, with interest. In consideration of this mutual sale and transfer the receiver released the firm of Fisk & Hatch from all further liability on account of the aforesaid transaction.

It will be observed in the first place, that the bill contains no allegation of any specific loss to the institution. It does not appear that any of these securities which have been disposed of, have realized a less price than that contained in schedule A. The only allegation from which the court is to gain an idea of the loss to the Newark Savings Institution, on account of the difference between the value of the government bonds and that of the miscellaneous securities, is contained on page 32, line 32 of the bill, where the statement is, that the loss exceeds the sum of \$400,000. It will be readily perceived that although the miscellaneous securities may not have been, at any time since they were taken, equal, in their market value, to the value of the government bonds for which they were substituted, yet a glance at the securities mentioned in schedule A, will show that the securities, therein scheduled, are subject to variations in their market value, dependent upon the condition of trade and other matters affecting the prosperity of the country; and that they may appreciate in value, and become worth more than the government bonds for which they were taken. And it is respectfully submitted that until these securities are sold and disposed of, and the loss to the institution thereby definitely ascertained, no suit will lie, to charge the managers with a loss, which although possible, is by no means certain.

It is therefore respectfully submitted, that the filing of the bill in this case was premature; that no effectual decree can be made thereon, and that the same should be dismissed.

Second. What effect has the settlement, made by the receiver with Fisk & Hatch, and his release to them, upon the liability of the managers? In the consideration of this question it is first submitted that the act of the receiver as set forth in the bill, which act was subsequently ratified by order of the Court of Chancery was the acceptance of the securities in question, in full payment of the debt. It will be carefully observed, that the president of the institution did not attempt to receive the miscellaneous securities in full payment or settlement of the liability of Fisk & Hatch to

return the government bonds. The allegation in the bill, on that subject, is found on page 32, line 13, which is, that these securities were transferred to the president of said institution on account of their (Fisk & Hatch) aforesaid liability to it. The receiver then, on coming into the institution, found the securities in the possession of the institution, taken and held simply on account of, and not in payment or settlement of the liability of Fisk & Hatch to return the full value of the government bonds. The receiver, therefore, had the power to elect whether he would return the securities and demand the government bonds, or exhaust the securities and hold Fisk & Hatch and the managers liable for the deficiency, or whether he would accept the securities in full payment for and discharge of the government bonds and all liability arising from the failure to return them. It is clear, that if the receiver had pursued either of the first two courses, the managers, if the situation of affairs was caused by their negligence, would clearly be liable to make good any deficiency. But the receiver elected to accept the securities in full payment for the government bonds, and in order to leave no doubt as to the nature of his transaction, he changed the title which Fisk & Hatch may have had to the government bonds to an absolute title, taking in return an absolute title to the miscellaneous securities: whereas, before, they were held merely as collateral, or at least as part payment. The effect of this settlement upon the Newark Savings Institution, will be readily understood when it is considered, that under the arrangement made by the president of the institution, if these miscellaneous securities had realized more than sufficient to pay for the government bonds and accrued interest, the surplus would have gone back to Fisk & Hatch, whereas now, and by virtue of said settlement, such surplus would belong to the Newark Savings Institution. The case of *Blackwood vs. Borrowers*, 2 Con. and Laws 477, is in point. In that case trustees loaned trust money on personal security, by which a loss was occasioned and they were thereby guilty of a breach of trust. The *cestui qui*

trust released one of the trustees. Lord Sugden held that the release of one trustee released the other, and said that he didn't rely on the technical ground of the release of one trustee being a release to the other, but he looked upon the release as *an acceptance of the securities in question*. Concurrence in a breach of trust by the cestui qui trust releases the trustee. Perry on Trusts, third addition, page 497; Brice vs. Stokes, 11 Vessey, 319; Walker vs. Symonds, Third Swnaston, 1; in which Lord Elden said that concurrence in a breach of trust or acquiescence without original concurrence will release the trustee. The same doctrine is supported in Wilkinson vs. Berry, 4 Russell, 273; Cocker v. Quail; 1st Russell and Mylne, 535; Underwood vs. Stevens, 1st Merivale, 712; Nail vs. Punter, 5 Sim., 555; Fellows vs. Mitchell, 1 P. Wm., 81; Buckerridge vs. Glasse, 1st Cr. and Phil.; Byrchall vs. Bradford, 6 Mad. 13 In. Re. Chestsey Market, 6 Price, 280; Cope vs. Clark, 18 W. R. 279, V. C. Malins; Hill on Trust, page 900, Fourth American Edition.

Under the authority of these cases, and many others, which might be quoted, it is clear that the acceptance of the miscellaneous securities by the receiver, the settlement with Fisk & Hatch and the release to them of all further liability, operate as a release to the managers and form a bar to this suit. But it is suggested in the opinion of the Vice Chancellor, 13 Stewart, 123, that the agreement with Fisk & Hatch was executed on the part of the receiver in consideration of the payment to him of \$845,632.04. But it is respectfully submitted that that was not the consideration upon which the agreement was executed or the settlement made, but the insistment of the appellants is that the consideration was the exchange of the bonds for the securities in schedule A. It is further stated in the opinion of the Vice Chancellor, that there was no ratification or pretence of ratification of the agreement made by the president with Fisk & Hatch. The Court will perceive that in schedule B is a statement of that part of the miscellaneous securities which the receiver has disposed of, and the total amount

thus received, as shown on page 43, exceeds the value placed upon them in the agreement by some \$3,000. The Court will also perceive in schedule A, commencing on the same page, that certain valuations were placed upon the securities, not, as stated in schedule B by Fisk & Hatch, but as a component and substantive part of the agreement. If the Court will inspect the original agreement, as executed, the truth of this will appear. The receiver therefore, accepted these securities at the valuations which he himself agreed to and at such valuation they were sufficient to pay in full the market price of the government bonds. This is the agreement which he, himself, executed. How is he now at liberty to say that he did not accept these securities at the valuations thus stated, and in full payment for the bonds and in ratification of the taking of these securities from Fisk & Hatch by the president? Are not the parties to be bound by the recitals contained in an instrument which they voluntarily execute, particularly where there is no allegation of fraud, misrepresentation, or surprise, affecting the transaction? This agreement was not only a complete ratification of the act of the president but such the plain intention of the parties executing it. The preamble recites, distinctly, that Fisk & Hatch were accountable for the bonds and the money, and that Fisk & Hatch delivered to said institution the securities mentioned in schedule A, on account of and in lieu of said bonds. It also recites that the respondent, since the delivery of said bonds has been appointed receiver of said institution, and that it had been agreed to settle the differences arising out of the said indebtedness; and then the agreement proceeds to the effect a regular, solemn and complete sale and exchange of these respective securities; and they are described as securities, chosen in action and property of every kind described in schedule A. This part of the agreement constitutes the settlement. The latter part of the agreement contains a recital that the money due from Fisk & Hatch, not, *is agreed to be paid*, but *has* been paid, and concludes with the statement that all matters of difference between the respective parties are at an end.

How a more complete ratification of the transaction entered into by the president, on behalf of the bank with Fisk & Hatch, can be made, it is difficult to see. And it is further difficult to see, how, upon a proper reading and construction of this agreement it can be fairly said, that the agreement rests upon the consideration of the payment of the \$845,000. The agreement and the release was not executed upon the consideration of the payment of the \$845,000 whatever the allegation may be on that subject. The agreement does and must speak for itself and no allegation can change its recitals. It does not state that any of the acts done were in consideration of this payment; but it recites that the money had already been paid by Fisk & Hatch. They were bound to pay it and they did pay it. How can the payment of this debt be a consideration? But they were not able to return the bonds and with that, and that alone, the agreement deals.

Again it is argued in the opinion of the Vice-Chancellor, that the acts of the managers were fraudulent, and therefore the agreement with Fisk & Hatch can have no effect to release them. There is no allegation of fraud in the bill; the managers are simply charged with negligence. There is no allegation that any of the acts done by the managers resulted in, or promised to result in, any advantage in any way to them personally; there is no allegation that the managers took measures for alienating the property of the bank with the avowed design of depriving the institution of it, which is laid down in Perry on Trust, section 879, and is quoted by the Vice-Chancellor, as the test by which to judge of the character of breaches of trust. In the consideration of the allegations concerning the acts of the managers, all acts which in the bill are alleged to be a violation of the orders of the court, are to be considered as eliminated from the bill, under the decision of this court, in the case of *Dodd vs. Una*. If the situation of the government bonds at the time of the suspension of Fisk & Hatch be considered as arising from the contract, alleged to have been made by the managers with Fisk & Hatch, in January, 1883, (page

26, line 38, of the case), then it appears that the loan of money or bonds to Fisk & Hatch was to be protected by good security ; and that the said firm should pay as a permanent rate of interest, 5 per cent. per annum. This contract, therefore, while partaking of considerable risk, yet, if carried out, would result in the realization by the institution of interest at 5 per cent. per annum on all their uninvested moneys, and also secure to them a permanent rate of 5 per cent. per annum on all the government bonds into which the money might be converted, and the result would be a greater and larger return to the institution than could have been effected by any other means. This contract was fair, and promised a beneficial result to the institution and to the depositors ; and the managers could not be charged with any fraudulent act or intent in making that contract, although they may be charged with negligence in assuming such a risk. If the frame work of the bill is properly understood, it will be seen that this contract is the basis of the charge against the managers. The various conversions of the money, so lent by that contract, into government bonds and the reconversion again into money, and so on, until the final catastrophe, are all made, by the bill, to depend upon this original contract of 1883. The position, therefore, of the managers touching the condition of the bonds and money in Fisk & Hatch's hands at the time of the suspension, was, according to the bill, as if they had lent the bonds and money to Fisk & Hatch under that same contract, to be secured by good security upon 5 per cent. interest. That Fisk & Hatch made an illegal use of these bonds, or that they failed to properly secure them and the moneys, was no part of the intention of the managers, but a direct violation by Fisk & Hatch, of the contract. The managers are not to be charged with having committed a fraud on account of having made this contract. An examination of the cases which I have quoted will show clearly that the same kind of transactions and contracts were considered in those cases and were not pronounced fraudulent. In fact it may be said, that these cases treat of the same kind of circum-

stances in which these managers were placed, and that that doctrine relied on, is evolved from the consideration of just such transactions. If there was no fraud in them ; there is no fraud here. It is alleged in the bill, that it was not the intention of the respondent, by that agreement, to release the managers. In answer, it may be said, that it was not the intention of the cestui que trustent in the cases relied upon in this brief, that the release or settlement should release the trustees. It is further alleged in the said bill, that the recitals of said agreement or writings are erroneous, and that the pretended sale of bonds, admitted to be made by said writing, was impossible, inasmuch, as they were not then in the possession or ownership of the respondent, etc.

* * * * *

That said supposed release or paper writing was and is based upon a condition of things which had no existence in point of fact, and is therefore void and without effect, and more especially void and without effect as to the defendants therein. As there is no prayer in the bill, asking that said release be set aside for these considerations or any pretense of an application for relief on that ground, it is submitted that these allegations have no effect whatever upon the statements and recitals contained in the agreement itself ; and that these allegations must be treated as if they had not been inserted in the bill.

Again, it is insisted in the bill, that at the time of the execution of said paper writing, the respondent was ignorant of the aforesaid breaches of trust and illegal acts, etc. ; that the said breaches of trust and illegal acts were thus denied and concealed by the managers, etc., as will be found on page 39, line 3, etc. The doctrine that a knowledge of the circumstances is a necessary element in an agreement releasing the trustees, is supported somewhat by the case of Waker vs. Symonds, third Swanstons, 1. It is not my purpose to dispute the truth of this legal proposition. But the mere allegation, above quoted, is not sufficient to overcome the effect of the recitals contained in the agreement of release itself. It is clear that such ignorance, as will defeat

the effect claimed for this release, must be the want of knowledge of such fact or facts as, if known, would affect the action of the receiver in making the agreement with Fisk & Hatch. The receiver knew that the bonds and money were in the possession of Fisk & Hatch, and that Fisk & Hatch were accountable to the institution for them. He knew that the president had endeavored to recover the bonds from Fisk & Hatch, and he knew that he had failed to obtain them and had taken on account of them, the miscellaneous securities, which he, the receiver, afterwards accepted. It is to the very loss, which was occasioned by the failure of Fisk & Hatch to pay the money and bonds to the institution for which they were accountable, that the receiver owed his appointment. Was he not, then, completely possessed of all the circumstances necessary and intelligently to deal with this question? Would any fact alleged in the bill, of which he was not aware, have changed or altered this settlement with Fisk & Hatch? The bill alleges, page 33, section 34, that upon becoming the receiver, the respondent made diligent efforts to obtain from said firm of Fisk & Hatch the payment of their liability to said institution; that he had frequent interviews, and made inquiries into their financial condition, which inquiry and investigation, according to the allegation to the bill, covered also the legal status of the situation. Can it then be successfully assumed, that the receiver was ignorant of the circumstances? The manner in which Fisk & Hatch acquired possession of the bonds or the money, had no effect upon this agreement made by the receiver. Nor would the agreement have any effect upon the legal position of the managers unless it could be successfully shown that their acts were fraudulent.

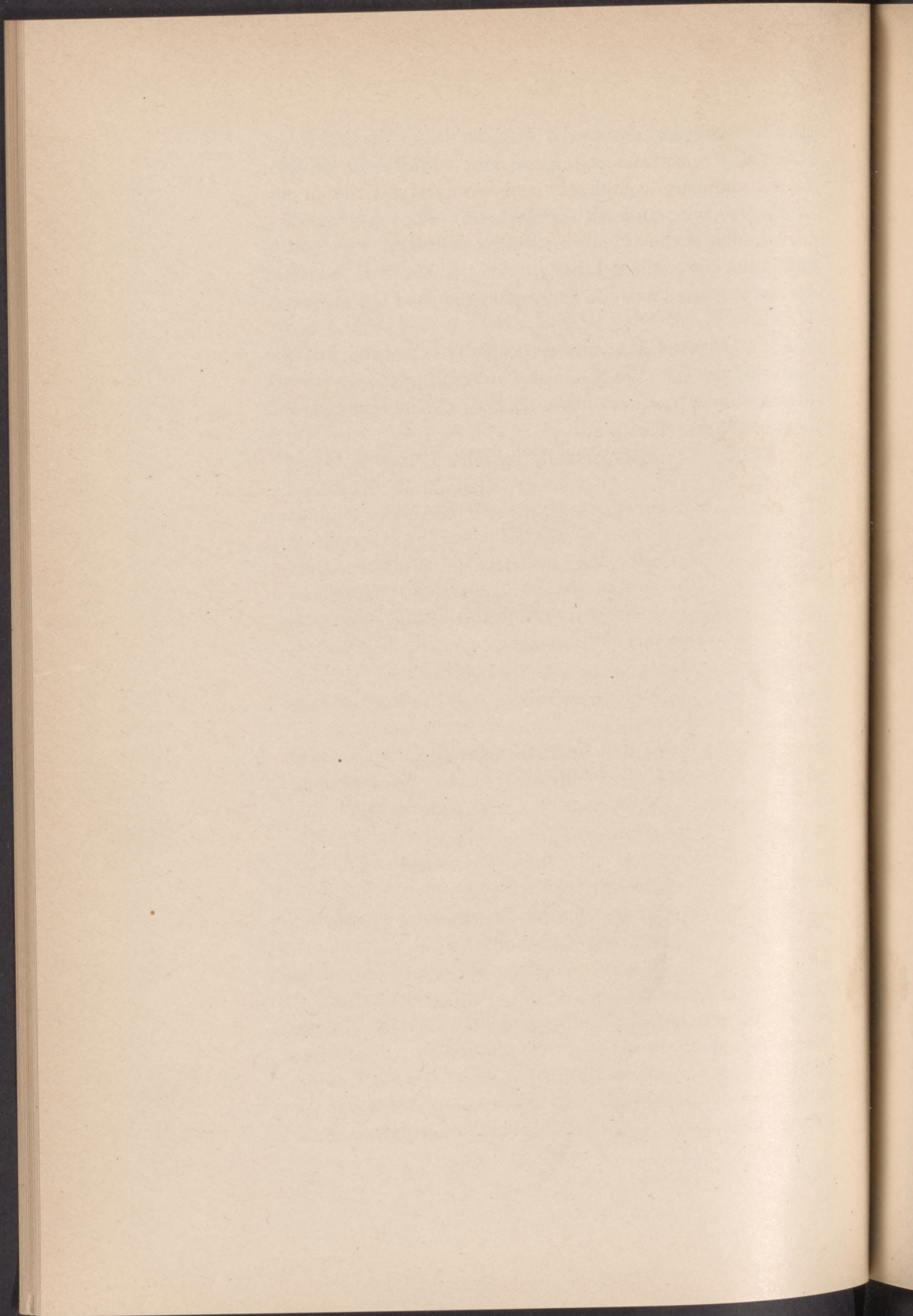
The necessity which has arisen, and is recognized in the cases to which I have heretofore referred, for holding that a release by the cestui que trust to one trustee or an acceptance of the securities taken by a trustee, or the ratification by the cestui que trust of the act of the trustee, releases him, must certainly very clearly appear, when it is considered

that, if managers are to be held liable for the deficiency which may arise from the settlement of the receiver, then the managers are completely and absolutely at the mercy of the receiver, and without redress. The receiver says, that the loss made by his settlement will exceed \$400,000, and if the last position I have taken is not true, he could just as well have made it \$2,000,000 and sued the managers for that.

For all these reasons it is respectfully submitted that the decree of the Court of Chancery overruling the demurrers filed by the appellants in this suit, should be reversed and the bill dismissed with costs.

Respectfully submitted, etc.,

GEORGE W. HUBBELL.



Court of Errors and Appeals.

BETWEEN

A. BISHOP BALDWIN, ET AL.,
Appellants,

AND

GEORGE WILKINSON, RECEIVER, ETC.,
Appellee.

On Appeal
from Chancery.

Brief for A. Bishop Baldwin, Charles S. Haines, Daniel Price, and William Rankin, on appeal by them from an order overruling their demurrers to the bill filed by George Wilkinson, Receiver, &c., appellee.

Appellants insist that the order appealed from was erroneous, and that their demurrer as to the bill should have been sustained.

I.

OBJECT OF THE SUIT.

The bill was filed by the complainant—as Receiver of the Newark Savings Institution, and thus representing the depositors of that institution, as beneficiaries or *cestuis que trust*—against the defendants as managers of that institution, in their capacity of trustees, to compel them to account for and pay to said complainant, the loss, (estimated at about \$400,000,) alleged to have been sustained by said institution in consequence of pretended breaches of trust by the defendants, as such managers, *in having lent to, or*

deposited with, Fisk & Hatch, bankers, U. S. government bonds belonging to said institution, of the par value of \$2,036,000.

See section 31, Case, p. 31.

See last 7 lines of section 32, Case, page 32.

See lines 2-10, Case, p. 41.

II.

THE BILL OF COMPLAINT.

(A.) The bill sets forth and alleges:

1. The complainant's *appointment* as receiver, &c. (Sections 1-2.)
2. The *charter*, &c., of the institution. (Sections 3-7.)
3. Its *by-laws*, &c. (Section 8.)
4. The *insolvency proceedings*, &c., of Dec. 12, 1877. (Sections 9-10.)
5. The *course of business* of the institution, under the chancellor's orders in said proceedings. (Sections 11-13 and 19.)
6. The *officers and manager's names, duties, compensation*, &c. (Sections 14-18.)
7. Statements of impertinent and irrelevant matters, containing accusations of supposed breaches of trust, from which no loss is pretended to have arisen. (Sections 20-30.)
8. The lending to or depositing with Fisk & Hatch, bankers, of U. S. government bonds to the amount of \$2,036,000, par value, by the managers, which bonds it is alleged "*that on the fifteenth day of May, 1884, the said firm of Fisk & Hatch ought to have had in their possession.*" (Section 31.)
9. "That on said fifteenth day of May, 1884, the said firm became insolvent and stopped business", that "they had

pledged, sold, or otherwise disposed of all of the aforesaid government bonds with which they were chargeable as aforesaid"; and that "the loss to said institution arising from the failure of said firm to return the government bonds * * * in full * * * exceeds the sum of \$400,000." (Section 32.)

10. "That in consequence of said failure of Fisk & Hatch and the loss to the institution resulting therefrom, said institution became insolvent." (Section 33.)

11. That when the complainant "became receiver of the said The Newark Savings Institution, he made diligent efforts to obtain from said firm of Fisk & Hatch, payment of all their liability to said institution. * * * That the said firm during a long term of years *had acquired considerable reputation in their business and enjoyed considerable credit*; that *they informed him they would be able to borrow a sufficient amount of money to pay him said sum of \$845,632.04, provided he would immediately execute to them a release from all further liability to said institution, but that only on that condition could such money be obtained by them.*

That, being satisfied that such representation was true, your orator, *by advice of counsel, and as the only means of obtaining from said firm for said institution and its depositors, any further sum of money or other valuable thing, * * on the 29th day of May, 1884, signed a paper writing under seal, of which the following is a copy:*

(EXTRACTS.)

(1.) "Whereas, Fisk & Hatch hereinafter mentioned, have received from, or on account of the Newark Savings Institution, United States government bonds to the amount, at par value, of \$2,036,000, for the market value of which they become accountable;

(2.) "And whereas, afterwards, said Fisk delivered to

said Savings Institution the securities mentioned in schedule "A," hereto annexed, in lieu of the said United States bonds ;

(3.) "And whereas, George Wilkinson, since the delivery of said bonds, has been appointed receiver of said institution, and it has been agreed to settle the differences arising out of said indebtedness in manner hereinafter stated ;

(4.) "*Now, therefore,* this memorandum of agreement, made this 29th day of May, 1884, between Harvey Fisk and Alfrederick S. Hatch, composing the firm of Fisk & Hatch, parties of the first part, and George Wilkinson, as receiver of the Newark Savings Institution, party of the second part, witnesseth : The parties of the first part, in consideration of *the sale of the said United States government bonds by the party of the second part to the parties of the first part,* hereinafter provided for, *and of other good and valuable consideration,* have bargained, sold, transferred, and set over, etc., the said securities, choses in action, and property of every kind described in schedule A hereunto annexed, etc. * * * *

(5.) "And the party of the second part, in consideration of the sale of the securities, choses in action, and other property enumerated in said schedule A, *and of other good and valuable considerations,* has bargained, sold, transferred, and set over, and by these presents, does bargain, sell, transfer, and set over, unto the parties of the first part, their executors, administrators, and assigns, the following United States government bonds, to wit: \$900,000 United States four per cent. bonds ; \$1,136,000 United States four and a-half per cent. bonds ; to have and to hold the same unto the parties of the first part, their executors, administrators, and assigns forever. * *

(6.) "It is mutually understood and agreed by and between the parties hereto, that all matters in difference, what-

soever between the parties hereto, and between the parties of the first part and the Newark Savings Institution, are at an end and definitely adjusted hereby." (Section 34.)

12 (1.) "That, at the time of the execution of said paper writing, your orator was ignorant of the aforesaid breaches of trust and illegal acts, which rendered said managers responsible to your orator, as aforesaid.

(2.) "That the said breaches of trust and illegal acts were then denied and concealed by them; and your orator has only been able to discover the same after a long continued and diligent examination of the books and records of said institution.

(3.) "That the said managers were not parties to said writing, and were in no wise released or affected thereby.

(4.) "That it was not your orator's intention to release them; nor did he, in fact, release them or any person whatsoever, from any liability incurred to said institution, by the aforesaid breaches of trust.

(5.) "That the liability of Fisk & Hatch and of said managers to said institution and to your orator, was a several as well a joint liability.

(6.) "That a release to one of the persons who were guilty of the breaches of trust and of the illegal acts hereinbefore complained of, was and is no release to any other of such persons.

(7.) "That the recitals of said agreement or writing are erroneous.

(8.) "That the pretended sale of bonds, attempted to be made by said writing, was impossible, as they were not then in the possession or ownership of your orator or of said institution, having been long prior thereto disposed of by said firm.

(9.) "That said *supposed* release or paper writing, was and is *based upon a condition of things which had no existence in point of fact*, and is therefore void and without effect, and more especially void and without effect as to the defendants herein.

(10.) "That it was executed by your orator, as the only means of saving to said depositors a considerable portion of the money due from said firm." (Section 35.)

(B.) The bill prays—

1. An answer, *without oath*.
2. That the defendants "may be decreed to have occasioned, by their aforesaid neglect and illegal act and breaches of trust the loss suffered by said institution at the hands of *Fisk & Hatch*."
3. "That an *account may be taken* of the loss."
4. That the defendants "may be decreed to pay the amount of the losses with which they, or any of them, are properly chargeable."
5. General relief.

III.

DEMURRERS.

The defendants (Baldwin, Haines, Price, and Rankin) demur—

1. *For want of parties*; that is to say, because Fisk & Hatch are not made defendants.
2. *For want of equity*.

FIRST POINT.

(As to parties.)

1. The bill clearly shows that Fisk & Hatch were *quasi* trustees, or trustees *ex maleficio*; they having received the

government bonds (\$2,036,000) *with full knowledge that they were trust funds* belonging to the Savings Institution.

2. The bill alleges that Fisk & Hatch are *jointly and severally liable with the defendants*, to the institution and to the complainant.

"The liability of Fisk & Hatch and of said managers to said institution and to your orator, was a several as well as a *joint liability*."

Case, p. 39, lines 16-19.

3. The bill also alleges that the *release* given to them was "*void and without effect*," and *did not* "*release any person whatever*."

Case, p. 39, lines 13-15, and 28-31.

4. It follows from these premises, that Fisk & Hatch should have been joined as defendants.

AUTHORITIES.

"If the trustee commit a breach of trust, *and third parties obtain the benefit of it, they must be joined as defendants*, in a suit by the *cestuis que trust*."

If the trustees convey the property to a third person with notice of the trust, or without consideration, such third persons may be sued by the *cestuis que trust*, and *must be joined with the trustees* in a suit for relief by the *cestuis que trust*."

2 *Perry on Trusts*, 3d ed. § 877.

see *Id.* §§ 875-876.

"If co-trustees commit a breach of trust, *and a third party reaps the benefit, he must also, as a quasi trustee, be made a defendant*; since he is liable to be sued by the *cestuis que trust*, and the equities between himself and the co-trustees ought to be settled so far as is practicable."

Lewin on Trusts, 2d Am. ed. 846.

see *Id.* 845.

Munch v. Cockerell, 8 Sim. 219.
 see also, *Burt v. Dennet*, 2 Br. C. C. 225.
Perry v. Knott, 4 Beav. 179.
 S. C. 5 id. 297.
Consett v. Bell, 1 Y. & C. Chy., 569.
Williams v. Allen, 29 Beav. 292.
Salomons v. Laing, 12 id. 377.
Wright v. Wood, 12 Jur. 595.
Dorsheimer v. Rorback, 8 C. E. Gr., 46.
 S. C. on appeal, 10 id. 516.

Fisk & Hatch would have been liable, under the circumstances stated in the bill, to a suit *even by the defendants*, as trustees.

“If third persons have obtained all the benefit of a breach of trust, *the trustees* may recover from them the loss which has accrued to the trust property.”

2 *Perry on Trusts*, § 848.

see also *Lewin on Trusts*, 768.

SECOND POINT.

(Want of Equity.)

1. The bill shows, that, instead of the government bonds in question having been lost by the *fault of the defendants*, they were “*bargained, sold, transferred, and set over*,” by the complainant himself, to Fisk & Hatch, “*in consideration of the sale*” by them to him, of certain securities, etc., “*and of other good and valuable considerations*.”

Case, p. 35, ll. 36-40.

Id. p. 36, ll. 1-9.

(1.) If the facts are as they clearly appear from the tenor and legal purport and effect of the instrument set forth in the bill, the complainant has no equity whatever.

(2.) It was made and executed :

(a.) *Ante vitem motam*.

(b.) With knowledge of the situation.

Case p. 33, § 34

- (c.) After careful and mature deliberation. *ibid.*
 (d.) With a full view of all the legal consequences
 to all persons interested or concerned.
 (e.) By and with the advice of counsel learned in
 law; and, *Case p. 34, ll. 13-18.*
 (f.) By and with the sanction of the Chancellor,
Case p. 33 ll. 23-28.

(3.) It must therefore be presumed :

(a.) That in employing the apt language of a technical, absolute sale and assignment, without explanation or qualification, the parties to the instrument *intended thereby truthfully to characterize the transaction*, and give it all the attributes, force and effect of a valid sale and assignment, including not only an *implication*, but also a *warranty, of title*, in the assignor or grantor.

(b.) That it was intended to transfer to, and vest in, Fisk & Hatch, (who had previously no title whatever,) as valid and perfect a title as the lawful owner, (the institution itself,) could vest in them, and free from every possible infirmity; and moreover, one that *would*, in connection with the *release, operate as a complete protection and defense, not only as against the institution and its receiver, but also, as against the defendants as managers of the institution in any suit by them or any of them, for indemnity or contribution; in other words, a title perfect, indefeasible and unimpeachable against the world.*

(4.) The form and substance of the instrument, and the intent of the parties manifest from the language thereof, *negative and preclude the notion*, (on which the bill is based) *that the institution or its receiver did not at the time have full and actual or virtual possession of, and unimpaired title to, all the bonds, (\$2,036,000,) or that the defendants had done or omitted to do any act whereby the title could have been defeated or impaired.* This view is confirmed by the solemn averment in the bill, viz.: "*That at the time of the*

execution of said paper writing, your orator was ignorant of the aforesaid breaches of trust and illegal acts, which rendered said managers responsible to your orator, as aforesaid." (Sec. 35.)

If this averment means anything, it means that the receiver, when he executed the assignment, was "ignorant" that the managers had parted with the custody or title of the securities, and that he supposed the institution still had the title, control and custody of all of them, unimpaired and unaffected by the aforesaid breaches of trust and illegal acts," which were not discovered till afterwards, and "after a long continued and diligent examination of the books and records of the institution." (Sec. 35.)

Although after a perusal of the whole bill, one may be pardoned for being a little skeptical respecting the truth of this averment, the complainant himself, having deliberately and solemnly made it for one purpose, is not at liberty to deny it for the purpose of invalidating, impeaching, impairing or limiting the full legal effect of the instrument. "*Allegans contraria non est audiendus*"—which maxim, we are told, "expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times," (much less at the same time, and *uno flatu*.) on the truth of each of two conflicting allegations, according to the promptings of his private interest."

Broom's Maxims, 7th ed. 169.

It is not permissible in pleading (as in fiction,) to aver that "yonder cloud" is like a camel, like a weasel, and "very like a whale," at the same instant.

(5.) It may be remarked, by the way, in this connection, that if the complainant was, as he avers, "ignorant of the aforesaid breaches of trust and illegal acts," (that is to say the transfer of the custody of the bonds to Fisk & Hatch,) it was manifestly not because the same were, "denied and con-

cealed" by the managers; they could not have been "*denied*" until after the *discovery* of the fact of transfer by the receiver, and a mention of the fact to the managers who are alleged to have "*denied*" their agency in the matter; they could not have been "*concealed*," for an "*examination of the books and records*," (where alone it was proper that a *memorandum* of the fact should be made,) seems readily to have yielded full information. (See section 35.)

(6.) None of the averments or statements in the bill, contrary to, or inconsistent with, the legal purport and true construction of the instrument are to be regarded, *and none of them are admitted by the demurrers.*

"A demurrer necessarily admits the truth of the facts stated in the bill, *so far as they are well pleaded; but it does not admit the conclusions of law drawn therefrom*, although they are alleged in the bill."

Story's Eq. Pl. § 452.

Cooper's Eq. Pl. p. 111.

Mitford's Eq. Pl. pp. 211, 212.

Williams v. Steward, 3 Mer. 472, 492.

Ford v. Peering, 1 Ves. Jr. 72.

Wyatt's Prac. Reg. 163.

Penfold v. Nunn, 5 Sim. 405.

Earle v. Holt, 5 Hare, 180.

"A demurrer only admits matters positively alleged in the bill; *not every fanciful pretense suggested.*" Per Baron Wood in *Baker v. Booker*, 6 Price, 381.

"A demurrer does not admit that the *construction of a written instrument set forth in the bill*, is the true one; or that a parol understanding stated in the bill, as varying a written instrument, is competent and admissible in evidence."

Leo v. Robeson, 12 Gray, 280.

Dillon v. Barnard, 21 Wall, 430.
S. C. 1 Holmes, 386.

“So, if fraud is charged in the bill, and the facts constituting the fraud, *are not specifically set forth*, the fraud, which is a mere conclusion of law, is not admitted by a demurrer.”

Fuellen v. Crane, 58 Ala. 627.

Story's Eq. Pl. 9th ed. § 452, note a.

see also *Tompson v. Nat. Bk. of Redemption*,
106 Mass, 128.

Pearson v. Tower, 55 N. H. 36.

Partee v. Kortrecht, 54 Miss. 56.

Stow v. Russell, 36 Ill. 18.

“On a demurrer, *ambiguous statements are construed adversely to the pleader* * * * But although a demurrer confesses the matters stated in the bill to be true, such confession is confined to those matters which are well pleaded. *It does not, therefore, admit any matters of law, which are suggested in the bill, or inferred from the facts stated.*”

1 Dan. Chy. Pr. 5th ed. 546.

“Although a demurrer admits all the facts alleged in the bill, [yet] where a bill *alleged as a fact*, that a check was paid, and then proceeded *to detail the manner and circumstances* of its payment, and the circumstances appealed to show its payment, did not establish the fact, it was *held* that the allegation amounted to nothing.”

Redmond v. Dickerson, 1 Stock. 567.

see also *Tompson v. Nat. Bk. of Redemption*,
106 Mass. 128.

Notice the averments in section 35 of the bill, which are manifestly untrue, or palpably inconsistent with the true construction and legal effect of the instrument set forth in the bill, and which must therefore be disregarded.

2. Again, contrary to the averment in the bill, and according to the legal construction and effect of the instrument set forth in the bill, the *quasi* trustees *Fisk & Hatch*, have been released by the complainant, without the consent of the defendants, and without a reservation of rights as against them; and therefore they are discharged.

“Where the *cestui que trust* has entered into any compromise or arrangement with the trustee, by whom the trust fund has been lost, and the rights of the other trustees to be indemnified out of the assets of the defaulting trustee, are varied or affected by that arrangement, the *cestui que trust* will be held to have waived the remedy to which he was previously entitled against the other trustees. For instance, where the *cestui que trust* executes, or authorizes the other trustees to execute, a deed of compromise, as one of the creditors of the defaulting trustee; and, by that deed, the other trustees are precluded from putting in force a bond given by the defaulting trustee for the amount of the trust fund, the *cestui que trust* could not afterwards proceed against the other trustees for the breach of trust.”

Hill on Trustees, p. 315.

See *id.* p. 582.

See *Walker vs. Symonds*, 3 Swans, 1, 77.

Thompson vs. Harrison, 2 Bro. Ch., 164.

Vandebende vs. Livingston, 3 Swans, 625.

Blackwood vs. Borrowes, 2 C. & L., 459.

2 Pom. Eq., Sec. 1081.

“If two or more are jointly and severally bound in a

bond, a release to one discharges the others, and in such case, the joint remedy being gone, the several is so likewise."

Bac. Abr., Release G.

1 Parsons on Cont., 6th Ed. 27.

2 Chitty on Cont., 11 Am. Ed., 1187. 1154.

3. It does not appear that any loss has actually occurred. At most, it appears that a loss *may* occur.

Whether it will ever actually happen, depends upon whether the securities "set forth in Schedule C, valued at \$1,510,330," and which "remain unsold," will yield, when sold, their estimated value. They may bring less; they may bring *more*.

See Sherman vs. Lanier, 12 Stew. 249-255.

4. It remains to notice some observations contained in the opinion of the learned Vice-Chancellor, concerning cases cited in support of the objection of want of parties.

1. *Munch v. Cockerel*, 8 Sim., 217.

This case (decided by *Shadwell*, V. C., a very distinguished equity judge,) plainly holds that—

"Where several trustees are implicated in a breach of trust, the *cestui que trust* is not at liberty to file a bill to recover the trust fund, *against some of them only, but must make all of the trustees who are living, and the representatives of such of them as are dead, parties.*"

The Vice-Chancellor disposes of this decision by remarking (1) that it was "admitted in the case that there *may* be many special circumstances which will prevent the application of the *general rule*"; that is to say, that *the rule may have exceptions*; (2) that he thinks the case did not *involve the question raised now*.

It is sufficient to remark concerning the *first* point that *every* rule has its exceptions, and is proved by them, "*exceptio probat regulam*"; and in regard to the second point, that a careful examination of the case will show that it *did* involve and require a decision of, substantially the *very* question now raised.

In that case, the trust funds required to be invested by the trustees, were, in violation of the trust, *deposited and suffered to remain with a house that failed, and by failure of which the funds were lost.*

The learned Vice-Chancellor does not undertake to *distinguish* the cases in principle. The *very* question involved in this case, *was* involved in that, but was decided *rightly* in that, and erroneously (as we submit) in this.

2. *Perry v. Knott*, 4 Beas., 179, decided by *Lord Langdale, M. R.*, and to the same effect as *Munch v. Cockerel*.

The Master of the Rolls says: "I think this case is *deficient for want of parties*. I must on this occasion, act upon what I conceive to be the *established rules and principles of the court in this kind of cases*." He then, after deciding the case according to the "established rules and principles," as he says he "*must*" do, intimates that the "difficulties" under which parties labor, by reason of the rules, must, before long, lead to an *alleviation*—alluding, (as will be seen by reference to the note, p. 181), to a change in the rules *by the law making power*.

These "established rules and principles" are still *obligatory* in our jurisprudence, with all the additional sanction of time, and yet it seems that they are now for the first time thought to be not binding or worthy of regard.

3. *Consett v. Bell*, 1 Y. & C., p. 569, decided by *Vice-Chancellor Shadwell*.

In this case it was insisted in the answer of one of the defendants (*Wilson*) that he was *improperly* made a party.

Whether he was a *proper* party or not, was the question for determination. The Vice-Chancellor decided that he was, because he was a *receiver of the real estate held in trust*. The court did not decide that he was a *necessary* party, because it was unnecessary to decide that question.

4. *Salomons v. Laing*, 12 Beav., 377, decided by Lord Langdale.

This case held that where the directors of one incorporated railway company *paid over its funds to another railway company for purposes wholly unauthorized, and the latter received them with knowledge of the breach of trust, it was properly made a party to a suit to bring back the fund.*

Whether it was *properly* made a party, was all the court was required to decide. In deciding the question, the Master of the Rolls used the following pertinent language: "I have not the least doubt they [the second company] were properly made parties to this suit. *They are not third parties; they have made themselves principal parties to this misapplication; they have themselves obtained the money, knowing the purpose to which alone it ought to be applied,*" etc.

If the second company had *not* been made a defendant, and the bill had been demurred to for that reason, the question would have been (as in *Perry v. Knott*), whether it was a *necessary* party. Is it supposable that Lord Langdale, who decided *Perry v. Knott*, would or could have held that the second company were not a *necessary party to the suit, since they had "made themselves principal parties to the breach of trust?"*

5. *Williams v. Allen*, 29 Beav., 292, decided by Romilly, M. R.

The learned Vice-Chancellor's observation upon this case is that it "can scarcely be claimed as applicable, since in that case *the absent persons had an interest in the fund for life; and clearly the court could not tell to what extent to charge the trustees until the rights of the persons having a life interest were determined, and that could not be done in their absence.*"

A perusal of even the syllabus of this case shows that

the learned Vice Chancellor labored under a misapprehension of the facts and of the ground of the decision.

Suffice it to say :

- (1.) That the life tenants *were dead*.
- (2.) That, of course, their *life* interest was determined at their *death*.
- (3.) The omission to make *them* parties was, therefore, not a ground of objection.
- (4.) The court held, on an objection raised at the final hearing, that inasmuch as the trustee had *paid over the trust funds to the tenants for life, he (the trustee) would have a right to make any interest in the trust funds belonging to them available, and, therefore, that their legal personal representatives ought to be parties, * * and would be necessary parties in any inquiry.*"

The case involved the very question raised here by demurrer. The defendants who are sued in this case, insist that, as it is alleged in the bill, that the trust funds were turned over to Fisk & Hatch, the former have a right to make "available" the trust funds, or the proceeds of the trust funds, that are or ought to be in the hands of the latter.

6. *Wright vs. Wood*, 12 Jur. 595, decided by *Knight Bruce, V. C.*

The case, in brief, was this :

Some of the trust funds had been suffered by the trustee to get into the hands of E. W., who assigned them as security for advances. On a bill filed against the trustee and the assignees to whom some of the funds were assigned by way of security, there was a demurrer (*inter alia*) because E. W. had not been made a party. The court held that E. W. was a necessary party.

It was as if Fisk & Hatch had assigned the trust funds, *by way of security for advances made*. Vice Chancellor *Knight Bruce* would have held, (notwithstanding the as-

signment by them) that they, as well as their assignees, were necessary parties. *A fortiori*, would he have held them necessary parties, with the funds still in their hands.

7. *Bailey v. Inglee*, 2 Paige, 278.

The observations quoted from the opinion in this case were mere prefatory generalities indulged in by Chancellor Walworth, and were entirely uncalled for by the facts before him. After uttering these generalities, he decided the question involved in the case, as follows:

“The case *before* me is one in which Rhodes was a *necessary party*, because he was jointly liable with the complainant in the action at law on the note. Inglee and wife, therefore had a right to insist that Rhodes and Balestier should be made parties, so as to make the determination complete. (*Poore v. Clark*, 2 Atk. 515. *Breckenridge v. Bullitt*, 3 Litt. R. 5.) *And if they had not been made defendants, Inglee and wife might have demurred to the bill for want of parties.*”

In this case there was involved *no trust or controversy respecting trust funds*.

If the learned Vice Chancellor had quoted the words of the *decision*, instead of the rambling and irrelevant *obiter dicta*, in that case, he would not thereby have strengthened his position.

72 *Lund v. Blanshard*, 4 Hare., 28, decided by Wigram, V. C.

After making the general theoretical remarks quoted in the opinion below, Vice-Chancellor Wigram, approaching the consideration of a question somewhat like the present, uses the following language pertinent to this case, as made by the bill, but not quoted in the opinion therein: “But if a trustee fraudulently alienates trust property, so that the alienation be *ipso facto* void, by reason of the fraud, and a third party is implicated in that fraudulent and void transaction, thereby acquiring for his own benefit the possession

of the trust property, under circumstances which can give neither right nor title to it, my opinion is that a party so circumstanced can not require that the cestui que trust, who is defrauded, shall treat the liability of the stranger as distinct from that of the trustee. The fraud, by the supposition, is one and indivisible. In equity, the transaction is null and void."

8. *Attorney General v. Wilson*, 1 Cr. & Ph., 1, 28, decided by Lord Cottenham.

This suit was instituted against certain members of the governing body of the Borough of Leeds, to recover trust property belonging to the Borough, acquired for municipal purposes, and alienated and disposed of for entirely different purposes, "with the avowed design of depriving the corporation of it," and characterized by the Lord Chancellor as "not only a breach of trust and a violation of duty towards the corporation," but as "an act of spoliation," and because it was "an act of spoliation," he held that there could be no right of contribution between the defendants and those not sued, and that therefore the latter were *not necessary parties*.

9. *Cunningham v. Pell*, 5 Paige, 607, decided by Chancellor Walworth.

This case is introduced, not to show what was decided in it, but for the purpose of showing what the Chancellor said had been decided in another case not reported—the *Protection Insurance v. Dummer*. If we had a presentation of the facts of that case, instead of the short statement of an *abstract principle* said to have been decided in it, it might be worth while to attempt an examination of the case. It is enough to say now, that the current of well considered and reported decisions is against the principle held.

In respect to the case of *Cunningham v. Pell*, the charge in the bill was that "*funds of the bank had been fraudulently abstracted to a large amount;*" and the Chancellor held the bill defective on a demurrer for want of parties.

10. *Selden v. Connell*, 10 Sim. 79, decided by Vice Chancellor Shadwell.

Bill to set aside a sale *procured by fraudulent representation.*

On a demurrer for want of parties, the Vice Chancellor said: "I think that the other directors are not necessary parties; because the remedy sought here is in respect to their *fraudulent act*, that is, a *tort*, and not a mere breach of trust."

11. *Stainbank v. Fernley*, 9. Sim., 556, decided by the same Vice Chancellor.

Bill filed to set aside a sale of shares in a company, induced by fraudulent representations of the defendant and others, "*that the affairs of the company were in a prosperous state.*"

A case of pure *tort*, as in the last case.

12. *Moore v. Rand*, 60 N. Y., 208.

This was an action for dissolution of a partnership and for an accounting, the contract of partnership having been induced by *deceit*.

The court incidentally held "that although a joint action for the deceit would lie against the plaintiff, yet the right of action was several." But this decision has nothing to do with the question involved in this case.

13. *Wilson v. Moore*, 1 M. & K., 127, decided by *Sir John Leach, M. R.*

The case before the court arose out of a *misappropriation and conversion* of an estate by the executors in conjunction with third persons who had full knowledge of all the facts.

In other words it was a *tortious act*; and, although the case may have been rightly decided on the facts, yet there was no warrant for the *dictum* that "*all parties to a breach of trust are equally liable,*" and none "*primarily liable.*"

The judge who decided this case and uttered this *dictum*, was said by Sir Samuel Romilly to have been "*worse qualified for a judicial situation than almost any one he had known in the profession,*" and "*extremely deficient as a lawyer.*"

Foss' Biographia Juridica—Leach.

14. *Miller v. Fenton*, 11 Paige, 18.

This was a suit arising out of "*a fraudulent abstraction of the funds*" of a bank; and the court was warranted in holding there was no contribution.

15. *Andrews v. Murray*, 33 Barb. 354.

This was a suit growing out of a *penalty* incurred by the trustees of a manufacturing company, under a statute that imposed *upon each* trustee the duty of making the report required, and for the neglect of which *each* was liable.

The trustees were clearly wrongdoers, and the suit was one *ex delicto*.

16. *Heath v. the Erie Railway Company*, 8 Blatch. 347.

This was a suit originating out of Fisk and Gould's

transactions, the acts complained being *ultra vires* and a misapplication of corporate funds.

The true principle and established rule upon the subject of the *liability among co-trustees*, is correctly stated in *2 Pomeroy's Equity*, sect. 1081, as follows:

"The rule is firmly settled that where a breach of trust has affected two or more or all of co-trustees with a common liability, they *are liable jointly and severally*; each is liable for the whole loss sustained, or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them. Whenever two or more co-trustees are thus jointly and severally liable in the same amount *for a breach of trust which is not purely tortious in its nature*,—as where it consists in a failure to carry out the directions of the trust or a failure to make proper investments, or like acts of omission or commission which are not fraudulent, or do not involve a *willful breach of good faith*—*a right of contribution exists among themselves: and if one of them has paid the amount of liability, he may enforce a contribution from the others, in a suit brought for that purpose.*

In such cases, upon the general principles of equity pleading, *all the trustees who are liable, should be joined as defendants in a suit brought by the beneficiary.*"

The Vice Chancellor seems to have assumed that the defendants in this cause were something more even than *tort feasors*, having no rights that the court was bound to respect.

Even the case made by the bill, wild as many of the allegations are, shows nothing but a *breach of trust, arising from negligence, in depositing securities, &c., of the institution with Fisk & Hatch, without exacting from them proper safeguards.*

The bill charges that the loss arose "*from the failure of said firm to return said government bonds and money in full,*" and that such loss "*resulted from, and was occasioned by the gross negligence and breaches of trust of said managers in the performance of their duties.*"

Case, p. 32, sect. 32 ad fin.

Again, in another place, the charge is only that their acts "*constituted gross negligence and gross breach of trust,*"—and the facts as set out in the bill, with all the aggravation that the pleader could command, show that the epithet "*gross*" in this charge is "*overworked*" and entirely unwarranted.

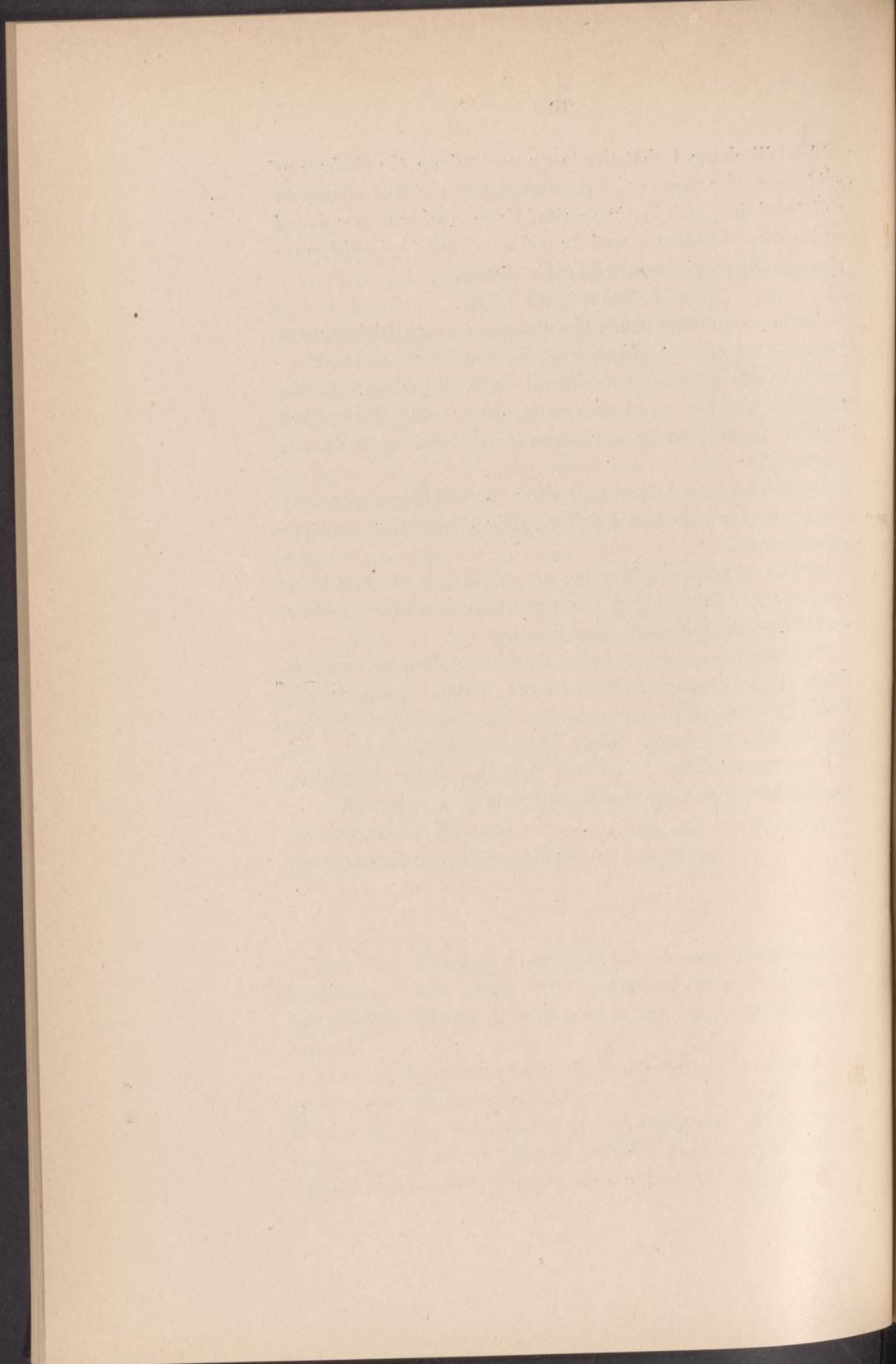
But the learned Vice Chancellor nevertheless, says they "*were wantonly and willfully guilty of misfeasance and of a fraud.*"

Such a characterization (as we submit,) is uncalled for and unjust. The alleged facts themselves, under the law, do not warrant the conclusion reached.

And as (to use the words of the opinion below) "*to affirm that thirty-six inches do not make a yard, proves nothing in behalf of a pleader,*" so such a characterization can not alter the facts. They speak for themselves.

It is respectfully submitted that the order overruling the demurrers was erroneous, and should be reversed.

JOHN W. TAYLOR,
of Counsel for demurrants.



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NEW JERSEY
Court of Errors and Appeals.

BETWEEN
DANIEL DODD,
Appellant,
and
GEORGE WILKINSON, RECEIVER OF THE
NEWARK SAVINGS INSTITUTION,
Respondent. } On
Appeal.

Bill of Complaint.

[Filed January 9, 1885.]

IN CHANCERY OF NEW JERSEY.

BETWEEN
GEORGE WILKINSON, RECEIVER, &c.,
Complainant,
and
DANIEL DODD ET AL,
Defendants. } On Bill,
&c.

To the Honorable Theodore Runyon, Chancellor of the
State of New Jersey :

Humbly complaining showeth unto your honor, your
orator, George Wilkinson, of the city of Newark, New
Jersey.

1. That on or about the seventh day of June, eighteen hundred and eighty-four, William Una, Henry S. Pfeil, Herbert W. Knight and Horace B. Anderson filed their bill in this court against the Newark Savings Institution, setting forth (inter alia) that they were depositors therein; that its assets were insufficient to pay the total amount of its indebtedness, that it had ceased to transact the ordinary business of a savings institution, and was not able to pay its depositors interest on its deposits; and
10 that the said institution was then insolvent and praying (inter alia) that its managers might be enjoined from continuing to exercise its franchises, and that a receiver might be appointed to collect its assets and distribute them among the persons entitled thereto.

2. That such proceedings were had in said suit, that on said seventh day of June this court made an order restraining the managers and directors from paying depositors the amount of their deposits and from exercising the franchises of said corporation; constituting the
20 said corporation the ward of this court according to the statute, and appointing and continuing your orator receiver of the said institution with all the powers incident to such receivership, as by reference to said order and decree will more fully appear; and that your orator since his said appointment as receiver, has duly taken the oath required by law and qualified and given bond as such, and has proceeded in the execution of the duties imposed upon him by said order and by law.

3. That the said the Newark Savings Institution was
30 incorporated by an act of the Legislature of this State, approved February the twenty-fifth, eighteen hundred and forty-seven, and was thereby constituted a body politic and corporate, capable of suing and being sued, of purchasing, taking, holding and enjoying real estate in fee simple or otherwise, and any goods, chattels or personal estate necessary for the purposes in said act recited, and of selling, leasing or otherwise disposing of the said real or personal estate, or any part thereof, provided the clear annual value of such real and personal
40 estate exclusive of the profits which might arise from

the interest accruing upon investments, or upon the sale of any investments in which the deposits might be made should not exceed the sum of ten thousand dollars.

4. That by said act it was further prescribed as follows:

"Sec. 2. And be it enacted, That the institution shall be conducted by twenty-five managers, twenty of whom shall be residents of the city of Newark; a majority of the managers shall be a quorum to do business; and the seat of any manager who shall have neglected to attend for four successive meetings, may be vacated by the board; the persons named in the first section of this act shall be the first managers of the institution, and the managers shall hereafter meet annually, on the second Monday in May, and choose one of their number as president; and they shall have power to appoint a secretary, treasurer, and such other officers as to them shall appear necessary, which officers so chosen and appointed shall continue in office one year, and until others are chosen; and all officers so chosen shall be under oath for the faithful performance of the duties of their office respectively; and such officers shall have power to appoint a clerk or clerks, and such other agents or servants as they may deem necessary for conducting the affairs of the corporation, and to remove them at pleasure, and to appoint others in their stead, and to fix their salaries.

"Sec. 3. And be it enacted, That the said board of managers shall, from time to time, have power to make, ordain and establish such by-laws and regulations as they shall judge proper for the election of their officers; for prescribing their respective functions and the mode of discharging the same; for regulating the time and places of meeting of the officers and managers, and for the transacting, managing and directing the affairs of the institution; provided, such by-laws and regulations shall not be repugnant to the constitution and laws of this State and of the United States; and such by-laws and regulations shall be put up in some public and conspicuous place in the room where the business of the said institution shall be transacted, but shall not be al-

tered so as to affect any one who may have been a depositor previous to such alterations.

“Sec. 4. And be it enacted, That the said corporation may receive as deposits all sums of money which may be offered for the purpose of being invested, in such sums, and at such times, and on such terms as the by-laws shall prescribe, which shall be invested accordingly, and shall be repaid to such depositor at such times, and with such interest, and under such regulations as the
10 board of managers shall from time to time prescribe; and the said corporation may accept and execute all such trusts of every description as may be committed to said corporation by any person or persons whatsoever, by will or otherwise, or transferred to the same by order of any court.

“Sec. 5. And be it enacted, That it shall be the duty of the managers to regulate the rate of interest to be allowed to the depositors, so that they shall receive a rateable proportion, as near as may be, of the profits after
20 deducting therefrom all necessary expenses, and a reasonable surplus or contingent fund; provided, that the said rates of interest may, at the discretion of the managers, be so regulated that the interest allowed to depositors having one thousand dollars or more deposited shall be at least one per cent. less than the interest allowed to other depositors, and so that no interest or dividend on account of said surplus fund shall be allowed for moneys which shall have been withdrawn from deposit.

30 “Sec. 6. And be it enacted, That no emolument whatever shall, directly or indirectly, be received by the president or managers for their services; nor shall they issue any notes or bills; nor shall any manager, officer or agent of the incorporation be allowed, directly or indirectly, to borrow any money or moneys from the said institution, or to use the same, except to pay necessary expenses; nor shall they have or hold any bonds, mortgages, or other securities for the payment of money drawn or endorsed by, or existing against any manager,
40 officer or agent of the institution; and no manager or

officer shall have any interest in any of the deposits, or the profits arising from the same, except it may be due for deposits made by them as trustees for the benefit of others.

"Sec. 13. And be it enacted, That the managers shall have power to fill up, by ballot, after notice of one month, any vacancy which may occur in their own body or officers, two-thirds of the members present to agree to all removals and new appointments; and no appointment or removal to take place when a less number than two-thirds of the managers are present."

5. That it was further provided that the managers and officers of the incorporation should keep certain books and allow interest as in said act specified, and by a supplement to said act of incorporation, approved February the ninth, eighteen hundred and fifty-nine, it was provided that so much of the original act as prohibited compensation to managers for actual services performed by them for said corporation should be repealed, and all compensation to be allowed managers should be first determined upon by the board of managers at their meeting.

6. That it was further provided by said charter that the institution should make an annual report to the legislature of this State, under oath, of the state of its funds, but since the first day of January, eighteen hundred and seventy-nine, the said institution has made its annual report to the secretary of state, pursuant to the provisions of an act entitled "An act concerning savings banks" and the supplements thereto (which act was and is obligatory upon said institution), by which it is provided that it shall be the duty of the managers of every savings bank, by a committee of not less than three of said managers, on or about the first day of January of each year, thoroughly to examine the books, vouchers and assets of such savings bank, and its affairs generally, and to make a report based upon such examination, verified by the oath or affirmation of a majority of the managers making the same, to the secretary of state, on or before the first day of February in each year; and

it was further provided that said report should (inter alia) state the cost, par value, and estimated market value of all investments, designating each particular kind of security and the amount loaned upon the pledge of securities, with a statement of securities held as collateral for said loans; and said report was to be further verified by the oath or affirmation of the two principal officers of said institution.

7. That by the original charter of incorporation the
10 said institution was prohibited from investing money in any other public stocks than such as were created under the laws of the United States or of this State, or on bond and mortgage except on unincumbered real estate worth at least double the amount of the sum invested. By supplements to said act, approved, respectively, on March the fifth, eighteen hundred and fifty, and February the ninth, eighteen hundred and fifty-nine, the said institution was permitted to invest in certain other stocks in
20 said supplements particularly specified, as by reference thereto will appear; but said acts, so far as they relate to investments or loans, have been superseded in whole or in part by the "Act concerning savings banks," heretofore mentioned, and by an act approved April the fifth, eighteen hundred and seventy-eight, entitled "An act for the better security of depositors in savings banks," and the supplements thereto, as by reference to said acts will more fully and at large appear.

8. That shortly after it became incorporated the said
30 institution began to transact the business of a savings bank, and continued so to do, with a very short intermission occurring in the month of December, eighteen hundred and seventy-seven, until the sixteenth day of May, eighteen hundred and eighty-four; and that several years prior to the first day of January, eighteen hundred and seventy-seven, its board of managers made and established by-laws for its government, which have remained unrepealed ever since, except as hereinafter mentioned. By these by-laws it was (inter alia) ordained as follows:

"ARTICLE I.

"The stated meetings of the board shall be on the second Monday of May, and on the second Wednesday of every other month at three o'clock, P. M., at the office of the institution, and extra meetings may be called by the president or vice president; and it shall also be the duty of either of these officers upon the written request of three managers to call a meeting of the board.

"ARTICLE II.

"There shall be a president, vice president, treasurer, 10 an auditing committee of five members, a funding committee of four members and the president and vice president, *ex officio*, and also a safe deposit committee of five members, and the president and treasurer, *ex officio*; one of the elected members of each of said committees shall retire each year. Such clerks and other persons as may be deemed necessary shall be appointed by the board from time to time, removable at their pleasure, which employees, together with the treasurer, shall receive such compensation, and give such official bonds as the 20 board may from time to time direct.

"ARTICLE III.

"The president shall have the custody of the common seal, and of the official bonds given to the institution, and shall be *ex officio* chairman of the funding committee. He shall have the custody of the books, papers, funds and assets, and also the direction of the persons employed in the institution, and generally of its executive business, subject always to the action of the board.

"The vice president shall, in the absence of the presi- 30 dent, preside at the meetings of the board and of the funding committee, and shall perform such other duties as may from time to time be imposed upon him by the board.

"The treasurer shall have the general control and management of the clerical business of the institution under the direction of the president. He shall deposit the cash funds in such bank or banks, as may, from time to time, be designated by the funding committee. He shall also be secretary of the board and of the funding committee, 40

keep the minutes of their proceedings and give due notice of their meetings.

“The president, vice president and treasurer shall receive such compensation for their services as the board may from time to time direct.

“ARTICLE IV.

“The funding committee shall have power and authority to invest such parts of the money deposited in or belonging to the institution, as they shall deem proper, and
10 in accordance with its charter, and at their discretion to sell, dispose of or exchange any of the securities in which the funds of the institution may be invested. They shall also have power to demand the payment of any bond or mortgage or other security, and if necessary in their judgment, to enforce such payment by due course of law; and shall have power to authorize a release of a part of the mortgaged premises, if in their judgment the remaining security is ample to secure the
20 amount. They shall keep minutes of their proceedings and report the same to the stated meetings of the board. The auditing committee shall examine all the cash, securities and accounts of the institution, and report their condition at every regular quarterly meeting of the board in January, April, July and October in each year.

“ARTICLE XVIII.

“The president, vice president, treasurer and new members of the board, shall be elected by ballot, by a majority of the managers, and the funding, auditing and
30 safe deposit committees by a vote of not less than seven managers.”

That on the twelfth day of September, eighteen hundred and eighty-three, the said board so amended Article One of said by-laws that the stated meetings of the board were required to be held quarterly, on the second Wednesday of January, April, July and October, instead of monthly, as theretofore.

That in the month of August, eighteen hundred and seventy-one, the following resolution was passed by said
40 board :

"Resolved, That minutes of board of managers and funding committee and all other business which is to be submitted to any meeting of this board, shall be placed upon the table in the manager's room at least one hour before the time fixed for the meeting of managers."

9. That on or about the twelfth day of December, eighteen hundred and seventy-seven, the said institution presented a petition to this honorable court, setting forth that the said institution and the managers thereof were trustees for its depositors, that its deposits amounted to 10 about ten million and eight hundred thousand dollars, and its assets to about twelve million dollars, but that owing to the depreciation in the market value of a part of its securities, it would in the event of a sudden withdrawal of a large portion of its assets by depositors (which withdrawal then seemed probable), be unable to pay the remaining depositors in full. To prevent inequality of distribution, it therefore prayed (inter alia) that an order might be made restraining it from paying to any depositor more than eighteen per cent. of his de-20 posit until the further order of this court, and from paying any dividend except such as should be authorized by this court.

It further prayed that an order might be made permitting the said institution to provide that all deposits thereafter made, and until the further order of the court should be treated as special deposits and invested only in the bonds of this State or of the city of Newark, or of the United States, and that separate accounts thereof might be kept, and that the actual interest received from 30 such investments, deducting necessary expenses, should be paid as dividends on such deposits, and that such deposits should not be subject to any restrictions as to payment, except such as were imposed by the by-laws theretofore adopted; and it further prayed that the future administration of the said trust should be under the control of the court so long as should be deemed necessary to promote the interest and insure the permanency and prosperity of the institution. In this petition the then managers of the said institution, that is to say, 40

Daniel Dodd, William Pierson, Ira M. Harrison, Daniel Price, Francis Mackin, Algernon S. Hubbell, Henry G. Darcy, William T. Mercer, John Kennedy and Zenas S. Crane, joined; they subscribed the same, and requested in writing its immediate presentation to the chancellor.

10. That upon the presentation of such petition this court ordered as follows:

Upon reading and filing the petition of The Newark Savings Institution, setting forth the situation and character of the securities in which the moneys deposited for investment under the provisions of its charter have been invested, and praying for the direction of this court in the administration of its trust, in order to secure absolute equality among the depositors and promote the permanency and usefulness of the institution for the causes set forth in said petition—

And the court having fully considered the matters contained in said petition, and being of opinion that the said institution is a public trustee of the fund in its hands belonging to its depositors, and that the administration thereof is under the control of this court, and that the facts set forth in said petition justify the exercise of such control in order to secure equality in the distribution and payment of said funds, and to enable the managers to administer their trust in such manner as, if practicable, to secure the depositors against ultimate loss, and promote the permanency and efficiency of the institution—

And it further appearing to the satisfaction of the chancellor that the said institution will have received at the close of this year for interest on its investments during the last six months an amount more than sufficient to enable it to pay an interest of two per cent. on the deposits for the said term, and that it has on hand, in cash or its equivalent in United States bonds, sufficient to pay on demand eighteen per cent. of its deposits—

It is thereupon on the twelfth day of December, eighteen hundred and seventy-seven, ordered by the chancellor that the said institution be authorized to credit and pay, on and after the second day of January next, an

interest or dividend of two per cent. out of its earnings for the past six months, on such deposits as shall be then entitled to receive the same; that from and after the service of a copy of this order the Newark Savings Institution do refrain from paying to any depositor any sums which in the aggregate shall exceed eighteen per centum of the amount of the deposit standing to the credit of such depositor at the close of the eleventh day of December, eighteen hundred and seventy-seven, until the further order of this court. 10

That the said institution shall hereafter, and until the further order of the court, refrain from making any disposition of its assets, except the payment to depositors above mentioned, and its ordinary taxes and expenses, without the approval and order of the court.

That all deposits in said institution made on or after the twelfth day of December, eighteen hundred and seventy-seven, and until the further order of the court, shall be treated as special deposits, and invested only in the bonds of this State, the city of Newark, or the United States, and that separate accounts thereof be kept and the actual interest received thereon, deducting necessary expenses and taxes, be paid as dividends upon such special deposits; and that such deposits shall not be subject to any of the restrictions hereby imposed. 20

11. That subsequently the said institution, from time to time, as it was able to realize from such assets as were subject to the claims of depositors who were such prior to said twelfth day of December, eighteen hundred and seventy-seven, on application by petition to this honorable court, obtaining leave to pay dividends to the amount of ninety-five per cent. of the claims of such depositors, and has accordingly paid the same, or the greater part thereof. 30

12. That pursuant to the leave granted to said institution by the order of December twelfth, eighteen hundred and seventy-seven, a new account was opened with such persons as made special deposits under said order, and such special deposits were made continuously from

said twelfth day of December to said fifteenth day of May, eighteen hundred and eighty-four.

13. That said special deposits received from time to time subsequent to said twelfth day of December, eighteen hundred and seventy-seven, were at first invested by the managers of said institution in the manner directed by the foregoing order, but such managers, finding it difficult to invest all the money so received in the manner required thereby, on the second day of June, 10 eighteen hundred and eighty, presented a further petition to this court praying that they might be allowed to invest a part of such deposits on bond and mortgage. Upon such petition this honorable court, on the second day of June, eighteen hundred and eighty, made order that the managers of the Newark Savings Institution might make investments to the amount of fifty per cent. of the new deposits on mortgages, but no such investments should be made except upon first mortgages of real estate in this State, and they were thereby required 20 to observe certain provisions contained in the order as to the value and title and sufficiency of the mortgaged premises, and that the remaining fifty per cent. of the new deposits should continue to be subject to the regulations theretofore made, and be invested in United States, New Jersey State, or Newark city bonds, as by reference to the said order, to which your orator prays leave to refer, will more fully appear.

14. That the said the Newark Savings Institution was not authorized by its charter to issue any stock. It pos- 30 sessed no capital other than the deposits of the depositors. Its managers were entitled to no part of its earnings or accumulated surplus except by way of compensation for services rendered and labor done and performed, except in so far as they might lawfully claim the same as depositors in trust, pursuant to the sixth section of the charter of said institution. The entire assets of said institution, and the interest and income of the same, after the payment of debts lawfully contracted in the prosecution of its business belonged exclusively to its depos- 40 itors, and said managers were the trustees of said insti-

tution and of its depositors, and received compensation for their services as such. Daniel Dodd was president of said board and institution, and one of its managers, from the eighth day of May, eighteen hundred and seventy-one, to the time when it ceased to transact business on the fifteenth day of May, eighteen hundred and eighty-four, and he received for five years prior to said last mentioned day an annual salary of four thousand dollars for his services to said institution. A. Bishop Baldwin was vice president of said board and institution, 10 and one of its managers, from the twenty-seventh day of August, eighteen hundred and seventy-nine, to said fifteenth day of May, and he received at first an annual salary of six hundred dollars, and continued to receive this sum until the first day of May, eighteen hundred and eighty-one; thereafter he received a salary of one thousand dollars, down to the fifteenth day of May, aforesaid, and in addition thereto, from the first day of May, eighteen hundred an eighty-three, he received the sum of eight dollars per week for services rendered in 20 connection with the settlement of the old account; and by resolution of said board passed on the ninth day of October, eighteen hundred and seventy-eight, each of the other managers was entitled to receive, and did in fact receive, compensation at the rate of three dollars per day for each and every day's service rendered by him to said institution, exclusive of their attendance upon regular board meetings, but inclusive of their attendance upon all meetings of committees of said board, and compensation at this rate continued to be paid to 30 them down to the month of May, eighteen hundred and eighty-four. And your orator respectfully charges and insists, that as such paid agents and trustees it was the duty of all of the managers to give regular and faithful attendance at the institution, and at all board meetings thereof, and to perform all the duties required of them by the charter and by-laws, by law and by the order of the court hereinbefore mentioned; and it was specially their duty when appointed to any committee of said board to give regular and faithful attendance upon 40

meetings of said committee, to see to it that said committee was properly called together, and at such regular and convenient intervals as would enable it properly to discharge all the duties specially assigned to it by said by-laws, and not to delegate such duties to others, or to any individual member or members of said committee.

15. That the managers of said institution, who were such, while the wrongful acts hereinafter complained of were being penetrated, were as follows :

10 Daniel Dodd, who was a manager, and acted as such, from the twelfth day of April, eighteen hundred and seventy-one, to the fifteenth day of May, eighteen hundred and eighty-four.

A. Bishop Baldwin, who was a manager, and acted as such, from the thirteenth day of February, eighteen hundred and seventy-eight, to the fifteenth day of May, eighteen hundred and eighty-four.

20 Henry G. Darcy, who was a manager, and acted as such, from the nineteenth day of December, eighteen hundred and forty-nine, to the tenth day of April, eighteen hundred and eighty-four.

H. Hugo Fraetzel, who was a manager and acted as such, from the twenty-seventh day of February, eighteen hundred and seventy-eight, to the fifteenth day of May, eighteen hundred and eighty-four.

Algernon S. Hubbell, who was a manager, and acted as such, from the thirteenth day of January, eighteen hundred and fifty-one, to the fifteenth day of May, eighteen hundred and eighty-four.

30 Charles S. Haines, who was a manager, and acted as such, from the thirteenth day of February, eighteen hundred and seventy-eight, to the thirteenth day of May, eighteen hundred and eighty-four.

Francis Mackin, who was a manager, and acted as such, from the thirteenth day of June, eighteen hundred and sixty-six, to the fifteenth day of May, eighteen hundred and eighty-four.

William T. Mercer, who was a manager, and acted as such, from the twelfth day of December, eighteen hun-

dred and sixty-six, to the fifteenth day of May, eighteen hundred and eighty-four.

Henry H. Miller, who was a manager, and acted as such, from the nineteenth day of January, eighteen hundred and seventy-eight, to the fifteenth day of May, eighteen hundred and eighty-four.

Daniel Price, who was a manager, and acted as such, from the tenth day of May, eighteen hundred and forty-seven, to the fifteenth day of May, eighteen hundred and eighty-four. 10

William Rankin, who was a manager, and acted as such, from the thirteenth day of February, eighteen hundred and seventy-eight, to May fifteenth, eighteen hundred and eighty-four.

Abner S. Reeve, who was a manager, and acted as such, from the thirteenth day of February, eighteen hundred and seventy-eight, until the time of his death, which occurred on the seventh day of January, eighteen hundred and eighty-four.

Bernard M. Shanley, who was a manager, and acted as such, from the thirteenth day of February, eighteen hundred and seventy-eight, to the fifteenth day of May, eighteen hundred and eighty-four. 20

George Watson, who was a manager, and acted as such, from the twenty-seventh day of February, eighteen hundred and seventy-eight, to the twelfth day of December, eighteen hundred and eighty-three, and

Charles E. Young, who was a manager, and acted as such, from the nineteenth day of January, eighteen hundred and seventy-eight, to the twelfth day of September, 30 eighteen hundred and eighty-three.

16. That the funding committee hereinbefore mentioned was, whilst the wrongful acts hereinafter complained of were being perpetrated, constituted as follows:

Daniel Dodd and A. Bishop Baldwin were two of the members thereof, *ex officio*.

Henry G. Darcy was a member thereof from the fifteenth day of May, eighteen hundred and seventy-seven, to the tenth day of April, eighteen hundred and eighty-four. 40

Abner S. Reeve was a member thereof from the thirteenth day of May, eighteen hundred and seventy-eight, to the seventh day of January, eighteen hundred and eighty-four.

Charles S. Haines was a member thereof from the tenth day of May, eighteen hundred and eighty, down to the thirteenth day of May, eighteen hundred and eighty-four.

William Rankin was a member thereof from the ninth
10 day of May, eighteen hundred and eighty-one, to the fifteenth day of May, eighteen hundred and eighty-four.

17. That the auditing committee hereinbefore mentioned was, whilst the wrongful acts hereinafter complained of were being perpetrated, constituted as follows:

William T. Mercer was a member thereof from the fifteenth day of May, eighteen hundred and seventy-seven, to the fifteenth day of May, eighteen hundred and eighty-four.

20 Henry H. Miller was a member thereof from the thirteenth day of May, eighteen hundred and seventy-eight, to the fifteenth day of May, eighteen hundred and eighty-four.

Charles E. Young was a member thereof from the ninth day of October, eighteen hundred and seventy-eight, to the twelfth day of September, eighteen hundred and eighty-three.

Algernon S. Hubbell was member thereof from the
30 tenth day of May, eighteen hundred and eighty, to the fifteenth day of May, eighteen hundred and eighty-four.

Francis Mackin was a member thereof from the tenth day of May, eighteen hundred and eighty, to the fifteenth day of May, eighteen hundred and eighty-four.

18. That on the seventh day of January, eighteen hundred and eighty-four, Abner S. Reeve departed this life, having first duly made and executed his last will and testament, and having thereby constituted Rebecca C. Reeve, George F. Reeve and Frederick C. Reeve his executors; that said will was duly admitted to probate
40 on the nineteenth day of January, eighteen hundred

and eighty-four, by the surrogate of the county of Essex, and that letters testamentary were duly issued by said surrogate to the said George F. Reeve and Frederick C. Reeve, who were duly qualified to act as executors of the estate of said testator, and have taken upon themselves the administration of said estate.

19. That after the twelfth day of December, eighteen hundred and seventy-seven, the said institution kept a separate account of all deposits made therein after that date, pursuant to the aforesaid orders of this court, treating them as special deposits and paying dividends only to its new depositors out of the interest and income derived therefrom, or from the loaning or investment of the same. The account thus kept was called the new account, in contradistinction to the account of deposits made prior to the said twelfth day of December, which was styled the old account.

20. That in the year eighteen hundred and eighty-one, the said managers began to loan money, in deliberate disregard both of the letter and spirit of the aforesaid 20 orders of this court, and of the statutes regulating savings banks and of the law of the land, and continued so to do until the institution ceased to do business as aforesaid. Pursuant to the law of the land, to the statute and to said orders, a large portion of the moneys standing to the credit of the new account had been invested in government bonds, bearing interest at the rate of four and four and one-half per cent. These bonds were and are universally regarded as securities among the best 30 fitted to constitute a permanent investment. They were however without necessity sold and the proceeds loaned, either on collateral security, or without any security whatever. The collaterals securing these loans were often such as were sanctioned neither by the law of the land, by such orders nor by statute, and the collaterals themselves were at times unlawfully left under the exclusive control of the borrower, and the losses which subsequently resulted as hereinafter stated were the natural and legitimate consequences of this mode of dealing with the assets of the institution. Some of these loans were 40

small in amount, but others were of great magnitude and made to persons living and doing business principally in the city and State of New York. On the twenty-second day of August, eighteen hundred and eighty-one, the said managers lent to Fisk & Hatch, a firm of brokers doing business in the said city of New York, the sum of five hundred thousand dollars, and took as security therefor government bonds, which were at first kept in the vaults of said institution at Newark,
10 but were afterwards unlawfully lent or entrusted to the borrowers, to whom was given the exclusive possession and control of them, with the right to exchange them in their (the borrowers') discretion for other collateral.

On the thirteenth day of May, eighteen hundred and eighty-two, the said managers lent to Joseph A. Halsey, seventy thousand dollars, taking as collateral security therefor, only stock of the Newark Gas Light Company, of the Essex County Bank and of the Newark City National Bank.

20 On the thirteenth day of May, eighteen hundred and eighty-two, the said managers lent to Stephen H. Condict the sum of eighty-five thousand dollars, taking as collateral security therefor only the following stocks and bonds, to wit, the stock of the Essex County National Bank, of the Newark City National Bank, of the National Newark Banking Company, of the Second National Bank of Newark, of the National State Bank of Newark, of the Manufacturers National Bank of Newark and of the Merchants National Bank of Newark, of the Merchants In-
30 surance Company, of the American Insurance Company and of the New Jersey Insurance Company, of the United New Jersey Railroad Company, of the Central Railroad Company, of the Citizens Gas Light Company, of the Newark Gas Light Company, of the Yonkers Gas Light Company of New York, of the Newark City Ice Company and of the Consumers Coal Company; also the bonds of the Lehigh and Wilkesbarre Coal Company and the income and adjustments bonds of the New Jersey Central Railroad Company, some of which stocks and
40 bonds were the stocks and bonds of foreign corporations.

On the twenty-sixth of April, eighteen hundred and eighty-three, they lent to E. H. Harriman & Company, a firm of brokers residing in the State of New York, the sum of eight hundred thousand dollars, which amount was obtained by them from a wrongful sale of bonds of the United States belonging to said institution, and took as collateral security therefor the note of said firm, payable eleven months after date, secured by the following stocks and bonds only, to wit, the stock of the Illinois Central Railroad Company, of the New York Central 10 Railroad Company; also the bonds of the Sodus Bay and Southern Railroad Company, of the International and Great Northern Railroad Company, of the Chicago and New Orleans Railroad Company, of the St. Louis, Alton and Terre Haute Railroad Company, of the Oregon Short Line Railroad Company, of the Rio Grande and Western Railroad Company, and of the Canada Southern Railway Company; some of which bonds and stocks were added during the continuance of the loan, and all of which were the stocks and bonds of foreign 20 corporations.

That by the terms of the agreement under which said money was lent the said institution had the privilege of calling at any time for additional securities.

In the latter part of the month of March, eighteen hundred and eighty-four, the money thus loaned was converted temporarily into the bonds of the United States, which were, on or about the third day of April following, again sold, and the sum of eight hundred and one thousand five hundred and seventy-five dollars was 30 on said last mentioned day again loaned to E. H. Harriman & Company on similar securities.

All these loans, except said Harriman loan of eight hundred thousand dollars, could, pursuant to the agreement between the parties, have been called in at any time, or on short notice. It is pretended by the managers, or some of them, that these loans were made by Daniel Dodd, the president of the institution, or some other member or members of the funding committee, without their knowledge or consent, but your orator 40

charges that the sole purpose of said institution was the safe investment of the savings of those who, by reason of their humble condition in life, or ignorance of business matters, were unable properly to invest for themselves; that the said managers were, as a body, charged with the duty of making and caring for such investments, and held themselves out to the public, by advertisement and otherwise, as being so charged, and that it was the imperative duty of those who voluntarily and without
10 necessity (they having no personal interest as stockholders or otherwise to care for,) undertook, as the agents and trustees of said depositors, to invest and keep their deposits for them in a prescribed mode, not to abdicate their functions or to impose duties upon one or more of their number which had been by the charter and by-laws devolved upon the entire board; and your orator charges and insists that if said managers contrary to law and to the orders of this court, voluntarily committed to a single manager the execution of duties properly
20 resting upon them all, such manager became their agent as well as the agent or trustee of the depositors for the performance of such duties, and they, the said managers, are responsible for his negligent acts; and your orator further charges and insists that the said managers could not under the charter lawfully commit the sole and exclusive management of said institution and of its funds and assets to a single member without being themselves guilty of gross negligence and breach of trust, and if
30 they did, they are, by reason of such negligence and breach of trust, and notwithstanding the third article of the by-laws (if, and so far as, it gives the custody of the funds and assets of said institution to the president), answerable for all pecuniary loss that may have resulted to the depositors therefrom; and your orator further charges that the by-laws have imposed special duties upon the funding and auditing committees, as hereinbefore set forth, if those committees failed to perform such duties, or entrusted their performance to one or more of
40 their number, they were guilty of gross negligence and breach of trust in so doing and are answerable to the de-

positors for all the pecuniary loss which may have resulted therefrom, and the person or persons so entrusted became the agent or agents of said committee, which became responsible for his or their (the said agents') acts.

And your orator further charges that if any of the managers did not concur in actually making such illegal loans they had full knowledge of the same after they had been made, or ample means of knowledge from the books of said institution, from the reports, both written and verbal, made at board meetings, and from the statements 10 made to the secretary of state pursuant to law, and that all the managers had the same knowledge or means of knowledge of the loans of bonds and money hereinafter set forth as of those hereinbefore mentioned, and that it was a gross breach of trust on their part to permit the money or bonds so lent to remain illegally unsecured and outstanding after they had knowledge thereof or might have known the same had they not been grossly negligent in seeking and obtaining the requisite information.

21. That on the first day of August, eighteen hundred 20 and eighty-two, the said institution held to the credit of the new account, bonds of the United States of the par value of one million nine hundred and seventy-five thousand dollars, of which, bonds of the par value of one million five hundred and fifty thousand dollars bore interest at the rate of four per cent., and bonds of the par value of four hundred and twenty-five thousand dollars bore interest at the rate of four and one-half per cent. Both by law and by the order of this court these bonds constituted an investment of the funds of the institu- 30 tion which it was the duty of the managers not to change or disturb without good and sufficient reason, yet in disregard of said orders and of the statute and of the law of the land, and without sufficient reason, the aforesaid Funding Committee, consisting of Daniel Dodd, A. Bishop Baldwin, Henry G. Darcy, Abner S. Reeve, Charles S. Haines and William Rankin, at a meeting held on the ninth day of August, eighteen hundred and eighty-two, at which all the members were present, passed the following resolution relative to said bonds: 40

“The sale of four per cent. and four and a half per cent. bonds at best rates was agreed to, and the loaning of the proceeds upon collateral ordered.” This resolution was read at a meeting of the board held on the thirteenth day of September, eighteen hundred and eighty-two, and approved thereat; at this meeting the said Daniel Dodd, A. Bishop Baldwin, H. Hugo Fraenzel, Charles S. Haines, Francis Mackin, William T. Mercer, Henry H. Miller, William Rankin, Abner S. Reeve 10 and Charles E. Young were present. That the total deposits held by said institution to the credit of the new account on the first day of August, in the year eighteen hundred and eighty-two, amounted to the sum of five million five hundred and six thousand eight hundred and forty-one dollars and forty-three cents. That the total deposits still held by said institution to the credit of the old account on the same day amounted to the sum of one million five hundred and sixteen thousand 20 cents. Between that day and the tenth day of the same month the deposits to the credit of the new account were increased by a sum not exceeding sixty thousand dollars, and the deposits to the credit of the old account were diminished by a sum of not less than one hundred and fourteen thousand dollars. The deposits to the credit of these two accounts comprised all the deposits of said institution. That part of the money on deposit in said institution to the credit of the new account which had on said first day of August, in the year 30 eighteen hundred and eighty-two, already been loaned upon notes, bills of exchange or drafts, with the additional pledge of collateral security, consisting in part of bonds of the United States, and in part of the stocks and bonds of railroad and gas corporations, of national and state bank stocks, and of the stocks and bonds of other private corporations, amounted to the sum of one million one hundred and twenty-six thousand six hundred and forty-nine dollars and eighty-five cents, and the amount thus loaned continued outstanding on the pledge 40 of said collaterals for several months after that time;

and that the aforesaid resolution was not only a violation of the aforesaid orders of this honorable court and of the law of the land, but it was also a direct violation of the act entitled "An act for the better security of depositors in savings banks," and the supplements thereto, inasmuch as it ordered the loaning of the proceeds of said bonds of the United States, whose market value considerably exceeded their par value, upon collateral security to an amount greatly in excess of fifteen per cent. of the whole deposits held by said institution, and 10 at a time when, to the knowledge of said managers, more than said fifteen per cent. had already been loaned as aforesaid; and that from the time of the passage of said resolution to said fifteenth day of May, in the year eighteen hundred and eighty-four, the said funding committee, or some of them, with the consent of the said managers, constantly loaned from at least thirty per centum to fifty per centum of the total deposits of said institution on collateral security in direct contravention of the said act, and that the fact that said illegal loans 20 upon pledge of collateral were being made was known to all the members of the board, and that all said members assented to the making of the same.

22. That two days prior thereto the said committee or some of its members had sold of said four per cent. bonds, bonds to the amount of five hundred and fifty thousand dollars (par value) and lent the proceeds of the sale thereof to the aforesaid firm of Fisk & Hatch as hereinafter in paragraph twenty-six, particularly mentioned. One day prior to the passage of said resolu-30 tion, the said committee or some of its members had sold of said four per cent. bonds, bonds to the amount of two hundred thousand dollars (par value) and two weeks subsequently, the said committee or some of its members sold of said four per cent. bonds, bonds to the amount of two hundred and twenty thousand dollars (par value) and of said four and a half per cent. bonds, bonds to the amount of five thousand dollars (par value). The above resolution of August ninth was intended to apply to and sanction all said sales. On the day of the 40

sale of said bonds to the amount of two hundred thousand dollars, viz., on August eighth, eighteen hundred and eighty-two, the proceeds of said sale with other moneys of said institution amounting in all to three hundred and fifty thousand dollars, were unlawfully lent to one Victor Newcomb residing in the State of New York, or elsewhere out of the State of New Jersey, upon the pledge of the following securities only, viz., bonds of the Pennsylvania Company, of the Louisville and Nashville Railroad Company, of the Michigan Central Railroad Company, all of said companies being foreign corporations, and bonds of the United States of the par value of ten thousand dollars. For part of the bonds of the Michigan Central Railroad Company was afterwards substituted stock of the Illinois Central Railroad Company.

On the day of the sale of said bonds of the United States to the amount of two hundred and twenty thousand dollars and of five thousand dollars, viz., on the twenty-third day of August, eighteen hundred and eighty-two, the proceeds of said sales to the amount of two hundred and seventy thousand dollars were unlawfully loaned, either to the Merchants National Bank or to E. H. Harriman & Company upon the pledge of the following securities only, which were allowed to remain with the said Merchants Bank and under their control, that is to say, stock of the Chicago, Rock Island and Pacific Railroad Company, of the Chicago, Milwaukee and St. Paul Railroad Company, of the Delaware and Hudson Canal Company, of the Central Pacific Railroad Company, and the stock and bonds of other foreign railroad corporations.

Both of these last mentioned loans remained outstanding until the twenty-ninth day of March, eighteen hundred and eighty-three, when they were paid. The securities securing, or purporting to secure, these loans were recorded in the books of the institution, and were known to and seen by the auditing committee when they made their quarterly examination in the month of January, eighteen hundred and eighty-three and were returned in detail under oath by three of the members of that committee, to wit, Algernon S. Hubbell, Henry H. Mil-

ler and Francis Mackin, as well as by the president, Daniel Dodd, in their annual report to the secretary of state made in that month.

That during all this time, that is to say, from the first day of January, eighteen hundred and eighty-one, to the time when the bank ceased to do business, they constantly published in the newspapers and in other ways for the purpose of attracting new deposits and increasing the volume of their business, that they were acting under and pursuant to the special order of this court¹⁰ and were for that reason the more entitled to public confidence.

24. That by the fourth article of the by-laws, it was particularly directed that the said funding committee should keep a minute of their proceedings and report the same to the stated meetings of the board. That for over twenty years prior to the year eighteen hundred and eighty-two, the said minutes had been kept with care and contained a record of the transactions of said committee, but after that time the more important loans²⁰ and investments made by said institution and in particular the illegal loans hereinbefore and hereinafter specially mentioned, were not recorded therein.

These minutes however continued to be read at the board meetings, and all the members of the board, from the statements handed them, from inquiries made by them and from the books, which were always put upon the table at said board meetings, pursuant to the resolution recited in paragraph eight hereof, had sufficient information respecting such unrecorded transactions to³⁰ put them upon inquiry, and their continued failure to prosecute such inquiry, and to insist that a full and accurate record of such transactions should be entered in such minutes so that the board itself might have knowledge of all investments made, and be able to approve or disapprove the course of the committee in making them, constitutes such negligence as makes them answerable for all loss resulting from such failure on their part.

25. That by the thirteenth section of the charter of⁴⁰

said institution it is provided as follows: "That the managers shall have power to fill up by ballot, after notice of one month, any vacancy which may occur in their own body or officers; two-thirds of the members present to agree to all removals and new appointments; and no appointment or removal to take place when a less number than two-thirds of the managers are present." And that by reason of such provision the depositors had no control over said managers or power to select
10 or appoint them, or any committee thereof, and no voice in the disposition of the assets of the institution or in the proper investment of the same. That such management is by the charter entrusted to the whole board, with no power whatever to devolve its duties upon any particular member thereof; that said depositors have a right to the judgment of the entire board as to how the funds of the institution shall be invested, and that if
20 a particular committee of their number shall in the first instance make such investments, the ultimate responsibility therefor lies with the board, and the said committee are no more than their agent in the matter, for whom they are answerable.

26. That there was realized out of the proceeds of the sale of the four per cent. bonds, of the par value of five hundred and fifty thousand dollars, as mentioned in paragraph twenty-two thereof, the sum of six hundred and sixty thousand dollars. This sum was lent to the firm
30 of Fisk & Hatch, to whom had been before loaned, and who then had in hand, the additional sum of four hundred and fifty-eight thousand five hundred and ninety-nine dollars and eighty-five cents. The amount thus lent was increased in the month of October, in the same year, to one million six hundred thousand dollars, and in the month of January, eighteen hundred and eighty-three, to one million and seven hundred and fifty thousand dollars.

In said last named month an agreement was made between said managers and said firm that the money thus
40 lent should remain in the hands of said firm "right along,

say for a year, except as any part of it might be sooner required to meet extraordinary or unexpected demands" from the depositors of said institution, the said firm paying interest thereon at the rate of five per cent., as a permanent rate, and keeping at all times in the city of New York, in a box belonging to them (the said firm), of which they alone had the key, and to which they alone had access, a sufficient amount of good securities to cover the amount with ample margin. That said money so lent remained in the hands of Fisk & Hatch until about 10 the twenty-ninth day of March, eighteen hundred and eighty-three, when the said managers requested the said firm to convert the same temporarily into bonds of the United States to answer a temporary purpose. To this conversion the said firm consented and reported to said institution that they had purchased with said money and with other money belonging to said institution, bonds of the United States of the par value of two million dollars, bearing interest at the rate of three per cent., and bonds of the United States of the par value of seven hundred 20 thousand dollars, bearing interest at the rate of four and a half per cent. Of these, as soon as the temporary purpose for which the money was directed to be procured was answered, three per cent. bonds of the par value of one million dollars, and four and a half per cent. bonds of the par value of two hundred thousand dollars were sold during the month of April, eighteen hundred and eighty-three. All the residue of said bonds remained, by permission of said managers, in the hands of Fisk & Hatch who had the privilege of using them in lieu of 30 the money agreed to be lent as aforesaid, until on or about the fifteenth day of August, in the year eighteen hundred and eighty-three, when the million three per cent. bonds, parcel of said residue, were taken to Newark and thereafter kept in the vaults of said institution, but the four and a half per cent. bonds so reported purchased and still remaining unsold, (the par value of which amounted to five hundred thousand dollars), were allowed by said managers to remain in the possession, use and control of the said Fisk & Hatch until their failure 40

on the fifteenth day of May, eighteen hundred and eighty-four, as an equivalent in part for the money agreed to be loaned in January as aforesaid; but whether said bonds were purchased by Fisk & Hatch specially for said institution, and so dealt with that they were distinguished from their own bonds or from those of other persons, or whether they were the bonds of Fisk & Hatch at the time of the purchase reported as aforesaid, and so separated from their other bonds, or distinctly
10 marked, as to become the property of the Newark Savings Institution, your orator is ignorant and prays discovery; but he respectfully charges and insists that whether the said institution acquired the legal title to any particular bonds of that issue or not, the loan of said bonds if actually the property of said institution, or of the money in the hands of Fisk & Hatch, reported to have been converted into such bonds, and such other money as was, subsequently to the first day of April, eighteen hundred and eighty-three, lent to said firm to replace the
20 money to which the said firm were entitled by the terms of the agreement made in January aforesaid, was illegal and contrary to the aforesaid orders of this court, to the statutes and the law of the land, inasmuch as it permitted the securities which were to secure said loan to remain in the hands and under the exclusive control of the borrowers, and was, in fact, a loan without any real or substantial security whatever.

27. That after the temporary purpose of the conversion of money into bonds had been answered, the said
30 managers began again to lend money to said firm subject to the terms of said agreement of January, in addition to the four per cent. bonds mentioned in the last preceding paragraph and in lieu of the money so converted. The amount thus lent was at first comparatively small, but as the bonds of said institution were sold by and withdrawn from said firm the amounts so lent increased. On the thirtieth day of April, A. D. 1883, it amounted to about two hundred and twenty-two thousand dollars; on the thirty-first day of July, A. D. 1883, to five hundred and
40 six thousand dollars, and the amount was gradually in-

creased until the twenty-ninth day of Febauary eighteen hundred and eighty-four, when it amounted to nine hundred and eighty-seven thousand dollars, or thereabouts.

This was in addition to the five hundred thousand dollar four and a half per cent. government bonds here-
inbefore mentioned. This money was again, with the consent of Fisk & Hatch, and to answer the same temporary purpose for which the conversion in March, eighteen hundred and eighty-three had been directed, for a few days converted into bonds of the United States, but 10
these bonds were almost immediately reconverted into money, and this money was again lent to Fisk & Hatch on the thirtieth day of April, eighteen hundred and eighty-four; the amount thus lent was eight hundred and fifty-one thousand dollars or thereabouts, and at the time of the failure of said firm on the fifteenth day of May following, eight hundred and forty-five thousand five hundred and thirty-two dollars and four cents.

28. That to secure said loan according to the terms of said agreement, the said firm of Fisk & Hatch deposited 20
in said box at different times bonds of the United States; bonds of the Chesapeake and Ohio railroad, bonds of the Elizabeth, Lexington, and Big Sandy Railroad Company, and stock of the Central Pacific Railroad Company, and the collaterals so deposited were used and changed by them as often as it suited their convenience to do so. That the said firm exercised over said collaterals, at all times, complete control, and when they failed the said collaterals had all been used and the money due said institution remained without security. 30

29. That the four per cent. government bonds which remained after the sales that took place in the autumn of the year eighteen hundred and eighty-two, and which are mentioned in paragraph twenty-one hereof, their par value amounting to five hundred and eighty thousand dollars, were during the autumn of the same year registered in the name of the institution, yet, notwithstanding such registry, at the request of Fisk & Hatch they were, with the consent of the funding committee, lent to that firm, and such formal transfer of them exe-40

cuted by the president of said institution as was necessary to pass the title. On the fifteenth day of January, eighteen hundred and eighty-four, the said funding committee purchased three hundred and twenty thousand additional four per cent. registered government bonds and these bonds were also immediately after their purchase lent to Fisk & Hatch by said committee. All the bonds so lent were used and sold or otherwise disposed by said firm in the course of their business, and were
10 never returned to said institution. They were lent to said firm without security, and were never demanded of them until the fifteenth day of May, eighteen hundred and eighty-four, the day on which said firm failed, and no part of them has ever been returned either to said institution or to your orator.

30. That pursuant to the requirements of the by-laws, the auditing committee, which during the years eighteen hundred and eighty-three and eighteen hundred and eighty-four, consisted of William T. Mercer, Alger-
20 non S. Hubbell, Henry H. Miller and Francis Mackin, and during a part of the year eighteen hundred and eighty-three of Charles E. Young, made, during those years, quarterly, examinations of all the securities and accounts of said institution. Three members of that committee, namely, Algernon S. Hubbell, Francis Mackin and Henry H. Miller, were also appointed the committee to make the annual report to the secretary of state, hereinbefore referred to, and they reported ac-
30 cordingly in the month of January in the year eighteen hundred and eighty-three, and also in the same month in the year eighteen hundred and eighty-four. Said auditing committee had full knowledge of all the illegal loans, both of money and of bonds hereinbefore particularly set forth, and of the fact that the collaterals were allowed to remain in the possession of the borrowers as hereinbefore mentioned, and notwithstanding such knowledge they failed to take any step whatever to have said loans called in, or to compel the borrower to give such security as was required by law or by the orders of
40 this court, or to report the facts to the board, or to bring

them to the knowledge of this court, although they had ample time and opportunity so to do, and, had they done so, the assets of said institution would now be intact, and your orator respectfully charges and insists that these derelictions of duty constitute gross negligence and a gross breach of trust and that they are liable for all loss resulting therefrom.

31. That on the fifteenth day of May, eighteen hundred and eighty-four, the said firm of Fisk & Hatch ought to have had in their possession the four per cent. 10 government bonds of the said institution mentioned in paragraph twenty-nine hereof, amounting in the aggregate to nine hundred thousand dollars; the four and a half per cent. government bonds mentioned in paragraph twenty-six hereof, amounting to five hundred thousand dollars; certain four and a half per cent. government bonds amounting to five hundred and fifty-six thousand dollars (par value), which said institution had purchased on the twenty-seventh day of March, eighteen hundred and eighty-four, and which had been allowed 20 to remain in the possession of said firm from the time of purchase; and also certain four and a half per cent. government bonds amounting to eighty thousand dollars (par value), which said institution had purchased on the first day of May, eighteen hundred and eighty-four. That the par value of all the said bonds on the fifteenth day of May, eighteen hundred and eighty-four, was two million and thirty-six thousand dollars, and that the market value thereof on the same day was two million three hundred and twenty-nine thousand six 30 hundred dollars. In addition to these bonds the said firm had or ought to have had in its possession money of said institution amounting to eight hundred and forty-five thousand six hundred and thirty-two dollars and four cents, as mentioned in paragraph twenty-seven hereof. The assets thus chargeable to Fisk & Hatch on the fifteenth day of May, eighteen hundred and eighty-four, and over which they had had full and exclusive control for so long a time, and which had been subjected to the hazard of their business in the manner hereinbefore set 30

forth, constituted more than one-half of the entire assets of the said institution.

32. That on said fifteenth day of May, eighteen hundred and eighty-four, the said firm became insolvent and stopped business; their liabilities greatly exceeded their assets; they had pledged, sold or otherwise disposed of all of the aforesaid government bonds with which they were chargeable as aforesaid and were unable to return the money loaned to them by the said institution as
10 hereinbefore mentioned; they collected together, however, a large number of miscellaneous securities (a list of which is hereto set forth in paragraph thirty-four hereof, therein called Schedule "A,") and transferred them to the president of said institution on account of their aforesaid liability to it, in lieu of said bonds. The value set upon the securities enumerated in said schedule were those attached by said firm of Fisk & Hatch at the time of said transfer, but in several instances such values largely exceed the true market value thereof at that time
20 and ever since that time. A part of the securities mentioned in said schedule have been sold and all the loans receivable therein set forth have been paid. Schedule "B" hereto annexed, contains a detailed list of such securities and loans and the moneys received thereon by your orator, amounting in the aggregate to the sum of eight hundred and twenty-one thousand two hundred and twenty-five dollars and sixteen cents. These securities were valued by said firm in said schedule at \$818-
30 138.47. The other securities contained in Schedule "A," therein valued by said firm at \$1,510,330.00, and which are set forth in Schedule "C," hereto annexed, remain unsold. The value so put upon these last-named securities by said firm exceeded their true market value at the time of said transfer by at least the sum of four hundred thousand dollars, and has exceeded their true market value by at least that sum ever since, and the loss to said institution arising from the failure of said firm to return said government bonds and money in full, (all of which loss resulted from and was occasioned by the gross negli-
40 gence and breaches of trust of said managers in the

performance of their duties as hereinbefore set forth,) exceeds the sum of four hundred thousand dollars.

33. That in consequence of said failure of Fisk & Hatch and the loss to the institution resulting therefrom, said institution became insolvent. On the fifteenth day of May, eighteen hundred and eighty-four, its assets other than those in the hands of Fisk & Hatch amounted to the sum of three million one hundred and eighteen thousand eight hundred and thirty-seven dollars and forty cents, and its liabilities to its depositors amounted to the sum of six million one hundred and fifty-six thousand five hundred and thirty-four dollars and twenty-eight cents, besides other current indebtedness; and that in consequence of such insolvency it was restrained from further transacting business, and your orator was appointed receiver thereof by order made on the sixteenth day of May, in the year last aforesaid, in the same proceeding in which the said managers had petitioned this court as mentioned in paragraph nine hereof, upon application duly made for that purpose; and your orator thereupon took oath and duly qualified and gave bond as such receiver, and was subsequently, to wit, on the seventh day of June following, appointed, continued and confirmed as receiver, under the order mentioned in paragraph two hereof; and his acts done by him as receiver under said order of the sixteenth day of May were thereby confirmed and adopted as far as said acts were in accordance therewith.

34. That when your orator became receiver of the said the Newark Savings Institution he made diligent efforts to obtain from said firm of Fisk & Hatch payment of all their liability to said institution. That after frequent interviews with them and inquiry into their financial condition he found that he could not, by any legal proceedings, recover the value of the bonds and money due from them to said institution, and that if any such proceedings were instituted, the said firm would make an assignment of such property as they still had, which was insignificant in amount and inadequate even to the payment of a small percentage of the debt owing to said 40

institution alone; in which event your orator would realize little, if anything. That the said firm during a long term of years had acquired considerable reputation in their business and enjoyed considerable credit. That they informed him that they would be able to borrow a sufficient amount of money to pay him said sum of eight hundred and forty-five thousand six hundred and thirty-two dollars and four cents, provided he would immediately execute to them a release from all
10 further liability to said institution, but that only on that condition could such money be obtained by them. That, being satisfied that such representation was true, your orator, by advice of counsel, and as the only means of obtaining from said firm for said institution and its depositors, any further sum of money or other valuable thing, your orator, on the twenty-ninth day of May, eighteen hundred and eighty-four, signed a paper writing under seal, of which the following is a copy:

“Whereas, Fisk & Hatch, hereinafter mentioned, have
20 received from or on account of the Newark Savings Institution, United States government bonds to the amount at par value of two million and thirty-six thousand dollars for the market value of which they became accountable.

“And have also received for account of said institution eight hundred and forty-five thousand and six hundred and thirty-two dollars, for which with interest from May fifteenth, eighteen hundred and eighty-four, they are also accountable.

30 “And whereas, afterwards, said Fisk & Hatch delivered to said savings institution the securities mentioned in Schedule A, hereto annexed in lieu of the said United States bonds.

“And whereas, George Wilkinson, since the delivery of said bonds, has been appointed receiver of said institution, and it has been agreed to settle the differences arising out of said indebtedness in manner hereinafter stated, now, therefore, this memorandum of agreement, made this twenty-ninth day of May, one thousand eight
40 hundred and eighty-four, between Harvey Fisk and Al-

Frederick S. Hatch, composing the firm of Fisk & Hatch, parties of the first part, and George Wilkinson, as receiver of the Newark Savings Institution, party of the second part, witnesseth: The parties of the first part, in consideration of the sale of the said United States government bonds by the party of the second part to the parties of the first part hereinafter provided for, and of other good and valuable considerations, have bargained, sold, transferred and set over, and by these presents do bargain, sell, transfer and set over, unto the party of the 10 second part, his successors and assigns, the said securities, choses in action, and property of every kind described in Schedule 'A' hereunto annexed, which is hereby made part of this agreement; to have and to hold the same unto the party of the second part, his successors and assigns, forever, and the parties of the first part have made, constituted and appointed, and by these presents do make, constitute and appoint, the party of the second part their true and lawful attorney irrevocably for them, and in their name, place and stead, to ask, 20 demand, sue for, collect, receive and give acquittance for all the sums of money, debts and demands scheduled in and by said Schedule 'A,' as 'loans receivable,' giving to said attorney full power to do everything whatsoever requisite and necessary to be done in the premises as fully as they could do if personally present, with full power of substitution, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do or cause to be done by virtue hereof; but it is mutually understood and agreed by and between the parties hereto that 30 the party of the second part will, upon the payment in full of each of said loans receivable with interest to date of payment in each case, deliver to the parties of the first part, or to their order, the securities and property pledged to secure said loan with the parties of the first part and now held by the party of the second part. And the party of the second part, in consideration of the sale of the securities, choses in action, and other property enumerated in said Schedule 'A,' and of other good and valuable considerations, has bargained, sold, transferred 40

and set over, and by these presents does bargain, sell, transfer and set over, unto the parties of the first part, their executors, administrators and assigns, the following United States government bonds, to wit, nine hundred thousand dollars United States four per cent. bonds, one million one hundred and thirty-six thousand dollars United States four and one-half per cent. bonds, to have and to hold the same unto the parties of the first part, their executors, administrators and assigns, forever.

- 10 "And, whereas, the parties of the first part have paid to the party of the second part the sum of eight hundred and forty-five thousand six hundred and thirty-two dollars and four cents, for principal, and two thousand two hundred and thirty dollars and forty-five cents for interest thereon to the date of these presents, amounting in the aggregate to the sum of eight hundred and forty-seven thousand eight hundred and sixty-two dollars and forty-nine cents due upon open account, it is mutually understood and agreed by and between the parties hereto
- 20 that all matters in difference whatsoever between the parties hereto and between the parties of the first part, and the Newark Savings Institution, are at an end and definitely adjusted hereby.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"HARVEY FISK, [L. s.]

"ALFREDERICK S. HATCH, [L. s.]

"GEORGE WILKINSON, [L. s.]

30 "Receiver.

"Signed, sealed and delivered
in the presence of—

The word "said" twice interlined before execution.

"CORTLANDT PARKER,

"A. G. RICHEY."

SCHEDULE A.

21,000 shs. C. & O. common,	} at 15,	\$360,000 00
3,000 " 2d. pfd,		

2,110	"	stock of O. D. Land Co., @ par,	\$211,000	00
1,122,000		C. & O. Currency Bonds @ 50,	561,000	00
232,000		N. Y. W. & R., 1st Mtg. Bonds,		
		@ par,	232,000	00
47,000		Can. So. 2nd Mtg. Bonds, @ 83,	39,010	00
10,000		C. M. & St. P. M. P., Div. 5s @		
		par,	10,000	00
5,000		D. & H. Penna. Div., 7s, @ 131½,	6,575	00
8,000		C. B. & Q. Iowa Div., 5s, @ 107,	8,560	00
26,000		C. & O. Mtg Bonds of 1911, @		10
		101,	26,260	00
23,000		No. Western Union, 7s, @ 130,	29,900	00
8,000		Houston & Tex. Cont., 1s, @ 112,	8,960	00
7,000		Georgia Gold, 7s of 1890, @ 113,	7,910	00
22,000		Iowa Midland 8s, @ 130,	28,600	00
4,500		C. & N. W. Menom. Ext. 7s, @		
		128,		
11,000		C. & N. W. Mad., Ext. 7s, @ 128,	19,840	00
46,000		St. Paul, So. West Div. 6, @ 114,	52,440	00
13,000		" Wis. Valley Div. 6, @		20
		107,	13,910	00
8,000		St. Paul, Dubuque Div. 6, @ 111,	8,880	00
3,000		do. La Crosse & Dar. 5s, @ par,	3,000	00
1,000		" Iowa & Dakota 7s, @ 125,	1,250	00
45,000		St. Paul, Hastings & Dakota 7s, @		
		124 1-2,	56,025	00
60,000		Tex. N. & O. Sabine Div. 6s, @ 95,	57,000	00
48,000		Eliz., Lex. & Big Sandy 6, @ 100,	48,000	00
15,000		Midland R. R. of N. J. 6s, @ 94,	14,570	00

Loans Receivable.

30

J. H. Righter,	\$20,635	83
S. T. Smith,	2,642	83
First Nat. Penn. Yan, N. Y.,	11,827	80
Old Dominion Land Co.,	5,000	00
" " "	5,000	00
Mary E. S. Graves,	2,680	45
P. V. B. Demarest,	1,291	25
S. R. Bucknal,	936	25

S. S. Caree, check,	\$436 25
J. Vandever,	790 00
E. C. Rowland,	114 25
H. W. Rowland,	114 25
N. I. Fowler,	208 47
Andrew Scott,	141 25
Jno. Hobart Warren,	13,612 50
Henry Moller, check,	3,303 75
E. T. Jackson, check,	1,370 38
10 Putnam Coun. Savings Banks check,	26,421 86
Peerson & Perkins,	1,650 62
Hatch, Brooks & Hamlin,	10,000 00
C. B. Orcutt,	5,012 50
Geo. C. Bloomer,	5,045 00
J. M. Hooper,	1,046 25
Hatch & Kendall,	5,000 00
D. R. Martin,	6,500 00
A. Martuton,	10,000 00
R. T. Colburn,	2,400 00
20 J. E. Gates,	6,500 00
Gilder & Farr,	10,000 00
Pliny Fisk, Trenton, N. J.,	5,000 00
C. B. Orcutt,	13,425 00
Jno. L. Moore,	23,549 19
Sophie Marchais,	1,853 10
Nat. W. Foster,	1,359 44
C. P. Huntington, Agt.,	140,000 00

Government Bonds.

30	50 m. Coup. 4½,	@ 113,	56,500 00
		80,000 Coup.,	} @ 122, 122,000 00
100	"	4 20,000 Reg.,	
			\$2,327,968 47

35. That at the time of the execution of said writing the said firm paid the sum of two hundred and fifty thousand dollars in cash on account of said sum of eight hundred and forty-five thousand six hundred and thir-

ty-two dollars and four cents, and the balance thereof they paid, with interest, on the fifth day of June, eighteen hundred and eighty-four. That at the time of the execution of said paper writing your orator was ignorant of the aforesaid breaches of trust and illegal acts which rendered said managers responsible to your orator as aforesaid; that the said breaches of trust and illegal acts were then denied and concealed by them, and your orator has only been able to discover the same after a long-continued and diligent examination of the books 10 and records of said institution; that the said managers were not parties to said writing, and were in no wise released or affected thereby; that it was not your orator's intention to release them, nor did he in fact release them or any person whatsoever from any liability incurred to said institution by the aforesaid breaches of trust; that the liability of Fisk & Hatch and of said managers to said institution and to your orator was a several as well as a joint liability, and that a release to one of the persons who were guilty of the breaches of trust and of the illegal 20 acts hereinbefore complained of, was and is no release to any other of such persons; that the recitals of said agreement or writing are erroneous, and that the pretended sale of bonds attempted to be made by said writing was impossible, inasmuch as they were not then in the possession or ownership of your orator, or of said institution, having been long prior thereto disposed of by said firm, and that said supposed release or paper writing was and is based upon a condition of things which had no existence in point of fact, and is, therefore, void and 30 without effect, and more especially void and without effect as to the defendants herein; and that it was executed by your orator as the only means of saving to said depositors a considerable portion of the money due from said firm.

And your orator well hoped that the said managers would have made good the loss occasioned by their negligent acts aforesaid, but now so it is that they not only refuse so to do, but the members of said finance committee, or some of them, pretend that said loans of 40

said government bonds and of said moneys were made without their knowledge or consent, whereas your orator expressly charges the contrary thereof to be true, and that even if any of the members of said committee were not at the time of said loans informed thereof, it was their duty to have obtained information thereof, such information being easily had, and to inquire as to the uses to which the property and money of said institution were being put, where such bonds were kept, and
10 whether, in the case of United States bonds, they were and continued to be registered in the name of the institution, or were otherwise secured to the depositors. At other times the said managers, or some of them, give out or pretend that they did not for long periods attend the meetings of said board, and are not, therefore, chargeable with its wrongful or negligent acts, but your orator charges that if said members absented themselves from board meetings, their failure to attend the same, particularly if wilful and long continued, was in itself a
20 breach of trust for which they are responsible. And the said managers at other times give out and pretend that the said securities so transferred to said Dodd by said firm are equal in value to the bonds so illegally disposed of by them, whereas your orator charges the contrary thereof to be true as hereinbefore particularly set forth, and he hereby tenders himself ready to transfer to said managers all the securities so transferred by Fisk & Hatch remaining in his hands, on payment by said managers of the fair market value of said government bonds, for
30 which the said Fisk & Hatch were accountable on said fifteenth day of May, with interest, less such sum as may have been realized out of such of the said securities as have been sold or paid in.

To the end, therefore, that said managers may, without oath, full, true and perfect answer make to all and every the matters aforesaid, and that the said managers may be decreed to have occasioned by their aforesaid neglect and illegal acts and breaches of trust, the loss suffered by said institution at the hands of Fisk & Hatch;
40 and that they, and the executors of said Abner S. Reeve,

out of his estate, may be decreed to make good the same, and that an account may be taken of the losses resulting from said negligent and illegal acts and breaches of trust of said managers, or of any of them, and that they may be decreed to pay the amount of the losses with which they, or any of them, are properly chargeable, and that the executors of said Reeve may be decreed to pay the amount of the losses with which he or his estate is properly chargeable so far as the assets of said estate may extend; and that your orator may have such other and 10 further relief as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your honor to grant to your orator the State's writ of subpoena issuing out of and under the seal of this honorable court, to be directed to the said Daniel Dodd, A. Bishop Baldwin, Henry G. Darcy, H. Hugo Fraentzel, Algernon S. Hubbell, Charles S. Haines, Francis Mackin, William T. Mercer, Henry H. Miller, Daniel Price, William Rankin, to George F. Reeve and Frederick C. Reeve, executors of the last will 20 and testament of Abner S. Reeve, deceased, Bernard M. Shanley, George Watson, and Charles E. Young, commanding them and each of them, by a certain day, and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court then and there to answer all and singular the premises, and to stand to, abide by, and perform such order and decree therein as to your honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator as in duty bound will ever pray, &c. 30

STEVENS & WARD,
Solicitors for Compl't.
FREDERIC W. STEVENS,
Of Counsel.

SCHEDULE B.
Stocks and Bonds.

Par value.

Amount realized
by Receiver.

\$47,000 Canada Southern R. R. 2d mt. bonds \$38,540 00

	10,000 Chicago, M. & St. Paul, Mineral Pt. div., 1st mtg.,	\$10,024 40
	5,000 Del. & Hudson Canal Co., Penna. div. 1st,	6,580 00
	8,000 Chicago, B. & Quincy R. R. Co., Iowa Div. 1st.,	8,560 00
	23,000 Northwestern Union R. R. Co., 1st,	29,849 53
	8,000 Houston & Texas Central R. R. Co. 1st,	8,960 00
	7,000 State of Georgia, gold 7 per cents,	7,910 00
10	22,000 Iowa Midland R. R. Co., 8 per cents, 1st,	28,572 50
	4,500 Chicago & Northwestern R. R. Co., Menom. ex. 1st,	157 50
	11,000 Chicago & Northwestern R. R. Co., Madison ex',	
	46,000 Chicago, M. & St. Paul R. R. Co., So. west division,	52,453 33
	13,000 Chicago, M. & St. Paul R. R. Co., Wis. Valley division,	13,910 00
20	8,000 Chicago, M. & St. Paul R. R. Co., Du- buque division,	8,800 00
	3,000 Chicago, M. & St. Paul R. R. Co., La Crosse division,	3,015 00
	1,000 Chicago, M. & St. Paul R. R. Co., Iowa & Dakota division,	1,259 16
	45,000 Chicago, M. & St. Paul R. R. Co., Hast- ings & Dakota division,	55,945 00
	50,000 Government 4½ per cent. coupon bonds	55,875 00
	100,000 do. 4 do. do.	124,000 00

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Loans Receivable.

J. H. Righter,	\$20,665 07
S. F. Smith,	2,644 33
First N. R. R., Penn. Yan,	11,987 47
Old Dominion Land Co.,	10,238 33
Mary E. S. Graves,	3,168 74
P. V. B. Demarest,	1,292 33
S. R. Bucknale,	937 80
S. S. Carle,	436 25

J. Vanderveer,	\$790 79
E. C. Rowland,	114 36
H. W. Rowland,	114 36
N. J. Fowler,	208 64
Andrew Scott,	141 39
J. Hobart Warren,	13,739 54
Henry Moller,	3,303 75
E. T. Jackson,	1,370 37
Putnam Co. Savings Bank,	26,421 86
Pierson & Perkins,	1,562 70 10
Hatch Brooks & Hamlin,	10,015 83
C. B. Orcult,	5,030 04
J. M. Hooper,	1,077 62
Geo. C. Bloomer,	5,067 40
Hatch & Kendall,	5,075 00
D. R. Martin,	6,565 00
A. Masterton,	10,090 83
R. T. Colburn,	2,474 20
J. E. Gates,	6,599 67
Gilders & Farr,	10,008 33 20
Pliny Fisk,	5,230 00
C. B. Orcult,	13,425 00
John L. Moore,	23,593 45
Sophie Marchais,	1,854 95
Nat. W. Foster,	1,362 51
C. P. Huntington, agt.,	140,443 33

Total am't realized by receiver on above securities and loans, \$821,225 16

Valuation of above securities by Fisk & Hatch in Schedule "A," \$818,138 47 30

SCHEDULE C.

Valuation by Fisk & Hatch.		Par value.
\$26,260	Chesapeake & Ohio R. R. Co, 1st mtg.,	\$26,000
57,000	Texas & N. O. R. R. Co., Sabine division,	60,000

	48,000	Elizabethtown, Lexington & Big Sandy,	\$48,000
	14,570	Midland R. R. of New Jersey,	15,500
	561,500	Chesapeake & Ohio currency bonds,	1,123,000
	360,000	{ Chesapeake & Ohio, common stock,	2,100,000
10	211,000	Old Dominion Land Co., stock,	211,000
	232,000	N. Y., Wood Haven & Rockaway R. R. Co. bonds,	232,000
	<hr/>		
	\$1,510,330		

Order.

[Filed March 7, 1885.]

On motion of John W. Taylor, of counsel for William Rankin, Daniel Price, Charles S. Haines and A. Bishop Baldwin, four of the defendants in this cause—

- 20 It is ordered that the said defendants have leave to demur to the bill in this cause, without prejudice to their right, in the event of their demurrer or demurrers being overruled, to except to portions of said bill for impertinence, or to move to strike out such portions for impertinence.

Dated March 7, 1885.

THEODORE RUNYON, C.

Like order for other defendants.

Demurrer.

[Filed March 9, 1885.]

The demurrer of William Rankin, Charles S. Haines and Daniel Price, three of the defendants to the bill of complaint of George Wilkinson, receiver of the Newark Savings Institution, complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, do 10 demur thereto, and for cause of demurrer show that it appears by the said bill that Fisk & Hatch, (that is to say, Harvey Fisk and Alfrederick S. Hatch,) are necessary parties to the said bill; but yet the said complainant has not made them parties thereto; and for further cause of demurrer these defendants show that the said complainant has not, by his said bill, shown any sufficient matter of equity to entitle him to the relief sought in and by his said bill against these defendants.

Wherefore, and for divers other good causes of demur-20 rer appearing in the said bill, these defendants demur thereto, and humbly pray the judgment of this honorable court, whether they should be compelled to make any other or further answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JOHN W. TAYLOR,

Sol. and of Counsel for Defendants.

State of New Jersey, county of Essex, ss.—William Rankin, Charles S. Haines and Daniel Price, the defend-30 ants in the foregoing demurrer named, being duly sworn according to law, on their oath say—that the said demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

WM. RANKIN,
DANIEL PRICE,
C. S. HAINES.

Sworn and subscribed this 7th day of March, A. D. 1885, before me.

EDWIN A. RAYNER,
Master in Chancery of N. J.

I hereby certify that I have perused the complainant's bill, to which the foregoing demurrer is filed, and that, in my opinion, said demurrer is well founded in point of law.

JOHN W. TAYLOR,
Of Counsel for Defendants.

10

Like demurrer for defendants A. Bishop Baldwin, Henry G. Darcy, (pro ut the same.)

For defendants A. S. Hubbell, Henry H. Miller and George Watson, general demurrer for want of equity.

The like for defendants William T. Mercer, Bernard M. Shanley, Charles E. Young.

George F. Reeve and Frederick C. Reeve, executors of Abner S. Reeve.

Daniel Dodd, Francis Mackin, (pro ut the same.)

20

Order Overruling Demurrers.

[Filed Sept. 28, 1885.]

This cause coming on to be heard in the presence of Joseph D. Bedle and Frederic W. Stevens, of counsel with the complainant, and Thomas N. McCarter, John W. Taylor, Henry Young, Frederic H. Teese, John R. Emery, Charles Borchering and George W. Hubbell, of counsel with the demurrants; and the Chancellor, having heard the arguments of the counsel of the respective parties, on the demurrer of the defendant A. Bishop

Baldwin, on the demurrer of the defendants William Rankin, Charles S. Haines and Daniel Price, on the demurrer of the defendant Henry G. Darcy, on the demurrer of the defendants Algernon S. Hubbell, Henry H. Miller and George Watson, on the demurrer of the defendant William T. Mercer, on the demurrer of the defendants Bernard M. Shanley and Charles E. Young, on the demurrer of the defendant Daniel Dodd, on the demurrer of the defendants George F. Reeve and Frederick C. Reeve, executors of the last will and testament of Abner S. Reeve, deceased, and on the demurrer of the defendant Francis Mackin, filed in the above stated cause—

It is on this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five, on motion of Stevens & Ward, of counsel with the complainant, ordered that the said demurrers be overruled, with costs, and that the defendants, A. Bishop Baldwin, William Rankin, Charles S. Haines, Daniel Price, Algeron S. Hubbell, Henry H. Miller, George Watson, Henry G. Darcy, William T. Mercer, Bernard M. Shanley, Charles E. Young, Daniel Dodd, George F. Reeve and Frederick C. Reeve, executors of the last will and testament of Abner S. Reeve, deceased, and Francis Mackin, answer the complainant's bill within forty days, and that if they fail so to do, the complainant's bill be taken as confessed against them.

THEODORE RUNYON, C.

Respectfully advised,

JOHN T. BIRD, V. C.

Opinion.

[Filed September 23, 1885.]

Mr. Henry Young, for Shanly & Young, defendants.
 Mr. C. Borchering and Mr. J. R. Emery, for Reeves'
 Ex'rs.

Mr. F. Frelinghuysen, for Mercer.

Mr. George W. Hubbell, for Hubbell, Miller & Watson.

Messrs. Teese & Pitney, for Darcey.

Mr. J. W. Taylor, for Baldwin and others.

10 Mr. T. N. McCarter, for Dodd and others.

Mr. F. W. Stevens and Mr. J. D. Bedle, for complainants.

BIRD, V. C. The bill in this case was filed by the complainant, who had been appointed receiver of the Newark Savings Institution, against the managers of that institution, to recover from them the losses which resulted from the illegal use of the securities and of the moneys of the institution by them. To this bill nine demurrers have been filed; six of them are general and
 20 three for want of parties. Hence, is there a want of necessary parties or is there an absence of equity? These inquiries cover the case. I must be guided by the statement of the facts in the bill, so far as they are well pleaded.

The bill shows the insolvency of the bank and the appointment of the complainant as receiver; shows the origin of the bank and the laws upon which it rested, and which directed the manner of transacting business, and fixed or prescribed the duties of its officers; shows
 30 that on the 12th day of December, 1877, the institution embarrassed, and that on that day the Chancellor ordered "that all deposits in said institution made on or after the 12th day of December, 1877, and until the further order of the court, shall be treated as special deposits and invested only in the bonds of this State, the

city of Newark and the United States;" shows that on the 2d day of June, 1880, on application by the managers of the institution, an order was made by the Chancellor permitting them to invest fifty per cent. of said special deposits on first bond and mortgage on real estate in this State, shows that the managers of the institution during the time the acts complained of, were Daniel Dodd, A. Bishop Baldwin, Henry G. Darcy, H. Hugo Franzel, Algernon S. Hubbell, Charles S. Haines, Francis Mackin, William T. Mercer, Henry H. Miller, Daniel 10 Price, William Rankin, Abner S. Reeve, Bernard M. Shouley, George Watson and Charles E. Young; shows which of these composed the funding and which the auditing committees; shows that on the 7th day of January, 1884, said Abner S. Reeve died and names his executors; shows "that there was realized out of the sale of the four per cent. bonds of the par value of \$550,000 the sum of \$660,000; this sum was lent to the firm of Fisk & Hatch, to whom had been before loaned, and who then had in hand, the additional sum of \$458,599.85; 20 the amount thus lent was increased in the month of October, in the same year, to \$1,600,000, and in the month of January, 1883, to \$1,750,000;" shows that "in said last-named month an agreement was made between said managers and said firm, that the money thus lent should remain in the hands of said firm, 'right along, say for a year, except as any part of it might be sooner required to meet extraordinary or unexpected demands' from the depositors of said institution, the said firm paying interest thereon at the rate of 30 five per cent., as a permanent rate, and keeping at all times, in the city of New York, in a box belonging to them (the said firm) of which they alone had the key, and to which they alone had access, a sufficient amount of good securities to cover the amount with ample margin; that said moneys so loaned, remained in the hands of Fisk & Hatch until about the 29th day of March, 1883, when the said managers requested the said firm to convert the same temporarily into bonds of the United States to answer a temporary purpose; to this conversion 40

the said firm consented, and reported to said institution that they had purchased with said money, and with other money belonging to said institution, bonds of the United States of the par value of \$2,000,000, bearing interest at the rate of three per cent., and bonds of the United States of the par value of \$700,000, bearing interest at the rate of four and a half per cent.; of these, as soon as the temporary purpose for which the money was directed to be procured was answered, three per cent. 10 bonds of the par value of \$1,000,000, four and a half per cent. bonds of the par value of \$200,000, were sold during the month of April, 1883; all the residue of said bonds remained, by permission of said managers, in the hands of Fisk & Hatch, who had the privilege of using them in lieu of the money agreed to be lent as aforesaid, until on or about 15th August, 1883, when the \$1,000,000 of three per cent bonds, parcel of said residue, were taken 20 ported purchased and still remaining unsold (the par value of which amounted to \$500,000), were allowed by the said managers to remain in the possession, use and control of the said Fisk & Hatch, until their failure, on the 15th day of May, 1884, as an equivalent in part for the money agreed to be loaned in January, as aforesaid;" and shows that said transaction was contrary to law and to the orders of the court; shows that after the temporary purpose of the conversion of money into bonds had been answered, the managers began again to lend money to 30 said firm, subject to the terms of said agreement; April 30th, 1883, amounting to about \$222,000, on July 31st, 1883, to \$506,000, increasing until 29th February, 1884, when it amounted to \$987,000, all which was in addition to the \$500,000 four and a half per cent. bonds above mentioned; shows that this money was again converted into bonds of the United States for a few days, and the bonds almost immediately reconverted into money and this money again lent to Fisk & Hatch April 30th, 1884; the amount thus lent was \$851,000, and at the time of 40 the failure of said firm, 15th May, 1884, \$845,532.04;

shows that to secure said loan, said firm deposited in said box, at different times, bonds of the United States, of the Cheasapeake and Ohio Railroad, of the Elizabeth, Lexington and Big Sandy Railroad, and stock of the Central Pacific Railroad Company, which were used and changed by said firm as suited their convenience; shows that said firm at all times, exercised complete control of said collaterals, and when they failed they had all been used, and the money so lent to it remained without security; shows other similar transactions between the institution and said firm; shows that when Fisk & Hatch failed (May 15th, 1884,) they ought to have had in their possession United States bonds amounting to \$2,037,000, the market value of which was \$2,329,600, and money to the amount of \$846,632.04, constituting more than one-half of the entire assets of said institution; shows that on 15th May, 1884, Fisk & Hatch became insolvent and stopped business; their liabilities greatly exceeded their assets; shows that they had pledged, sold, or otherwise disposed of all of the said bonds, and were unable to return the said money so loaned to them; shows that Fisk & Hatch transferred to president of said institution, on account of their liability, a large number of miscellaneous securities; shows that the loss to said institution from said transaction with Fisk & Hatch, is over \$400,000, which resulted from the gross negligence or breach of trust of the said managers; that these transactions produced the insolvency of said institution; shows that complainant made diligent efforts to obtain from Fisk & Hatch the money due to the institution from them; that he could not do so by legal process, and that if he commenced legal proceedings, they would make an assignment of such property as they still had, which was insignificant in amount, in which event but little, if anything, would be realized; that they informed complainant that they would be able to borrow said \$845,632.04, and would pay it to him, provided he would immediately release them from all further liability to said institution, but that only on such condition could such money be obtained; that being satis-

fied that said representations were true and by advice of counsel, and as the only means of obtaining from said firm, for said institution and its depositors, any further sum of money or other valuable thing, did, on 29th May, 1884, enter into an agreement, under his hand and seal, with Fisk & Hatch, in and by which it was recited that Fisk & Hatch had received United States bonds of the par value of \$2,036,000, and for account of said institution \$845,632, and that said Fisk & Hatch had delivered
10 certain securities to said institution in lieu of said bonds, and that since all such transactions the complainant had been appointed receiver, and that they had agreed to settle their differences, and declared that Fisk & Hatch, in consideration of the sale to them of said government bonds by said complainant, sold and transferred to him all of certain choses in action and property therein referred to, in consideration of which said receiver bargained, sold, transferred and set over unto said Fisk & Hatch all of said government bonds, and then further
20 recited that Fisk & Hatch had paid to the receiver \$847,862.49 for principal, and \$2,232.45 for interest, to the date of said agreement, and added, "It is mutually understood and agreed by and between the parties hereto, that all matters in difference whatsoever between the parties hereto, and between the parties of the first part, and the Newark Savings Institution, are at an end and definitely adjusted hereby."

The bill alleges that at the time of the execution of said agreement the said receiver was ignorant of the
30 aforesaid breaches of trust and illegal acts which rendered said managers liable; that said managers then denied and concealed them, and alleges that he did not intend to release them, and alleges that the said pretended sale of bonds was impossible, as they were not then in the possession or ownership of the said receiver or of said institution; and that said agreement was executed as the only means of saving to the depositors a considerable portion of the money due from said firm.

The prayer is that said managers may be decreed to
40 have occasioned by their negligence illegal acts and

breaches of trust the loss suffered by said institution at the hands of Fisk & Hatch, and that they and the executors of said Abner S. Reeve, out of his estate, may be decreed to make good the same.

Fisk & Hatch were not made parties; and it is said that this is a fatal omission. Most eminent text writers, Perry and Lewin, are relied upon, the latter comprehending all that has been said by way of principle. He says: "If co-trustees commit a breach of trust, and a third party reaps the benefit, he must also, as a quasi trustee,¹⁰ be made a defendant; since he is liable to be sued by the cestui que trust, and that the equities between himself and the co-trustees ought to be settled, so far as is practicable." *Lewin on Trusts, (Am. Ed.) 846*. And several cases have been referred to as fully sustaining this proposition. One of them is *Munch v. Cockerill, 8 Sim., 217*. In this case it was plainly admitted that there may be many special circumstances which will prevent the application of the general rule. In that case the bill was filed against only part of the original trustees who²⁰ had been guilty of a breach of trust. I think the case did not involve the question raised now. Another case referred to is *Perry v. Knott, 4 Beav., 179*, in which the question was, whether all of the original trustees should be brought in upon bill filed to establish a breach of trust by one of them. But in that case the master of the rolls said: "I may without hesitation say this, that the difficulties under which parties labor who seek to have relief in such cases, in respect of necessary parties, must be, before a very long time, considerably alleviated."³⁰ Another case is *Consett v. Bell, 1 Y. & C. Ch., 569*, in which it was said that a defendant should not have been made a party. He was in some way connected with the alleged breach of trust. The court said he was a proper party, but did not say that he was a necessary party. The case of *Solomons v. Laing, 12 Beav., 277*, went no further than to say that one of the defendants was a proper party. The case of *Williams v. Allen, 29 Beav., 292*, can scarcely be claimed as applicable, since in that case the absent persons had an interest in the fund for life; and⁴⁰

clearly the court could not tell to what extent to charge the trustees until the rights of the persons having a life interest were determined and that could not be done in their absence. And it is my judgment that the case of *Wright v. Wood*, 12 Jur., 595, is still farther from the point. In *Hutchinson et als. v. Reed et als.*, Hoff. Ch., 316, cited by Perry, section 877, note 5, one of the questions was with respect to the ownership of the fund in controversy, and, of course, those who might have a just claim were necessary parties. Mr. Perry refers also to *Bailey v. Inglee*, 2 Paige, 278, but the Chancellor said: "Persons are necessary parties when no decree can be made respecting the subject matter of litigation until they are before the court, either as complainants or defendants; or where the defendants already before the court have such an interest in having them made parties, as to authorize those defendants to object to proceeding without such parties. There is also another class of cases where persons who are not absolutely necessary as parties may be made defendants at the election of the complainant. Thus, if a trustee has parted with the trust fund, the cestui que trust may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with the trustee at the election of the complainant." *Lund v. Blanshard*, cited by the last authority, is interesting, showing, as it does, how certain shareholders were necessary parties, and showing also what principles are useful in determining who are proper and who are necessary parties. Upon the last point it is observed:

30 "It is difficult to lay down any general rule as to the form of a suit by a cestui que trust in respect of claims against strangers, as debtors, or liable to the trust, by reason of the misconduct of the trustees or parties to whom the stranger is primarily liable. There are, apparently, three forms of suit applicable to such cases, according to circumstances. First, the cestui que trust may not be entitled, or at least not able usefully to do more than compel his trustees to allow him to sue the third party at law, as in the case of a claim for unliqui-

40 dated damages, and no collusion between the debtor and

the trustee. Secondly, the relief against the third party may be such as a court of equity will administer, and the cestui que trust may be entitled to sue the trustees and the third party jointly, but be bound to confine his suit to that specific matter, in respect of which alone the third party is liable. * * * Thirdly, there are cases in which the third party against whom a limited demand is made, may properly be made a party to a suit for the general administration of a trust, with which, in respect of that limited demand, he has no concern." 10

Perry, in his work on Trustees, section 879, also says: "If a person holding a fiduciary relation is guilty of something more than a mere breach of trust or of civil obligation, as if he commits a *tort* or *delictum*, or a fraudulent or a criminal act, he may be pursued alone, and his co-trustees need not be joined, nor even his confederates in the wrong." He cites *The Attorney General v. Wilson et als.*, 1 *Craig & Ph.*, 1, 28. In this case the court is speaking of the duties of the members of a corporation, says: "As members of the governing body it 20 was their duty to the corporation, whose trustees and agents, they in that respect, were to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property * * in a convenient position for that purpose, they take measures for alienating that property, with the avowed design of depriving the corporation of it, and with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with 30 the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate. * * If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would in this court be made responsible for so much of the alien-40

ated property as could not be recovered in specie?" * *

"It was then urged that all of the governing body, at least all who took any part in these transactions, ought to be co-defendants. Upon this point Lord Hardwicke's authority in the Charitable Corporation case is of the highest value. It was urged that as the injury had arisen from the misconduct of many, each ought to be answerable for so much only as his particular misconduct had occasioned; but Lord Harkwicke said: 'If this

10 doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty, nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person guilty of it be either in a private or public capacity.' In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all

20 them, and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all parties who may more or less have joined in the act complained of; nor would anyone derive any advantage from their being all made defendants because as the decree would be general against all found to be guilty of the charge, it might be executed against any of them. It is evident that Lord Hardwicke, in the case of the Charitable Corporation, considered that each defendant would be liable for each transaction in which he

30 had been a party."

Cunningham v. Pell et als., 5 Paige, 607, is also cited by Perry. On page 612 of that case the court says: "In the case of *The Protection Insurance Company v. Dunner and others*, decided in this court in April, 1834, but which is not reported, it was held not necessary to make all the fraudulent directors parties to a bill filed for the purpose of obtaining satisfaction for a fraudulent breach of trust," and that doctrine again prevailed in the case of *Cunningham v. Pell*. See also *Selden v. Connell*, 10 Sim., 79, 86;

Steinback v. Fernly, 9 Sim., 556; *Moore v. Rand*, 60 N. Y., 208; *Wilson v. Moore*, 1 Mylne & K., 127, 143.

In the case with which I am dealing, the managers had been before this court and the court had made an order, and amongst other things had directed the managers to invest certain moneys in the bonds of the State of New Jersey, of the United States, and of the city of Newark, and in bond and mortgage to the extent of fifty per cent. of the amount of the "new depositors." Certainly this direction was calculated to awaken confidence. 10 And during all the time that the managers were engaged with Fisk & Hatch in the manner above detailed, they were publishing notices in the newspapers to the effect that they were acting under the orders of the court, which must have been for the purpose of attracting the attention of depositors and of getting their earnings on deposit. Now, under these circumstances these managers obtained \$2,037,000 of money on deposit, which they converted into bonds and then handed the bonds over to Fisk & Hatch, and also \$846,032 in money, in 20 the manner set forth above in detail. This comprised more than half of the assets of the institution. And when the day of adversity came to Fisk & Hatch, the managers had nothing but the promise of Fisk & Hatch to show for their bonds and money, and Fisk & Hatch had not one of the bonds to return to the managers.

I think this statement will lead any unbiased mind to the conviction that the managers were wantonly and willfully guilty of a misfeasance and of a fraud. I so conclude, and consequently shall advise that Fisk & Hatch 30 are not necessary parties. I can see no reason for requiring the injured party to go after all the parties who may have joined in ruining him. I can see no more reason for requiring Fisk & Hatch to be made parties than any others who may have held the bonds with notice.

In the next place, is there such a case presented by the bill as will warrant the decree of this court in favor of the complainant, if the statements made be established by due proof? The defendants insist that the agree-40

ment made between the receiver and Fisk & Hatch as set out in the bill, is destructive of any equitable rights which he might otherwise have had. It is insisted that that agreement was made before the litigation, with a full knowledge of all the facts and circumstances, after long and careful deliberation, with a full view and knowledge of all the consequences, by and with the advice of counsel, learned in the law, and by and with the sanction of this court.

10 Again, it is insisted that the fair presumption is, that in employing in the agreement the language of a technical, absolute sale and assignment, the parties intended truthfully to characterize the transaction and to give it all the attributes and consequences of a sale and assignment, including not only an implication, but a warranty of title.

That is, that the receiver intended to confer on Fisk & Hatch, who had no title, a perfect title; so that neither the receiver in behalf of the bank, nor the managers
20 themselves, should they seek indemnity, could maintain an action or suit against them.

It is likewise said that the bill is based on the ground that the institution had no title to the bonds; but it is urged that the terms of the agreement negative any such notion, and show that the institution had full possession and an unimpaired title; and also negative the allegation that the defendants had done, or omitted to do, any act whereby the title could have been impaired.

And it is also urged that the bill itself, in the allegation
30 "that at the time of the execution of said paper writing, your orator was ignorant of the aforesaid breaches of trust and illegal acts which rendered said managers responsible to your orator as aforesaid," sustains the latter view of the case.

Therefore, the proposition is, that however clear or strong the case may be upon the face of the bill demurred to, independent of, or without the agreement referred to and incorporated in the bill, yet with that agreement, or depending on that, the case is devoid of all equity;
40 because in one allegation it appears that the managers,

whom the complainant represents, handed over all of the said bonds to Fisk & Hatch without any security, and that Fisk & Hatch had pledged, sold and assigned them all, and had no control of them at the time of their insolvency, and at the time of the appointment of the complainant as receiver; and in the next allegation an agreement appears in and by which the complainant, as receiver, bargained, sold, transferred, and set over to Fisk & Hatch all of the said bonds.

In disposing of questions of this nature on demurrer, 10 I can only be governed by the statements that are well pleaded. *Laying out of view the agreement, and the questions hereafter to be considered*, I have not the slightest doubt as to the liability of the defendants upon the bill as framed. Is the case thus made destroyed by the introduction of the agreement and the facts therein contained? As above stated, the principal facts contained in the agreement, which are relied upon as overcoming all the equities of the bill, are the sale and transfer of the bonds by the receiver to Fisk & Hatch, and the set-20 tlement of all matters in differences between the parties to the agreement and the Newark Savings Institution.

The bill must be treated *as a whole*. So, looking at it, it appears that Fisk & Hatch had had the bonds and had disposed of them and had become insolvent. These things are distinctly stated in the bill, but are not recited in the agreement. Certainly had Fisk & Hatch had the bonds in their own custody, or had they remained solvent, there would have been no necessity for any agreement, nor for a receiver. 30

It is alleged that Fisk & Hatch offered to pay the receiver \$845,632.04, on condition that he would release them from all further liability, and it is also alleged that that sum of money was paid upon the execution of the agreement.

Therefore the agreement was executed on the part of the receiver, in consideration of the payment of \$845,632.04 to him. Thus he secured that large sum from a ruined debtor. Whatever may be said of the form, the result was most beneficial to all concerned. It does not 40

seem as though it were possible to successfully question the wisdom of the transaction. How can any one say that the receiver was either rash, imprudent or negligent. With what light subsequent events have shed upon the scene, there is no room for criticism. By the action of the receiver, the depositors have over \$800,000 added to the fund for distribution, and the managers, if liable for the alleged negligence, have such liability lessened to that extent. Had the receiver failed to avail
10 himself of this offer, he would have been guilty of the grossest negligence. It is true, he might have averted any legal liability by prosecuting Fisk & Hatch for the bonds and money, but, if the allegations of the bill that Fisk & Hatch are insolvent are true, such prosecution would have been utterly useless. Had he prosecuted them without more than a barren judgment, and the depositors had never learned of the offer made by them to the receiver, his course would have been approved; but had he prosecuted the broken concern, and had it
20 become known that he refused an offer of \$845,632, on condition of his surrendering all right to prosecute, in my opinion such refusal would have met with universal condemnation. Was it his duty to consider it more binding on him to preserve the naked right of the managers to sue than to make the sum of money he did for the depositors who had been wronged? I think he was under the highest obligations to do what he did, and I believe every equitable tribunal will sustain him.

These considerations show why the receiver was in-
30 duced to go through the form of selling and assigning the bonds. He had the naked title and the right to the possession, but nothing more. If the statements of the bill be true, recovery of possession of the bonds was impossible, and it was equally impossible to recover their value. He received for his naked title and right to possession, \$845,632.

I think the receiver was right in making the formal sale of the title. If he was right in fact, and from a fair business standpoint, he ought to be regarded as right in
40 equity. It is the constant duty of this court to inquire

into the intention of the parties to transactions, even though the investigation runs contrary to their most solemn covenants, and to make decrees according to the very right of the case. This is especially so in all matters of fraud. The fact that a grantor makes a deed absolute on its face, does not prevent him from asking this court to regard it as a mortgage.

It being established, as I think, that it was right to execute the agreement, in consideration of the large sum of money thereby secured, and also that courts of equity 10 very frequently consider the real object of parties to agreements when that object in no way appears on the face of the agreement, we are now prepared to consider more particularly the results which, it is claimed, inevitably follow from the execution of such an agreement when third parties are interested in the transaction.

First, it is urged that when the receiver entered into this agreement he ratified the act of the managers, and having done this, however liable they might otherwise have been to a suit, he cannot now proceed against them. 20 Now, I think whether this result follows or not, depends upon the real character of the act, which, it is said, was ratified; whether that act was a void act or only voidable. On this point there does not seem to be any room for discussion. The act of the managers was illegal in every sense, and, consequently, void. It was, in every way, directly in violation of the statute. If it was illegal for the managers to do what they did, it is impossible for me to conceive of a method by which that illegality could be overcome. The insistence leads to this 30 conclusion; the managers did an unlawful act, but, being done over by their successor, it becomes lawful. No amount of repetitions or re-affirmations will confirm such contracts. *Chesterfield v. Jansen*, 2 Ves., 125, 158; 1 Atk., 354; *Story on Agency*, sec. 240. If ever this doctrine found a strong illustration, it is in this case now under consideration. And it impresses me that it would be against public policy to tolerate, in such cases, the doctrine of ratification. Certainly the court would not ratify or approve such an illegal and fraudulent act. Yet 40

it was gravely insisted that the court, in approving the agreement which produced over \$800,000, readily approved and made effectual to all intents and purposes whatever the managers had done, however culpable. If this be so, then I will unhesitatingly concede that if the act of approval was done with full knowledge of the circumstances, these demurrers ought to prevail.

But independently of the foregoing views, the doctrine of ratification has no place here. There was no
10 ratification nor pretence of ratification. The receiver received nothing under that illegal contract. Under that contract with the managers, it was the duty of Fisk & Hatch to return the bonds, and of course it was equally their duty to return them to the receiver, but being unable to return them and being insolvent, the receiver simply entered into a new contract with them and assigned to them his title, upon an entirely new and different consideration. The managers, themselves, acted upon this view of the case; seeing the hopelessness of
20 standing on the contract to return the bonds, they, too, accepted what Fisk & Hatch had to offer, that is, the miscellaneous securities mentioned in the bill, which they transferred to the receiver. The receiver no more approved the act of the managers than does the owner when he treats for the recovery of goods which his agent and a stranger may have joined in concealing. See *Cooley v. Perrine*, 12 Vr., 322.

Again, it is claimed that this agreement shows a release of Fisk & Hatch by the receiver, which takes away
30 the right to compel contribution by the managers in case they should be obliged to pay. If I am correct in my conclusions that the *managers were wantonly and willfully guilty of an illegal and fraudulent act*, the doctrine of contribution cannot be invoked, and consequently the agreement to settle and adjust all differences worked no injury to anyone. I think in such cases there is no contribution. *Lewin on Trusts* (2d Am. Ed.) 768; *The Attorney General v. Wilson*, 1 Y. & C., 28; *The Attorney General v. Leeds*, 4 Jur., 74; *Miller v. Fenton*, 11 Paige, 18; *Andrews v. Murray & Kane*, 33 Barb., 354; *Moore v. Apple-*
40

ton, 26 Ala., 633; Pomeroy Eq., sec. 1081; Heath v. Erie Railroad, 8 Blatch., 348-411.

But again it is said that the agreement, operating as a release, took away the right of the managers to bring an action against Fisk & Hatch. This, it will be perceived, is but a statement in a different form of the doctrine of contribution last considered. I mention it specially, since it was dwelt upon in the argument with great force.

The bill declares that Fisk & Hatch are insolvent.

That being so, *what real harm was done by the release?* 10
 Although, as above shown, one wrongdoer cannot sue another for a part of the penalty which he has paid for the wrong, yet, regardless of that principle in this case, nothing could have been claimed but the mere naked right to sue; that right, for the purposes of this inquiry, must be treated as worthless compared with what was realized. The receiver, certainly, had a right to sue, but a most valueless right. He was obliged to regard them from that standpoint. It was urged that they might not always remain insolvent. But the receiver found them 20
 so. He could not change the situation, nor dare he wait, depending on probabilities. Something might occur; true indeed, but what? Who can tell? From all human experience, that something was more likely to be the loss of \$845,000, than any substantial benefit from the defiant preservation of the naked right to sue. The receiver could bring his action or settle for the sum named. What would his judgment have been worth? He would have been under the necessity of selling it, as he would any other asset, and it is fair to say that the receipts on 30
 such sale would have been comparatively trifling. The consequence of that course would have been nothing for the depositors, and nearly a million dollars more for the depositors to pay if liable at all. And in addition to that, the right of the depositors to sue gone forever, because the receiver would have exhausted that right.

I think such questions are to be disposed of on equitable principles; and when the right or thing claimed is comparatively worthless, the former need not be retained for, nor the latter tendered to, the defendants. *Babcock* 40

v. Case, 61 Penn., 427; Smith v. Smith, 30 Vt., 137, also to same effect Cooley v. Perrine, 12 Vr., 322.

I have proceeded thus far upon the ground that the managers violated the express provisions of the law and of the orders of this court, in their transactions with Fisk & Hatch. But it was most earnestly contended that the bill shows that every dollar of money was first invested according to the statute and the order of the court, and then handed to Fisk & Hatch, so that in fact
10 no express enactment or order was violated. Counsel says: "The loaning of part, and the leaving of the rest, with Fisk & Hatch in their vault, may have been negligence or a breach of trust, but it was not in violation of the statute." The same counsel regards the transaction as "the grandest larceny he ever heard of," and said that Fisk & Hatch could have been indicted. Whether this properly characterizes the transaction or not from a legal standpoint, it most certainly directs the mind to the character of the act committed.

20 But Fisk & Hatch were not alone in this transaction. Unfortunately the defendants were with them. The defendants took the first step, and showed Fisk & Hatch how easy it was to violate the most sacred trust. If not money to be invested, the defendants took the bonds in which the money had been invested and handed them over to Fisk & Hatch, or loaned them to them, upon the simple promise that they should be held by them subject to the order of the defendants. If this was so grand a larceny in Fisk & Hatch, were not the managers almost
30 *particeps criminis*? True, it is said that the managers did not intend any wrong, and therefore, at most, the act can only be regarded as a breach of trust. *I do not make the foregoing observations to show that the managers were guilty of a crime, but to show the enormity of the breach of trust.* The protection of the statute, and the order of the court was not enough; these they would observe in the letter, but absolutely disobey in the spirit.

Therefore the insistence is that since the law has been literally complied with, however much broken in spirit,
40 the managers can only be charged as trustees ordinarily

are charged who neglect some official duty, and that they are entitled to every right that such trustees would be; and hence that the agreement named was both a ratification and a release.

I think this position cannot be maintained. There may be cases at law which fortify it, but certainly it dismantles and undermines the whole structure of equity. In the plainest language, what was the conduct of the managers? It was a wrong. And none will contend that the commission of a wrong, will not give the citizen 10 against whom it is committed a right of redress. And it was a fraud. Nor will any be found to urge that both law and equity does not in every case pursue the fraud doer.

These managers owed a duty to the depositors to invest all the money in certain securities named in the statute and in the order of the court. They performed that duty. But was that the end of their duty under the statute or the order of the court? Did their responsibility cease 20 under the statute or under the order when that act had been accomplished? I think not. The statute did not say, in express words, that the managers could not commit the securities to the flames, but both the statute and the order are mockeries and nothing else, if they are not to be so interpreted in every line. The managers are the creatures of the statute. They must stand or fall by that and by the order of the court. It must be admitted that under the statute it was just as much their duty to invest as to receive, and to preserve as to invest. The 30 duty spoken of arises under the statute and order, the same as though each had said: "Thou shalt not commit the securities to the flames nor expose them to any other hazard."

Every such act, every such breach of duty, is a wrong and a fraud, and is also illegal. See *Rolfe v. Gregory*, 34 *L. J. Eq.*, 274; *Ferguson v. Kinnoull*, 9 *Cl. & Finn.*, 251, 311. In the last case: "It was remarked that the refusal to obey the lawful decree of a court of justice is certainly wrong. We have here, therefore, the conjunction of wrong and loss; of wrong committed by the de-40

fenders and loss suffered by the pursuers, out of which an action arises, and, prima facie, the action is maintainable." It is also declared in this case that for every such wrong the parties concerned are jointly and severally liable. See 282, 289; *Blair v. Bromley*, 2 Ph., 354, 360.

One of the managers, Mr. Reeves, being dead, and his executors having been made parties, it is objected that this is improper. I think this objection must give way.

10 In all cases of fraud, the hand of the court is not arrested by the death of the wrong-doer; but the same relief shall be had against his executors, and satisfaction will be given out of his estate after his death. *Kerr on Fraud and Mistake*, 379; *Walsham v. Stainton*, 1 De G. J. & S., 678, 690; *Curtis v. Curtis*, 2 Brown, C. C., 620, 632; *Rawlins v. Wickman*, 111 De G. & J., 304, 322. I am not unmindful of the long-established rule of law that the right of action dies with the person in many cases of tort, if not all; but courts of equity have administered relief

20 from an early period. See *Garth v. Cotton*, 3 Atk., 751, 757; *Lewin on Trusts*, 765. But the statute, as interpreted by our courts, seems to have brushed away all possible questions. *Tichenor v. Hays*, 12 Vr., 193.

But it is urged that these managers were not, in any sense, trustees, and that, therefore, the rule above stated does not apply. And *Smith v. Anderson*, E. L. Rep. 15, Ch. Div., 275, is relied on. The learned judge in that case is very emphatic in declaring that there is a broad distinction between a director and a trustee. However,

30 it seems to me that that case does not so nearly meet the case I am dealing with as do the cases already cited, and as do the cases next named. In *Robinson v. Smith*, 3 Paige, 222, the court said: "I have no hesitation in declaring it to be the law of this State, that the directors of a married or other joint stock corporation, who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good that loss. And they are equally liable if they suffer the corporate funds or property to

40 be lost or wasted by gross negligence and inattention to

the duties of their trust." (*P.*, 231.) In this case the court regarded them as trustees. And it seems to me that this view is fully in harmony with that expressed in *The Charitable Corporation v. Sutton*, 2 *Atk.*, 400, 405-6. In *Koehler v. The Black River Falls Iron Co.*, 2 *Black*, (U. S.) 715, such officers were adjudged to be trustees. And so, also, in *Jackson v. Ludeling*, 21 *Wall.*, 616; *Hunn, Receiver, v. Cary et al.*, 82 *N. Y.*, 65; *Bliss v. Mattison*, 45 *N. Y.*, 22; *Butts v. Wood*, 37 *N. Y.*, 317; 88 *N. Y.*, 52.

I conclude that these managers were as fully clothed with all the powers of trustees, and unqualifiedly liable as if everyone of these depositors had entered into a written declaration of trust with them, agreeing thereby from time to time to commit to their hands, for the use and profit of the depositors, certain moneys; and which declaration had contained all the provisions and requirements of the several acts of the legislature, under which the institution has actually proceeded, and also the orders of this court above referred to. There cannot, in reason, be any difference in principle, whether the terms of the trust are prescribed by the law-making power or by individuals; the liability must forever be and remain the same; if the proposed trustee accepts the trust he is bound to be faithful alike in every case; it is not so much what the name imports, as what duties are imposed and undertaken.

It was urged on behalf of the managers who were not members of the funding committee, that they were not liable, since the bill shows that the funding committee had complete control of the funds and securities of the institution, and consequently the plain implication that the rest were ignorant of the illegal transactions with Fisk & Hatch. With me, this is not a debatable question. In the case of *Williams, Receiver, v. McKay* (not yet reported), the Court of Errors and Appeals have settled it; holding that in such cases upon demurrer all the managers are prima facie liable. The chief justice said: "It is only after answers and evidence, and on the final hearing, that the connection of the several defendants with the transactions in question, and the measure

of the responsibility of each, can be ascertained and established."

Again it is urged that it does not distinctly appear by the bill that the institution will certainly sustain a loss through the dealings of the managers with Fisk & Hatch, and that therefore the suit had been prematurely brought. This view of the case is certainly important to the complainant on the ground of costs and expenses. It appears that certain securities were turned over by Fisk & Hatch, after their failure, to the managers, on account of the loss sustained by the institution. Some of these, which were valued at the time at \$818,138.47, have since been sold for \$821,225.16. The balance were valued by said firm at \$1,150,330, and remain unsold. The language of the bill is: "The value so put upon these last named securities by said firm exceeded their true market value at the time of said transfer by at least the sum of \$400,000, and has exceeded their true market value by at least that sum ever since, and the loss to said institution arising from the failure of said firm to return said government bonds and money in full (all of which loss resulted from and was occasioned by the gross negligence and breaches of trust of the said managers in the performance of their duties as hereinbefore set forth) exceeds the sum of four hundred thousand dollars."

Certain it is, that to affirm that thirty-six inches do not make a yard, proves nothing in behalf of a pleader; and it is quite as far from convincing to assert that because a large portion of these securities sold for an advance, that therefore the balance will sell for enough to discharge the entire liability to the institution. The receiver says by his bill, that that loss will not be discharged by \$400,000. That is an allegation of substance, about a matter concerning which it is his duty to be fully informed, and in which he is supported by the strongest presumptions arising from the conduct of the managers themselves. The strong presumption is, that there has always been a wide margin between the true value of these securities and the amount due to the institution, or else the managers would have been enabled

to save, and most assuredly would have saved, the bank from ruin and themselves from shame and mortification, by realizing on them, and so making good the great deficit. Considering the dire plight in which they stood at that perilous period, I am very sure that they would have saved the craft which they had so wantonly committed to the confines of the maelstrom, if a sale of those securities would have proved the untruthfulness of the allegation, as to value, contained in the bill. The instinct of self-preservation is so strong and predominating 10 in the human breast, that I feel quite safe in assuming that it never fails intelligent men under such circumstances. This consideration alone so well supports the allegation of actual loss, that I am constrained to say that such allegation is well pleaded and must be sustained. I might add, that in my judgment it was not the duty of the receiver to wait longer for these securities to improve in value before filing his bill. He had long enough risked the chances of still greater depreciation and loss. In such cases the vigilance which the 20 law exacts of others, would be imposed upon and required of the receiver.

I shall advise that the demurrer be overruled, with costs.

Petition of Appeal.

[Filed November 6, 1885.]

N. J. COURT OF ERRORS AND APPEALS.

Between

Daniel Dodd,

Appellant,

and

George Wilkinson,

Receiver of the Newark Savings Institution,

Respondent.

} On appeal from 30
decreed advised by
Vice Chancellor
Bird. Petition on
Appeal.

To the honorable, the Court of Errors and Appeals, in
the last resort in all causes—

The humble petition of Daniel Dodd, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order or decree made in the Court of Chancery by his honor, Theodore Runyon, Chancellor of New Jersey, bearing date on the twenty-eighth day of September, in the year one thousand eight hundred and eighty-five, wherein the said George
10 Wilkinson, receiver of the Newark Savings Institution, was complainant, and your petitioner and others were defendants, in this respect, to wit, that the said order or decree orders that the demurrer filed by your petitioner, and the other defendants hereinafter named, to the bill of complaint in said cause, be overruled with costs, and that the defendants, A. Bishop Baldwin, William Rankin, Charles S. Haines, Daniel Price, Algernon S. Hubbell, Henry H. Miller, George Watson, Henry S. Darcy, William T. Mercer, Bernard M. Shanley, Charles E.
20 Young, Daniel Dodd, your petitioner, George A. Reeve and Frederick C. Reeve, executors of the last will and testament of Abner S. Reeve, deceased, and Francis Mackin, answer the complainant's bill within forty days, and that if they fail so to do, the complainant's bill be taken as confessed against them; and your petitioner humbly appeals from the whole of said order or decree which decrees as aforesaid, so far as the same relates to
30 your petitioner, upon the ground that the same is erroneous, for that the demurrer filed by your petitioner to the bill of complaint should have been sustained, and the said bill of complaint, as to your petitioner, should have been dismissed with costs for the reasons stated in said demurrer, and for the reasons that the said complainant has not by his said bill made or stated such a case as entitled him in the said court to any discovery from this petition, or to any relief against him as to the matters contained in the said bill, or any of such matters, and for divers other good causes of demurrer appearing in the said bill.

Your petitioner, therefore, prays that the said order or decree of the said Chancellor may, so far as it affects your petitioner, 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.

JOHN R. EMERY,

Sol. for and of Counsel with Daniel Dodd, appellant.

Answer to Petition of Appeal.

[Filed November 28, 1885.]

10

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

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

STEVENS & WARD,

Solicitors and of Counsel with Respondent.

Like petition and answer on appeal of defendants A.

Bishop Baldwin, Charles S. Haines, Daniel Price, William Rankin, Henry G. Darcy.

George T. Reeve, Frederick C. Reeve, executors of Abner S. Reeve.

Bernard M. Shanley, Charles E. Young, George Watson, Henry H. Miller, Algernon S. Hubbell.

William T. Mercer. Francis Mackin