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Notice of Appeal.

New Jersey Supreme Court

ROSEVILLE TRUST COMPANY, by George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff,

against

AMERICAN SURETY COMPANY OF NEW YORK and A. RANDOLPH JENNINGS,

Defendants.

Sirs:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as fails to award to plaintiff, and fails to include in said judgment, the sum of $2000 with interest, being the item of plaintiff's cause of action set forth in the complaint (in Schedule B thereof) as "item of default June 3, 1913, cash $2000", and so much of said judgment as disallows said item, on the following grounds:

1. The Court charged the jury as follows:

"* * * whether to overdraw your account is a stealing, embezzlement, misappropriation or misapplication of the funds of the bank.

I am not sure that it is; I am inclined to think it is not. The language of the contract and the language of the statute can be forced together by argument; but it seems to me that is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case, and denying the first and third requests to charge * * *.

"I have disposed in my own way of the item of $2000, disallowing it, * * * *

"MR. SMITH: If your honor please, I understand that the $2000 item is disallowed: is that what your honor said?

"THE COURT: Yes, I do not think it is fairly described by the statute as being within the terms of the contract."

2. The court denied the request of plaintiff's counsel to charge the jury as follows:

"(1) That the statute law of the State of New Jersey (4 Compiled Statutes, p. 5661) makes it a crime for a teller of a trust company to knowingly become liable to said trust company by reason of overdrawn account, and since defendant Jennings has conceded that he permitted the trust company to pay his $2000 check without funds in his account to meet it, the jury is charged that the defendant Jennings wilfully misapplied the said $2000 and the jury's verdict must be for the plaintiff so far as this item is concerned, to the extent of whatever less they find the trust company suffered through this transaction. Denied. * * (3) That the defendant Jennings has admitted that by means of the payment of his $2000 check upon his overdrawn account he knowingly obtained the use of $2000 of the trust company's funds for a period of a week or ten days until he, as he claims, gave Raymond E. Smith his note for a like amount, which, as he claims, was to be discounted at another bank. This is the version of the testimony which is most favor-

able to the defendants, plaintiff's version being that no such arrangement was made by Jennings with Smith, and no note delivered. That upon defendant's own admissions Jennings, as a teller of the trust company, knowingly procured a loan of $2000 from the trust company for a period of a week or ten days, without submitting in writing to a meeting of the board of directors or executive committee of the trust company a proposition to make such loan, stating the amount, terms and security, if any, offered therefor. This was a crime. (4 Comp. Stat., p. 5661.) And the jury is charged that the transaction was a wilful misapplication by Jennings of $2000 of the trust company's money. The jury must find for the plaintiff, for the amount of whatever loss they find the trust company suffered thereby. Denied."

Dated, June 12th, 1917.

Yours, etc.,

ROGER HINDS,

Attorney for Plaintiff-Appellant,
22 Midland Avenue,
East Orange, New Jersey.

To

Messrs. Edwards & Smith,
Attorneys for Defendant-Respondent, American Surety Company of New York,
1 Exchange Place, Jersey City, N. J.

To

Messrs. DeGraw & Murray,
Attorneys for Defendant-Respondent, Jennings,
9 Clinton Street, Newark, N. J.

Complaint.

SUPREME COURT OF THE STATE OF NEW JERSEY

COUNTY OF ESSEX.

ROSEVILLE TRUST COMPANY, by GEORGE M. LAMONTE, Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff,

against

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendants.

The plaintiff, a corporation of the State of New Jersey, having its principal office at Nos. 505-507 Orange Street, Newark, Essex County, New Jersey, by George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, in charge of said Roseville Trust Company, in liquidation, under the provisions of Chapter 171 of the Laws of 1913, says:

I. That at the times herein stated plaintiff was and still is a corporation of the State of New Jersey.

II. That at the times herein stated defendant, American Surety Company, was and still is a corporation authorized to do business in the State of New Jersey.

III. That prior to November 3rd, 1911, plaintiff appointed the defendant, A. Randolph Jennings, as its teller, and he continued as such teller in plaintiff's service until August 14, 1913.

IV. That on or about December 12, 1908, said defendants delivered to plaintiff a certain bond

executed by defendant, American Surety Company, a copy of which is annexed hereto as Schedule "A".

V. That by mutual agreement of plaintiff and defendant said bond was duly renewed from year to year, and was in full force at all the times herein mentioned.

VI. That between December 12, 1908, and August 13, 1913, said defendant Jennings was dishonest, and in connection with his said employment, stole and embezzled and wrongfully abstracted and wilfully misapplied money, funds and other personal property belonging to the plaintiff and others to whom plaintiff was legally responsible, upwards of $18,005.00. A more particular statement of said acts of dishonesty, theft and embezzlement is annexed hereto as Schedule "B".

VII. Said defendant Jennings has not repaid said sums hereinbefore mentioned nor any part thereof.

VIII. Plaintiff has performed all the terms and conditions of said bond on its part.

IX. That plaintiff did, on or about the 22nd day of December, 1913, duly furnish said defendant proof of the loss herein mentioned, as provided for in said bond.

X. That on or about August 14, 1913, George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, took possession of the property and business of plaintiff under the provisions of Chapter 171 of the Laws of 1913, said plaintiff being at that time in an unsafe and unsound condition to transact business, and being and remaining insolvent.

XI. That plaintiff, by George M. La Monte, as such Commissioner, has demanded payment of

said sum of $18,005 from defendants, but that defendants have refused and still refuse to pay said sum or any part thereof.

Plaintiff demands as damages the sum of $18,005.00, with interest from December 22nd, 1913.

ARTHUR T. VANDERBILT,
Attorney of Plaintiff.

Schedule "A".

F. 13 C.&P.
Continuous Individual
Suretyship Bond No. 671383.

AMERICAN SURETY COMPANY.
Capital, $2,500,000.
Fully Paid
OF NEW YORK.
Copyright 1911 by
Amount $10,000.00 Premium $———
American Surety Company
of New York.

WE, A. RANDOLPH JENNINGS, as Principal, hereinafter called the "Employee", and the American Surety Company of New York, hereinafter called the "Surety", as Surety (in consideration of the payment of an agreed annual premium to it, the said Surety) bind ourselves, subject to the provisions hereinafter contained, to pay Roseville Trust Company, Newark, New Jersey, hereinafter called the "Employer", at the home office of the Surety, in the City of New York, such pecuniary loss, not exceeding Ten Thousand Dollars as the Employer shall have sustained of Employer's money, funds or other personal property (or belonging to others for which the Employer may be legally responsible), stolen, embezzled, wrongfully abstracted or wilfully misapplied

by said Employe during his employment at any place in the United States or Canada, and in any position in the employ of said Employer, commencing December 12, 1908 at 9 A. M. and ending upon the termination of the services of the Employe, or upon the cancellation of this suretyship by the Surety or the Employer as hereinafter provided, or upon the acceptance of other suretyship by the Employer in place of this suretyship, but not in addition thereto.

PROVIDED, HOWEVER, AND UPON THE EXPRESS CONDITIONS:

1. That such loss be discovered by the Employer within thirteen calendar months next after the termination of such suretyship, and that notice of such loss be delivered by the Employer to the Surety at its home office in the City of New York, within ten days after such discovery, and that claim, if any, for such loss, be delivered in like manner, within three calendar months after such discovery, accompanied by a statement, verified under oath by the Employer, showing:

The items in detail with dates (as nearly as possible) and amounts of all losses of money, funds or other personal property by the Employer suffered by or through any act of the Employee; the date of termination of service; the date of discovery of loss and the amount and description of any other suretyship held by the Employer.

That the surety shall have two calendar months after delivery to it of such statement and claim within which to make examinations and payment; that the Surety shall not by receiving, accepting or retaining any notice, claim or statement, or by the request for a receipt, acceptance or retention of any other or further or different notices, proofs, claims, statements, documents, papers or

information, or the request for leave to make, or the making of any investigations or examinations at any time, be considered as waiving or be deemed to have waived any of its rights or privileges, or any of the provisions hereof; that the Employer shall at all times afford the Surety every facility for making investigations, in the presence of the Employee or otherwise as the Surety shall elect, and furnish all the information in its possession; that the Employer will, upon request of the Surety, use all diligence in prosecuting the Employee, civilly as may be allowed under existing laws, and criminally as may be required by the authorities of any State or of the United States, for any acts forming the basis of any claim under this suretyship, the direct pecuniary outlay attendant upon such prosecution, however, to be borne by the Surety. That in the event of any such loss by the Employer, and of any claim being made against the Surety, the Surety shall be entitled to share with the Employer pro rata on the basis which the Surety's loss bears to the Employer's total loss, in any recovery by the Employer, upon or by reason of such loss, from any source other than the Surety, excepting any recovery upon or from other suretyship for such Employee; and likewise in the event of loss by the Employer within the terms and provisions of this suretyship and in excess of the amount thereof, the Employer shall be entitled to share with the Surety in any net recovery by the Surety had, upon or by reason of the payment by it of such loss, pro rata on the basis which the Employer's loss in excess of the actual loss for which the Surety is liable hereunder bears to the Employer's total loss.

2. That no suit, action or proceeding upon or by virtue of this suretyship shall be instituted

against the Surety during said two calendar months; nor after the expiration of twelve calendar months from the time of the first giving to the Surety notice of discovery of loss hereunder; nor until after the full performance by the Employer of all the provisions hereof on the part of the Employer to be performed; that in any and every suit, action or proceeding at law or in equity, by the Employer against the Surety upon or by virtue of this suretyship, the Employee shall be made a party and served with proper process to bring him in, if he can be found with reasonable diligence.

3. That said Employer has not, nor (if a corporation) has any one of its Officers or Directors, been informed of any dereliction of duty, or any act of dishonesty on the part of the Employee, and that said Employee, as far as known to the Employer, its Officers and Directors, has always faithfully and satisfactorily performed his duties.

4. That the Surety shall not be liable for any funds, moneys or other personal property diverted by the Employee from the Employer, which have been directly or indirectly used to reimburse the Employer for any debt or deficiency incurred or contracted before the commencement of this suretyship, or to discharge in whole or in part any debt or obligation contracted or incurred during the continuance of this suretyship by agreement between the Employer and the Employee.

5. That upon the discovery by the Employer of any fact which ought to cause a suspicion or belief that there has been any act of dishonesty or grave dereliction of duty of the Employee which has caused or is likely to cause any loss to the Employer, notice thereof with a written statement of the facts shall, within ten days after

such discovery, be delivered to the Surety at its home office in the City of New York; that no condonation of any such act, nor compromise of any loss shall be made by the Employer, without the written consent of the Surety; that the Surety shall not be liable under this suretyship for any loss occurring to the Employer after discovery of any such fact, unless the Surety shall have had such notice and consented in writing to the continuance of its suretyship.

6. That this suretyship may be cancelled by the Surety upon not less than thirty (30) days' notice to the Employer; that from and after the expiration of thirty (30) days after date of giving such notice, the Surety shall be released and discharged from any and all liability, except for acts of the Employee committed within the provisions of this suretyship and prior to the expiration of thirty (30) days after the giving of such notice and which shall be discovered and notification thereof given to the Surety in the manner and within the limits of time hereinbefore provided; that after giving such notice of cancellation and after the expiration of all liability, if no claim has been made, the Surety shall, on written demand of the Employer, retund by its check the premium paid for the unexpired suretyship, or shall, after such expiration of all liability, at the written request of the Employer, apply said premium to the premium due to become due the Surety by the Employer for suretyship for any other Employee.

7. That this Suretyship may be cancelled by the Employer by notice to the Surety specifying the date from which the cancellation is to take effect, and the Surety will thereupon refund by its check the premium paid for the unexpired suretyship, or apply said premium to the premium due

or to become due the Surety by the Employer for suretyship for any other Employee.

8. That the amount of this suretyship may on application of the Employer be increased or decreased by the Surety; that so increasing the amount of suretyship shall operate as extending or continuing this suretyship as aforesaid, in the amount of suretyship first specified hereunder with an additional liability beginning from the date such increase of suretyship takes effect and not exceeding the difference between the amount of such original suretyship and the amount of such increase; that a decrease in the amount of suretyship shall be considered as extending or continuing this suretyship from its original date in the amount of such decrease, with an additional liability not exceeding the difference between the amount of suretyship first specified hereunder and the amount of such decreased suretyship from the beginning of the suretyship to the date of such decrease.

9. That the Surety upon the execution by it of this instrument of suretyship shall be immediately discharged from any and all liability to the Employer upon or by virtue of any prior instrument of suretyship for said Employee; that upon the execution by the Surety of any new instrument of suretyship it shall be discharged and released from any and all liability under or by virtue of this suretyship, unless otherwise expressly provided at the time of the issuance of such new instrument of suretyship by agreement in writing executed by the Surety.

10. That none of the conditions or provisions of this suretyship shall be deemed altered, modified or waived by the Surety, unless such alteration, modification or waiver, be in writing, executed by its President, or one of its Resident Vice-Presidents, sealed with its seal, and attested

by its Secretary, or one of its Resident Assistant Secretaries, and consented to in writing by the Employee.

11. That this bond of suretyship shall not be construed as entered into or delivered by the Surety until executed in due form by the Employee, as Principal.

AND SAID EMPLOYEE, AS PRINCIPAL, does hereby bind himself, his heirs, executors, and administrators, to save said Surety harmless from, and on demand to pay it any and all claims, demands, loss and damages of every nature and kind, and on demand to pay it all legal and other costs, counsel fees and expenses, directly or indirectly, which said Surety shall at any time sustain by reason or in consequence of such suretyship, whether before or after legal proceedings by or against said Surety and without notice thereof to him, said Employee.

IN WITNESS WHEREOF, said Employee, as Principal, has hereunto set his hand and seal, and said American Surety Company of New York, as Surety, has caused the execution hereof by its Resident Vice-President and its Resident Assistant Secretary, and its seal to be hereunto affixed at the City of Newark, N. J., this third day of November, 1911.

Signed, Sealed and Delivered by the Employee at Newark in the presence of }

(Signed) R. E. SMITH.

(Sd.) A. RANDOLPH JENNINGS, (L. S.)
Principal.

AMERICAN SURETY COMPANY OF NEW YORK,
By

(Sd.) JNO. F. CLARK,
Resident Vice-President.

Attest:

(Sd.) ROBERT F. ELMER,
Resident Assistant Secretary.

Schedule B.

Date		Items of Default	Amount
1911			
Feb. 8	1	John B. Scarlett deposit...	$5,700.00
Sept. 25	2	Jacob or Christina M. Dorer deposit	2,870.00
Nov. 13	3	Margaret E. Garrison deposit	50.00
Nov. 17	4	Estate Anna Goeller deposit	100.00
Dec. 5	5	Mrs. Anna Sander or Henry F. Sander deposit	500.00
1912			
Mar. 18	6	Catherine Powers deposit book	700.00
June 11	7	John V. Dwyer deposit book	900.00
June 27	8	Alice A. Dowling or William F. Burke deposit	800.00
Dec. 17	9	H. F. Lowther or Mrs. H. F. Lowther deposit	200.00
Dec. 28	10	Ermenia Laprete, false debit	1,000.00
1913			
Mar. 27	11	Mrs. Ida Chapman deposit..	225.00
June 3	12	Cash	2,000.00
June 14	13	Matilda Reglin deposit	3,000.00
			$18,005.00

Answer of American Surety Company.

(Filed, December 10, 1914.)

SUPREME COURT OF NEW JERSEY.

COUNTY OF ESSEX.

ROSEVILLE TRUST COMPANY, by George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff,

v.

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendants.

Action at law.

The defendant, American Surety Company, a corporation of the State of New York, by Edwards & Smith, its attorneys, hereby makes answer to the complaint heretofore filed in the above entitled cause, and says:

1. It admits paragraphs one (1), two (2), three (3) and four (4) of said complaint.

2. Answering paragraph five (5) it admits that said bond was renewed from year to year, but denies that the same was in force at the times mentioned in said complaint.

3. Answering paragraph six (6) it denies that between December 12, 1908 and August 13, 1913 said defendant, A. Randolph Jennings, was dishonest, and in connection with his said employment stole, embezzled, and wrongfully abstracted and wilfully misapplied moneys, funds and other personal property belonging to the plaintiff and others, to whom plaintiff was legally responsible,

amounting to Eighteen thousand five Dollars ($18,005) or any other amount, and specifically denies each and all the acts and "items of default" set forth in Schedule B attached to said complaint.

4. It has no knowledge of the allegations contained in paragraph seven (7) and therefore denies the same and more particularly refers to the answer to paragraph six (6) of said complaint.

5. It denies paragraphs eight (8) and nine (9)

6. Answering paragraph ten (10) it admits that sometime in the Summer of 1913 George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, took possession of the property and business of the plaintiff, Roseville Trust Company, but by virtue of what act or under what authority it does not know, and neither has it any knowledge as to whether or not the plaintiff was in an unsafe or unsound condition to transact business and insolvent, and therefore denies the same.

7. It denies paragraph eleven (11).

FOR DEFENSE TO SAID ACTION DEFENDANT SAYS:

1. That said employee, A. Randolph Jennings, did not steal, embezzle, wrongfully abstract, or wilfully misapply any moneys, funds, and other personal property belonging to plaintiff, or any one else to whom plaintiff was legally responsible.

2. That defendant has performed its contract or bond according to the tenor thereof.

3. That said plaintiff did not perform the said contract or bond mentioned in said complaint in the following respects:

(a) That the Roseville Trust Company of Newark, New Jersey (called employer in said

bond) did not at the time of making the said bond, nor at any time thereafter, keep and perform all the conditions and provisions mentioned and set forth in said bond, on its part to be kept and performed; in that it is provided in and by said bond that the employer should give to the surety notice of any loss under said bond, which notice should be delivered by the employer to the surety at its home office in the City of New York within ten days after the discovery of any loss, and that claim, if any, for such loss, be delivered in like manner within three calendar months after such discovery accompanied by a statement verified under oath by the employer, showing items in detail, with dates (as nearly as possible), and amounts of all losses of money, funds or other personal property by the employer, suffered by or through any act of the said A. Randolph Jennings, employee; the date of termination of service, and that date of discovery of loss. And this defendant says that said employer did not give such notice to the surety at the time and in the manner as provided in said bond and did not file a verified claim of loss within three calender months after such discovery of any loss, with proper data, as provided in said bond.

(b) That it is provided in paragraph five of said bond that upon the discovery by the employer of any fact which ought to cause a suspicion or belief that there has been any act of dishonesty or grave dereliction of duty by the employee, which has caused or is likely to cause any loss to the employer, notice thereof, with a written statement of the facts, shall within ten days after such discovery be delivered to the surety, at its home office in the City of New

York; that no condonation of any such act, nor compromise of any loss shall be made by the employer without the written consent of the surety; that the surety shall not be liable under its suretyship for any loss occurring to the employer after discovery of any such fact, unless the surety shall have had such notice and consented in writing to the continuance of its suretyship. And defendant says that shortly after the beginning of the term of said bond, and on divers dates, and at divers times there came to the notice and knowledge of the plaintiff acts, facts and information which did cause, or should have caused, a suspicion or belief (and said plaintiff did suspect and know or should have suspected and known) that there had been acts of dishonesty or grave dereliction of duty of the said A. Randolph Jennings (employee), which had caused or were likely to cause loss to the plaintiff, and that no notice thereof with a written statement of the facts was delivered to the defendant within ten days after such discovery as provided in said bond: and that said plaintiff (employer) did condone such acts, or some or one of them, and did compromise loses occasioned by the acts of said employee.

4. That said bond provides that the liability of defendant under the aforesaid bond shall not exceed Ten thousand dollars ($10,000.) and there could not be any liability thereunder in excess of that amount.

EDWARDS & SMITH,
Attorneys of Defendant,
American Surety Company.

Answer of Defendant A. Randolph Jennings.

SUPREME COURT OF NEW JERSEY.

COUNTY OF ESSEX.

ROSEVILLE TRUST COMPANY, by George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff,

against

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendants.

Action at Law.

The defendant, A. Randolph Jennings, by his attorneys, Messrs. DeGraw and Murray, hereby makes answer to the complaint heretofore filed in the above entitled cause, and says:

#1. That he admits paragraph #1 of the said complaint.

#2. That he neither admits or denies paragraph #2 of said complaint, but leaves the plaintiff to make proof thereof.

#3. That he admits paragraph #3 of said complaint.

#4. The defendant admits that he signed a bond on about the time alleged in paragraph #4 of said complaint but he does not know whether the bond described in, and a copy of which is annexed to the said complaint, is the bond which this defendant executed.

#5. That this defendant neither admits or denies the allegations contained in paragraph #5 of said complaint, but leaves the plaintiff to make

proof thereof, as he has no knowledge concerning the allegations contained in said paragraph.

#6. That this defendant denies that between December twelfth, nineteen hundred and eight, and August thirteenth, nineteen hundred and thirteen, or at any other time, this defendant was dishonest, and also denies that either in connection with his employment or otherwise, he stole or embezzled, or wrongfully abstracted or willfully misapplied money or funds or other personal property belonging to the plaintiff or to any other person or corporation whatsoever, and specifically denies each and all of the acts and "Items of Default" set forth on Schedule B attached to said complaint.

#7. This defendant, in answer to paragraph #7 of said complaint, admits that he has not repaid the sums therein referred to, because he does not and never has owed them or any part thereof.

#8 and #9. This defendant has no knowledge of the matters alleged in paragraphs #8 and #9 of said complaint, and leaves the plaintiff to make proof thereof.

#10. This defendant admits that some time in the summer of nineteen hundred and thirteen, the exact date of which defendant does not know, George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, took possession of the property and business of the plaintiff, but by virtue of what act or under what authority he did so, this defendant has no knowledge, and neither has he any knowledge of whether or not the plaintiff was in an unsafe or unsound condition to transact business, and insolvent, but leaves the plaintiff to make proof thereof.

#11. This defendant, in answer to paragraph #11 of said complaint, denies that George M. LaMonte, or any other person, has demanded of

him the sum therein mentioned, or any other sum, and that he does not owe said sum or any part thereof, and that had such demand been made, he would have refused to pay said sum or any part thereof.

DEGRAW & MURRAY,
Attorneys of Defendant, A. Randolph Jennings.

Reply.

(Filed, March 23, 1915.)

SUPREME COURT OF NEW JERSEY.

COUNTY OF ESSEX.

ROSEVILLE TRUST COMPANY, by George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, *Plaintiff*, v. A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY, *Defendants*.	Action at law.

The plaintiff hereby replies to the answer heretofore filed by the defendant American Surety Company, and says:

1. That it denies the allegations contained in the first and second defenses set up in the answer of the defendant American Surety Company.

2. That it denies the allegation contained in the third defense set up in the answer of the defendant American Surety Company, except those allegations which refer to the bond mentioned in the Complaint. As to those allegations, the plaintiff refers to the true copy of said bond annexed to the complaint.

ARTHUR T. VANDERBILT,
Attorney of Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT, ESSEX COUNTY.

ROSEVILLE TRUST COMPANY, by GEORGE LA MONTE, Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff,

vs.

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendant.

Action at Law.

APPEARANCES:

For Plaintiff appear MESSRS. FAIRLIE & VANDERBILT, by ARTHUR T. VANDERBILT, ESQ.; ROGER HINDS, ESQ., and EDWARD F. CLARK, ESQ., of the New York bar, who is admitted *pro haec vice* for the purposes of this case.

For Defendant A. Randolph Jennings appear MESSRS. DEGRAW & MURRAY, by JOHN DEGRAW, ESQ.

For Defendant American Surety Company appear MESSRS. EDWARDS & SMITH, by EDWIN F. SMITH, ESQ.

BE IT REMEMBERED, that on this twenty-first day of November, Nineteen hundred and sixteen, at a Circuit of the Supreme Court, holden at Newark in and for the County of Essex, before his Honor, Frederic Adams, Judge of the Essex County Circuit Court, to whom the issue above joined had been referred for trial, the said issue between the parties (pro ut the proceedings), came on to be tried by a jury for that purpose, duly empanelled, and thereupon the plaintiff and

defendant offered evidence as hereinafter set out to maintain the issue on their respective parts as follows:

Mr. Hinds opens for plaintiff.

Mr. Smith opens for Defendant American Surety Company.

Mr. DeGraw opens for Defendant A. Randolph Jennings.

By consent of all the parties the testimony has been abridged, pursuant to Rule 19.

WALTER H. MEIER, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. HINDS:

Q. Mr. Meier, what is your business? A. Exhibitor of motion pictures.

Q. What was your business in June, 1913? A. Exhibitor of motion pictures.

Q. Do you know A. Randolph Jennings? A. I do.

Q. The gentleman sitting here with his counsel (indicating)? A. I do.

Q. Did you have any business transactions in June, 1913, with Mr. Jennings? A. Yes, sir.

Q. What was the transaction? A. Sold him and Charles F. Meyer a motion picture theatre.

Q. Where was the theatre? A. 7 Avon Avenue.

Q. How do you spell Charles F. Meyer's last name? A. M-e-y-e-r.

Q. How do you spell your name? A. M-e-i-e-r.

Q. You are not relation to Mr. Meyer? A. No.

BY THE COURT:

Q. You sold it to Mr. Jennings? A. Yes, sir.

Q. You did? A. Yes, sir.

BY MR. HINDS:

Q. What was the purchase price?

MR. SMITH: I object, if your Honor please, as irrelevant, incompetent and immaterial.

THE COURT: Something was said at the opening of the case about motion pictures; I do not know just what it was. What is the object of this testimony?

MR. HINDS: It is offered for two reasons: First, to show that the alleged defaulter was engaged in an outside enterprise, and, second because this transaction is directly connected with a particular item of embezzlement; so that it is relevant in two different ways.

(Mr. Hinds argues further.)

MR. SMITH: If counsel intends under the evidence to show that this man and Mr. Jennings were in cahoots in stealing some money from the bank, I haven't any objection, but whether Mr. Jennings was buying a moving picture show or an automobile or a lot does not seem to me to be part of this case.

THE COURT: It is not, except in the sense in which I indicated in some remarks that I made this morning, that the question whether Mr. Jennings made or lost money, assuming, for the sake of the argument, that he was not honest in his dealings with the bank in his transactions, was not of itself all important; that if it has any importance in this case, it is after a connection is established with his financial dealings as an officer of the bank; and, collaterally, secondarily, it might, in a conceivable state of the proof, be supporting testimony in that point of view. I cannot anticipate what the evidence is going to be, of course, but I think there is nothing im-

proper about pursuing that line of inquiry, so that I overrule the objection.

Counsel for defendant American Surety Company prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was the purchase price? A. $5500.

Q. Of that price how much did Mr. Jennings pay? A. $2000 in cash and joint notes.

Q. (By the Court) Joint notes of himself and Meyer? A. Yes, sir; two notes.

Q. (By Mr. Hinds) Did Mr. Jennings pay you $2000 in cash? A. A check for $2000.

Q. What did you do with that check? A. Deposited it.

BY THE COURT:

Q. $2000 in cash paid by Mr. Jennings? A. Yes, sir.

Q. And two joint notes? A. Yes, sir.

Q. Two joint notes of Jennings and Meyer? A. Yes, sir.

Q. Do you remember what sums? A. They were $1000 each.

Q. $1000 each? A. Yes, sir.

Q. That would not make $5500, would it? A. No, sir; Meyer paid the balance.

Q. How much? A. Meyer paid $1500.

Q. (By Mr. Hinds) What did you do with the check? A. Deposited it in the Merchant's National Bank of Newark.

Q. (By the Court) What checks were they? You have not told us yet. What checks were there given? A. There was a $2000 check of Jenning's, and then previous to the closing of the deal Meyer had paid $200 on account.

Q. Then there was one check, was there? A. One check.

Q. A check for $2000? A. Yes, sir; and a check for $1,508.33 of Meyer's and a check for $200 of Meyer's and two notes for $1000 each. The $208.33 that shows there over and above the purchase price was the rent for the month of June, 1913.

Q. Previous to the closing Mr. Meyer had paid how much? A. $200.

Q. And the surplus— Of how much? A. $208.33.

Q. Was rent? A. Yes, sir.

Q. Which check did you deposit? A. All of them.

By Mr. Hinds:

Q. Now, among the checks that you deposited was the $2,000 check of Mr. Jennings', was it not? A. Yes, sir.

Q. Do you recall on what bank Mr. Jennings drew that check? A. I couldn't say positively, no.

Q. Have you here the stub portion of your check-book in the Merchant's National Bank for that period? A. Yes.

Q. Will you turn to that date and state whethere or not you found evidence of that deposit? A. (Referring to memoranda.) I find on May 31st—

Q. Do not read it; just state whether or not you do find it. A. Yes, sir.

Q. You do find it? A. Yes, sir.

Q. Was that made by you—those entries? A. Yes.

Mr. Hinds: I offer this in evidence, your Honor.

Mr. Smith: What is the purpose of the offer, Mr. Hinds?

Mr. Hinds: As evidence, according to the witness' statement, that a $2,000 check made

by Mr. Jennings was received by him and deposited in the Merchant's National Bank. This is only one link in the chain connected with this check transaction, but it is essential for us to show that that $2,000 was deposited in the Merchant's National Bank on that date.

Q. (By Mr. Smith.) These deposits were made by you in the Merchant's National Bank? A. Yes.

MR. SMITH: I have no objection at all.

THE COURT: I do not object to it. The only question I have about it is whether it is anything but a memorandum, whether it is strictly receivable as a document.

MR. HINDS: It was made in the course of the witness' regular bookkeeping.

THE COURT: It is not objected to.

MR. SMITH: No, sir.

THE COURT: I shall receive it.

(The check-book referred to by witness is marked Ex. P-69.)

THE COURT: What does it show?

MR. HINDS: It shows on that date, on May 31, 1913, a deposit by Mr. Meyer in the Merchant's National Bank aggregating $3839.83 made up of several items, all of which are enumerated, the first being C. F. Meyer, $1508.33; the second being Mr. Jennings' $2000—

MR. SMITH: Please read that right. It says "G. V. Jennings."

Q. Read that; it is in your handwritting. A. (Referring to Ex. P-69.) G. V. Jennings."

Q Who is the G. V. Jennings opposite the item of $2000 to whom you refer? Is this the gentle-

man sitting here next to his counsel (indicating)? A. Yes.

Q. Did you know him by the name of G. V. Jennings? A. Well, that may have been a mistake in entering it in the book.

Q. Have you brought your pass-book in the Merchant's National Bank for that date? A. Yes (producing book).

Q. Will you turn to the date of May 31, 1913? A. (Witness indicates in book.)

Q. Were you present at the bank when that entry was made? A. Yes.

MR. HINDS: I offer that in evidence.

(Mr. Hinds hands bank-book to defendant's counsel.)

MR. HINDS: I offer the page containing that item there.

MR. SMITH: What is the object of the offer?

MR. HINDS: It is an entry made in the witness' presence, in the ordinary course of his bookkeeping with the bank, supporting his statement that this deposit was made in the Merchant's National Bank of the aggregate items mentioned, including the $2,000 check.

MR. SMITH: I make the objection that he has not yet shown that. If he would ask the witness if that item constituted the items in the check-book, I would not object.

Q. Is this item of deposit of May 31, 1913, $3,839.83—

THE COURT: Ask him what it is.

Q. What is that entry there? A. That is the entry made by the receiving clerk at the Merchant's National Bank of the amount that I deposited on that day.

Q. Is that the same amount that appears in your stub-book? A. Yes.

Q. And does it include the check of $2,000 given you by Mr. Jennings? A. Yes.

MR. HINDS: I offer it in evidence.

MR. SMITH: No objection.

(Bank-book produced by witness is marked Ex. P-70.)

Q. Did you receive back from the bank the $2,000 check which you deposited on that date? A. No, sir.

Q. So far as you know, then, it was paid? A. Yes.

Q. Were the notes given you by Mr. Jennings and Mr. Meyer jointly ever paid? A. No.

Q. Did Mr. Jennings at or about that time make any statement to you respecting the extent of his property? A. Well, not exactly, the extent, no. He told me when he gave me the notes that he would probably sell some of his property that he had, and he would be in a position to pay the notes when they became due.

Q. State what property he said he had and state what he said, so far as you recollect. A. That is all I recollect, the statement that I just made.

BY THE COURT:

Q. At the time the notes were given, did you say? A. Yes, sir.

Q. Can you state just what he did say about his property? A. No further than what I have said.

BY MR. HINDS:

Q. Did he say whether it was real or personal property? A. Real estate.

Q. Did he say where it was? A. Not that I recall now.

CROSS EXAMINATION BY MR. SMITH:

Q. Mr. Meier, as I understand you, you owned a moving picture outfit, did you? A. A moving picture outfit?

Q. Yes. A. No, I owned a theatre.

Q. Where was it? A. 7 Avon Avenue.

Q. And did you show moving pictures? A. Yes, sir.

Q. And you wanted to sell it? A. Well, I didn't want to sell it; I was approached; they wanted to know if I would sell it.

Q. But they didn't make you sell it, did they? A. No, certainly not.

Q. Then you wanted to sell it?

MR. HINDS: I object to further argument with the witness.

THE COURT: Some indulgence must be shown counsel on cross examination. Proceed.

Q. Mr. Meier, as a matter of fact, you wanted to sell and they wanted to buy? A. Yes, sir.

Q. And you came together and made a bargain? A. Yes, sir.

Q. And sold it for $5500? A. Yes, sir.

Q. Jennings paid in full and Meyer started in to pay his part? A. Yes.

Q. And you got a check for $2,000? A. Yes.

Q. You put the check in your bank? A. Yes.

Q. And the check was paid and you got your money? A. Yes.

Q. And you received some notes. You called them joint notes? A. Yes.

Q. One of the men signing the notes was Meyer? A. Yes, sir.

Q. And the other was Mr. Jennings? A. Yes.

Q. There were two on each note? A. Yes.

Q. What you call joint notes? A. Yes.

Q. And those notes were never paid? A. No, sir.

Q. And you lost the money? A. Yes.

Q. And that is the whole transaction that you are talking about? A. Yes.

Q. The notes simply were not paid and you did not get paid, is that it? A. Yes.

By Mr. DeGraw:

Q. You did not lose the money, did you? A. What money?

Q. On the notes. A. Why, certainly.

Q. Did you not have a chattel mortgage on the theatre? A. Yes.

Q. What became of that? A. It was foreclosed.

Q. By yourself? A. Yes.

Q. And you got the theatre back? A. Oh, no, they defaulted in rent for more than the amount of the notes before the chattel mortgage was foreclosed.

Q. You had a mortgage to secure your notes, did you not? A. Yes.

Q. And that was foreclosed? A. Yes.

Q. And the theatre bought in by you? A. Yes.

Charles Mindnich, sworn in behalf of plaintiff.

* * * * * * * * *

Re-Direct Examination by Mr. Hinds:

* * * * * * * * *

Q. Now, in the ordinary course of business in your bank who could draw checks upon an account in the name of one person or another person? A. Both; both are authorized to sign.

Q. Or either? A. Either.

Q. (By the Court.) What do you mean by a

"demand account"? A. A demand account—we have been talking about savings accounts all along; this is a demand account.

Q. (By Mr. Hinds.) Do you mean a checking account? A. A checking account.

Q. Such as is ordinarily kept in banks? A. Yes, sir.

MR. HINDS: I will have this book marked for identification.

The book referred to is marked P-73 for identification.

MR. HINDS: I offer it in evidence.

Mr. Hinds hands the book referred to to defendant's counsel.

MR. HINDS: Will you concede that that is Mr. Jennings's checking pass-book?

MR. SMITH: I do not object to it at all.

MR. HINDS: Will you concede that that is the pass-book of Mr. Jennings?

MR. SMITH: I will concede that the inside of it says that it was the pass-book of May L. Jennings and A. R. Jennings.

MR. HINDS: Will you concede that that is the pass-book of Mr. Jennings?

MR. SMITH: Not personally; it was a joint book; he says it is the pass-book for their joint account.

Q. (By Mr. Hinds.) Can you state whether or not either of the Jennings had any other individual checking account in the bank besides their joint account? A. No, sir.

Q. They did not? A. No, sir.

Q. Now, I show you this book and ask you to state whether or not on the 31st of May, 1913, or at any time thereafter, there was in that account a balance of $2000, or any other amount? A. I can't tell that from the pass-book.

Q. Has it been balanced—can you tell whether

it has been balanced? A. It was balanced on March 18th.

Q. What was the balance on that date? A. $89.74.

Q. (By Mr. DeGraw.) What year? A. 1913.

Q. (By Mr. Hinds.) Were there any deposits subsequent to that date? A. Yes, there were deposits. What date did you mention?

THE COURT: March 18th.

Q. At any time after March 18th were there any deposits? A. Yes, there were a number of deposits.

Q. Will you look at them, making an addition, if necessary, and state whether there are sufficient deposits in that book after March, when you say there was $89 balance, to make $2000, or anywhere near that sum? A. No, sir.

MR. SMITH: I do not see the relevancy of it at this time. As the bank book of Mr. Jennings, I have no objection to it, but I do not see the relevancy of it at this time. It does not contradict anything, that I know of, and it is not affirmative proof of anything.

MR. HINDS: It is simply one link in our evidence on the $2000 item, if your Honor please. We have now shown that on May 31st and thereafter he had no such balance as $2000.

THE COURT: I shall receive it as an exhibit.

The book referred to is marked Ex. P-73.

WILLIAM J. THOMPSON, sworn in behalf of plaintiff.

* * * * * * * * *

Q. Now, Mr. Jennings, I show you your receiving teller's proof, in book P-22, for the 3d day of June, 1913, and I ask you whether your cash proved on that date? A. My cash did, yes, sir.

Q. In the course of the bank's business what does the receiving teller do with the cash items which he takes in on each day? A. Incorporates them in the proof of that day, then turns them over to the paying teller the following morning.

Q. Can you tell from that proof how much you turned over to the paying teller on the close of the day, June 3, 1913? A. I make it $4100.53.

Q. That is the amount, then, that you turned over to the paying teller at the close of that business day? A. Yes, sir.

Q. Who was the paying teller? A. Mr. Jennings.

MR. HINDS: This proof, I might explain, concerns the $2,000 which Mr. Meier has testified to. I offer the page in evidence.

Page dated June 3d of book formerly marked P-22 for identification now marked Ex. P-93.

Q. Now, I show you book P-32 for identification, and ask you what that book is? A. Paying teller's proof-book

Q. Will you turn to the date June 4, 1913? A. I have it, yes, sir.

Q. Who kept that page? A. Mr. Jennings.

Q. Is it in his handwriting? A. It is, yes, sir.

Q. Can you find, on that page, an entry showing the amount of cash items which Mr. Jennings, as paying teller, received from you, at the

close of the day June 3, 1913, or rather claims to have received in that book? A. Yes, the items are here (indicating).

Q. What is the amount? A. $2,100.53.

Q. What is the difference between what he claims to have received from you at the close of the business of June 3d and what your book shows that you turned over to him? A. $2,000.

MR. HINDS: I offer that page in evidence. Marked Ex. P-94.

Q. (By the Court.) The book he turned over to you on the previous date? A. The cash items in the book, the items themselves. Here (indicating) is the amount, $4,100.53, transferred.

Q. We are dealing, now, with the proof showing $2,100? A. That item is entered in the book there, $2,100.53.

Q. That shows the cash which he turned over to you on the previous day? A. No, sir; that shows the cash items that I turned over to him.

Q. At the close of the previous day? A. Yes, sir.

Q. (By Mr. Hinds.) Now, turn back to this proof as of June 3, 1913. Turn to the page already marked in evidence P-93, from which you said that you found that you had turned cash items of $4,100.53 over to Mr. Jennings. You find that those cash items are detailed? That is all of the items given? A. Yes, sir.

Q. Do you find an item there of the sum of $2,000? A. Yes, sir.

Q. Now, look at Mr. Jennings's proof for the following day, which page has been marked P-94, and state whether his reported total of cash items received from you, $2,100.53 has been itemized? A. No, it has not.

Q. Will you examine that item and state whether or not erasures have been made? A. An erasure has been made, yes.

Q. Will you take a pencil and state whether or not the columns are in balance. I will not rely upon the total appearing there, but I ask you to add it up and see whether the columns are in balance? A. It apparently proves.

Q. Now, in making the addition in the column which contains the figure $2,100.53 state whether you recorded it as $2,100 and not $4,100? A. Yes.

Q. The book is in proof? A. Yes.

Q. Suppose the item had been $4,100 instead of $2,100, obviously it would not have been in proof? A. That is correct, yes.

Q. Is it possible for you to tell me what the figure was under the two where the erasure has been made?

MR. HINDS: Is there a magnifying glass here?

The clerk hands Mr. Hinds a magnifying glass.

A. No, I cannot tell.

Q. An erasure has been made there? A. Yes.

MR. HINDS: Now I show that page to the jury.

Shows book to the jury.

Q. Is that "2" in Mr. Jennings's handwriting? A. It is, yes.

MR. HINDS: I call your attention to the figures, the entries itemized, which Mr. Thompson says aggregate $2,100.53, including the item of $2,000, which he says were turned over to Mr. Jennings. Some of the

other jurors are now examining the book of Mr. Jennings—wherein he reports only having received $2,100 from Mr. Thompson, or something else, and yet the book is in proof.

Q. Now, I show you four slips of paper and a small book. The book has been marked P-26 for identification. The slips themselves have not been marked, but have been pinned to the slip marked P-47 for identification. I ask you to state to the jury what each one of those slips or tickets is. A. The book marked P-26 for identification is the return item book. The list of items therein, the different exchanges between the period starting with May 28th, 1913, and ending with June 6, 1913. The slip, the number of slips marked P-47.

THE COURT: I understand that P-47 is a piece of paper on which four slips are pinned.

MR. HINDS: I am going to have them marked, though, if I can, either in evidence or for identification.

THE COURT: Do you want to put them under P-47?

MR. HINDS: Let us have them identified separately, now, your Honor, and then we can refer to them conveniently. Preferably, we might call them 47-A, B, C and D.

THE COURT: Mark them 47-B, C, D and E.

Marked Ex. P-47 B for identification; Ex. P-47 C for identification, Ex. P-47 D for identification, P-47 E for identification.

Q. Will you tell us the kind of a book P-26 is again? A. Return item book.

Q. Now, tell us what the four slips are which have been marked P-47 B, C, D and E, referring in each instance to the identification number.

Q. (By the Court.) Beginning with P-47 B. A. P-47 B is the face slip of the Merchants National Bank, giving a total of the exchanges, checks, sent to the Roseville Trust Company from the Merchants National Bank on June 3, 1913.

Q. (By Mr. Hinds.) And that is B, the first one. A. The second one, P-47 C, is a machine list of checks, in amount $5,206.25. That is one of the items on the face slip, P-47 D in amount, $1,258.25; that is the second amount; that is the machine list, the second amount, from the face slip, from the Merchants National Bank. The fourth item, P-47 E is a check of Charles F. Meyer, $1,508.33, paid by the Roseville Trust Company on June 3, 1913, and included among other checks in the list marked P-47 C.

Q. Now, will you state from the papers which you have just identified whether or not your bank received on June 3, 1913, among other items, a $2,000 check and a $1,508.33 check? A. Yes, sir; they did.

THE COURT: Does that mean the Roseville Trust Company?

MR. HINDS: Yes.

Q. Now, where do you find those two items? A. On the slip marked P-47 C.

Q. Which is a machine list? A. Yes.

Q. Is that part of the machine total which appears on 47 B, the face slip, which you received from the Merchants National Bank? A. That is a part of the total amount of checks received from the Merchants National Bank on June 3d, yes.

Q. (By the Court.) What bank did you say received that? A. We received these two checks.

Q. Who are "we"? A. The Roseville Trust Company.

Q. The Roseville Trust Company received a $2,000 check and a $1,508.33, and you find these on P-47 C? A. Yes, sir.

Q. (By Mr. Hinds.) And what date appears on the face slip on the Merchants National Bank? A. June 2d.

Q. When did you receive that in your bank? A. June 3d.

Q. No, what relative position are the two items on the machine list, the $2,000 and the $1,508.33? A. One directly underneath the other.

MR. HINDS: I offer in evidence the face slip, P-47 B and the machine list, P-47 C.

THE COURT: They merely have been marked for identification but you now offer them, and they will become P-47 B and P-47 C as exhibit.

Marked Ex. P-47 B and Ex. P-47 C.

Q. I show you, again, check of Charles F. Meyer and Walter H. Meier of May 29, 1913, which has been marked P-47 E and ask you whether that amount, $1,508.33 is the same amount as one of the two items that you have just testified to? A. Yes, the same amount.

MR. HINDS: I offer that in evidence also.

Marked Ex. P-47 E.

Q. Now, Mr. Thompson, if that $2,000 check which, together with the $1,508.33 check of Mr. Meyer had been turned over to you by Mr. Jennings after the close of his business day, June 3, 1913, it would have been included by you, would it not, in this list of sundries, in the cash items, in the ordinary course of your business, appearing in the receiving teller's proof, marked P-93? It would have appeared in the total of $4,100.53?

MR. SMITH: I object. It has not yet appeared that Mr. Jennings would turn over these things in the ordinary course of business.

Question withdrawn.

Q. Will you refresh your recollection from the return item book, which has been marked P-26 for identification, and state what the item of $2,000 was, which is the first item under cash items aggregating $4,100.53 which you turned over to Mr. Jennings at the close of the business day, June 3d, as shown on page in proof P-93? A. That is a first teller charge, that $2,000, as it appears on the return item book, it is a charge against the first teller, of $2,000.

Q. Who was the first teller? A. Mr. Jennings.

Q. What do you mean by a charge on the first teller? Describe what kind of a thing that is. A. It is just a memorandum charge made out on tickets that we had for that purpose, and the only information that it would contain would be simply "charge, first teller, $2,000."

Q. In the ordinary course of your bank's business what is indicated, what fact is indicated to you by the including in the items coming from the receiving teller of a first teller's charge ticket? A. Well, the only thing that it would indicate to me would be that a check had been taken out of the exchanges and a charge substituted for it.

Q. Now, I ask you in view of your examination of the return item book, and the entry of June 3d, first teller, $2,000, and your examination of this proof-book of that day, whether it is possible that that $2,000 check could have been turned over to you by Mr. Jennings? Referring to that first item of $2,000, whether that item could pos-

sibly be the $2,000 check which you have testified came from the Merchants National Bank in the mail of June 3, 1913? A. Well, it could possibly be, yes, sir.

Q. Were there any other items of $2,000 which you turned over to Mr. Jennings? A. No, sir.

Q. This $2,000 charge ticket was one of the items, was it not? A. Yes, sir.

Q. In view of that, can you state whether it is possible that that $2,000 item could have been the check received from the Merchants National Bank? A. Well, it might be necessary to explain what I mean by that.

Q. Will you explain? A. In making up the return item book proof of the exchanges there is no doubt but what that first teller charge was one of the items necessary for the proof on the exchanges, and, as I said before, it was a charge in substitution of the check that came through in the exchanges. This proof of exchanges was made up some time around between half-past twelve and one o'clock, and anything given—if any substitution had been made between one o'clock and three o'clock that substitution might possibly have been checked. That is the only way it could have been checked.

MR. HINDS: I offer in evidence the return item book marked P-26 for identification, the page of June 3, 1913, containing the item, "first teller, $2,000."

MR. SMITH: No objection.

Marked Ex. P-95.

Q. Do you recall ever having seen, in the exchanges, a check of Mr. Jennings for so high an amount as $2,000? A. I don't know as I did, no, sir.

Q. If you had seen it would you have recollected it today? A. That I don't know.

Q. Now, if you had seen such a check in the exchanges, if it did not appear on the books, had been thrown out, would you have recollected seeing such a check? A. That I cannot say sure.

Q. What did you do with those items, including that charge ticket, at the close of your business day, June 3, 1913? A. Turned them over to the first teller, Mr. Jennings.

Q. That was included in the total of $4,100.53, was it not? A. Yes, sir.

Q. Now, Mr. Thompson, would you refer, again, please, to the books that you had a little while ago relative to the check of Mr. Jennings. Take the paying teller's book (hands witness book). Your attention was called to the paying teller's proof-book, under item of June 4th, and you were asked as to the amount of cash items that you turned over on that date to the paying teller, and your attention was called to figures $2,150.53? A. Yes, sir.

Q. That left a balance of $2,000 at that time, as shown on that book, didn't it? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. I call your attention to June 2d and ask you what the amount of the item is that you turned over to Mr. Jennings, as having come in on that date? I presume these are the items? A. As having come in on June 2d?

Q. On June 2d? A. On June 2d.

Q. On June 2d. I ask you to figure this up and ascertain the amount? A. $1,510.35.

Q. Is that the amount as entered correctly on the ticket of Mr. Jennings? Isn't it? A. Yes, sir.

Q. You find opposite, don't you, the $2,000 entry, "has not been received"? A. Yes.

Q. That $2,000 entry, on that date, which is in excess of the money you turned over, would account for the $2,000 that does not appear on this day? A. I don't know how it would.

Q. You don't know how it would? Well, suppose Mr. Jennings had taken on the 3d this $2,000 check which you speak of and had entered it up as having been received on the 3d, would that account for it? A. Where do you get it from?

Q. From you. A. How could he, when I didn't turn them over until the 4th.

Q. You don't say that you didn't turn it over until the 4th anywhere, do you? A. Yes.

Q. Where? A. Refer to the return item book under date of June 3d. This item wouldn't be listed by the paying teller until June 4th.

Q. But suppose he took it on June 3d and gave you a charge slip for it? A. Suppose he took it on June 3d and gave me a charge for it?

Q. Yes. A. Well, that would straighten my cash out all right, but I cannot understand how his cash would be straightened out. Of course, I don't pretend to know how that thing was done there; he may have had very good reason for doing it but just as I say, on the face of it, here, the first teller charge of $2,000 was received by me on June 3d and kept until June 4th, when I turned it over to him.

Q. Then the $2,000 that went in on June 3d is in excess of what you handed him, isn't it? A. Yes.

Q. That is $2,000 over on that date? A. Yes.

Q. Over what you handed him? A. Yes.

Q. Then they balance, don't they?

MR. CLARK: I object unless he explains what he means by "they balance."

Q. (By the Court.) Do you understand the question? A. Yes.

Q. You may answer it. A. The $2,000 on one day and the $2,000 on the other day balance in amounts, that is quite apparent; but they do not balance out the day's work.

Q. (By Mr. Smith.) But they do not balance out the day you have it there? A. No.

Q. But you think it balances as in amount? A. The $2,000 balances in amount, yes, sir, every time.

Q. Now, in that amount of $4,100, that you have testified to, you say that this slip shows that there was a $2,000 slip, don't you? A. I say that book shows a $2,000 charge.

Q. A $2,000 charge slip? A. Yes.

Q. You say that it may possibly be that a $2,000 check was taken out and a $2,000 charge slip given you? A. Yes, sir.

Q. Now, by that very return check the $1,508.33 and this $2,000 check appear right there, in the regular course of business, as coming into the bank, don't they? A. Yes, sir.

Q. So that anybody who examined those slips could see that there was a two thousand dollar check of Mr. Jennings and a $1,508.33 check of Mr. Meyer? A. No, sir.

Q. Why not? A. Because neither amounts carry the amount of the checks with them as listed on the exchange slips.

Q. But the amounts of the checks are perfectly open? A. Oh, yes, certainly.

Q. Suppose I gave you a check on my account, in the bank, and gave it to John Jones, who deposited it in the bank, who would it come to when it came back to the Roseville Trust Company, assuming I had an account there? A. It would come back to the bookkeeper, finally.

Q. Who would it come to first? A. It would either come to Mr. Jennings first or Mr. Mindnich, first. It was one of those arrangements that took into consideration—

Q. I am not speaking about Jennings or Mr. Mindnich, you see? You are thinking of something that I am not asking you, it may be. A. Well, your check would come either to Mr. Jennings or Mr. Mindnich, in the beginning.

Q. Why Mr. Jennings? A. Because he looked at the signatures.

Q. Who would they come to first? A. Either of those two.

Q. Messengers bring them in? A. Yes.

Q. Mindnich was the bookkeeper? A. Yes.

Q. Then the checks, in Mr. Jennings's case, would either go to Jennings or Mindnich? A. Yes, sir.

Q. And Mindnich would enter it up in the ledger, is that what you mean? A. No. Before it was entered in the ledger it would have to be verified for signature, and then entered in the ledger.

Q. Then would it come to you? A. No, sir. I would never see it if the check was good.

Q. How did you get this check? A. I didn't get the check.

Q. How did you get the item there of $2,000? A. Because it was a return item.

Q. From where? A. From the bookkeeper.

Q. Would it then appear that the bookkeeper had the check? A. No; it wouldn't necessarily appear that the bookkeeper—I might correct myself, there; it does not necessarily prove that I got it from the bookkeeper, either, because there was a basket there in which we put all our return items. Mr. Jennings examined and threw

out checks for signature, and I think he looked at them for dates, also, and there was possibly a dozen reasons why checks are thrown out and not charged against the account in the ledger. Either he might have put it there or Mr. Mindnich might have put it there, and when I went to make up the proof the next I would see was a proof of $2,000 not entered in my book.

Q. That would indicate to you that the teller had something which should be charged against you? A. No, sir.

Q. What would it mean? A. It might mean that it would be charged against anybody else; I don't know anything at all about who it should be charged against. He had sufficient reason for taking it out. He charged himself for the item. It might have been his check or anybody else's check.

Q. But who would you charge it against, as against you? A. I would charge it against the first teller.

Q. Then as far as you were concerned it was a slip which you would charge to the first teller, $2,000, isn't that right? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. HINDS:

Q. Mr. Thompson, your counsel has asked you concerning the meaning or meanings of a certain charge ticket of the first teller, Mr. Jennings, $2,000, and I ask you if it is not a fact that whatever the charge tickets was or whatever it meant in the ordinary course of the bank's business, it should have been included in Mr. Jennings's teller's proof of the following day, in addition to the $2,100.53 of cash items that are shown in his proof to have been received from you, whatever it was? A. Yes, sir; according to my way of reasoning.

Q. And that is according to the ordinary course of the bank's business, was it not?

MR. SMITH: I object. He has not said that. It is directly leading.

THE COURT: I think so.

Q. Is that a fact? A. Why, that is in accordance with the regular routine, yes, sir.

Q. Even if it was only a charge ticket it should be included? A. Yes, sir.

Q. I show you a large book and ask you what that is? A. The individual ledger, or ledger showing the balances on check accounts.

Q. Turn to the account of Mr. Jennings. It is marked, I believe, with a paper. Have you found it? A. Yes, sir.

Q. Will you examine that account and state whether, on the 31st day of May, 1913, or at any time thereafter, Mr. Jennings had a balance in the bank of the amount of $2,000? A. No, sir.

THE COURT: That refers to what year?

MR. HINDS: 1913.

Q. What is the maximum amount that Mr. Jennings could possibly have had in the bank after the 31st day of May, 1913? A. The maximum amount that he did have after May 31, 1913, was $105.30.

Q. You cannot tell from that ledger, can you, that he had even that amount? There may have been checks drawn, even against that amount, may there not, or does that show the precise amount he had on that day? A. It purports to show the amount he had every day.

Q. Will you state the course of business pursuant to which entries are made in this account, or were made in that account? A. The bookkeeper would get them in, either in the exchanges

or from the receiving or paying teller, in checks to be charged to the accounts in the individual ledger. He would daily charge them.

MR. HINDS: I offer this page in evidence. The book has not been marked in evidence, but the page of Mr. Jennings's checking account. It is not numbered, it is arranged alphabetically.

Marked Ex. P-96.

Q. Did Mr. Jennings have any other checking account in your institution except that one? A. No, sir.

Q. Now, is it a fact, concerning your receiving teller's cage, that it was entirely cleaned out at the end of each day? A. Yes, sir; unless there was some deposit that came in after three o'clock, and those were held over until the following morning.

Q. Those were cleaned out? A. No; they were held in there in the next day's business. It may be that a one or two dollar deposit came in and that they couldn't be entered in that day's business on account of closing having gone through. Outside of that the receiving teller, would start out, each morning with an empty till.

RE-CROSS EXAMINATION BY MR. SMITH:

Q. Mr. Jennings never claimed to you to have had a balance of $2,000 in the bank, did he?

MR. CLARK: I object to whether one of the defendants in this case made a claim of the witness. That is not binding on the plaintiff. We have not asked him with regard to any claim that Mr. Jennings made of him. Mr. Jennings is one of the defendants.

THE COURT: I see no objection to the question. You may answer it.

A. No; he never made that claim to me.

ELMER D. VAN TUBERGEN, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. HINDS:

Q. What is your occupation? A. I am a bank clerk.

Q. What bank? A. Merchant's National Bank, of Newark.

Q. What was your occupation in June, 1913? A. Bookkeeper.

Q. In the same bank? A. Yes, sir.

Q. I show you Exhibit P-5, purporting to be a face slip from your bank, in the Roseville Trust Company, and ask you what that is? A. What that is termed is an exchange slip.

Q. I show you two machine lists, one, P-47 D, and the other P-47 C, which have been affixed to the face slip, and ask you if you can state what those are? A. Those are itemized lists of checks of the Roseville Trust Company that were in the bank, that were sent to them.

Q. Can you state from your examination of these exhibits whether or not your Merchant's National Bank, on June 2, 1913, sent to the Roseville Trust Company, checks including a $2,000 check and a check for $1,508.33? A. I can.

Q. Is that a fact? A. Yes, sir; it is.

Q. You are here under subpoena, are you not? A. Yes, sir.

Q. You brought with you the ledger account, in your bank, of Walter H. Meier? A. I have.

Q. Will you look at that ledger account and

state to me whether Mr. Meier deposited in your bank on or about that day, a check for $2,000 and a check for $1,508.33? A. On May 31, 1913, he deposited those two checks.

Q. Can you state from your examination of that ledger sheet whether or not the $2,000 check was paid at the Roseville Trust Company? A. Yes.

Q. Was it paid? A. Evidently. It was not charged back to his account, which would be the custom if the check was returned not good.

Q. If it was not paid it would have been charged back, would it? A. Exactly.

MR. HINDS: I offer that ledger sheet in evidence.

Marked Ex. P-97.

MR. SMITH: I have no questions to ask this witness.

CROSS EXAMINATION BY MR. DEGRAW:

Q. These checks went through in the regular course of business, did they not? A. They did.

FRANK C. FERGUSON, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. HINDS:

Q. What is your occupation, Mr. Ferguson? A. President of the Union Trust Company, of New Jersey, Jersey City.

Q. How long have you been a banker? How long have you been in the banking business? A. Sixteen years.

Q. Have you had experience as a bank examiner? A. I have.

Q. What? A. Seven years experience.

Q. What has been your official position in that connection? A. I have been an ordinary examiner; in the case of the Roseville Trust Company I was an assistant in the liquidation.

Q. What bank positions have you held? A. I have served in all the various capacities, as bank clerk; I have been cashier of the People's Bank of East Orange; vice president of the Savings Investment & Trust Company, East Orange; president of the Union Trust Company of New Jersey, Jersey City.

Q. What is the reserve of that institution? A. About five million dollars.

Q. What was your occupation or employment shortly after August, 1913? A. I was a bank examiner at that time.

Q. Did you, in connection with such employment, examine the books of the Roseville Trust Company, with respect to the following accounts: Margaret E. Garrison, Annie Goeller, Anna Sander, Catherine Powers, John V. Dwyer, Alice A. Dowling, H. F. Lowther, Ida Chapman, and the checking account of A. R. Jennings, and the account of Matilda Reglin? A. Yes.

Q. In the course of your examinations did you make any memoranda or memorandum of your examination? A. I did.

The next item on this list which I have prepared concerns a check of $2,000. This check was a check drawn by Jennings on the Roseville Trust Company and given to Mr. Walter H. Meier on May 31, 1913. On the day he gave this check he did not have funds in the Roseville Trust Company to pay the same. Mr. Meier deposited the check in the Merchant's National Bank and the Merchant's National Bank sent it through the clearing house for collection, as it

was paid by the Roseville Trust Company on June 3, 1913. On that day on the morning of June 3d, it came to the Roseville Trust Company, in the exchanges, and was carried in the receiving teller's cash that night. In connection with this, and at this point, I might say that the cash on June 3, 1913, as shown by the two teller's books, appears to be $2,000 over, and that is explained in this way: The $2,000 check which Jennings drew against the trust company was carried in the receiving teller's cash; and he also carried the same amount in his own cash; consequently, when he made this adjustment of figures the next morning he had to reduce his cash $2,000.

Q. (By Mr. Hinds.) I call to your attention again paying teller's proof of June 4, 1913, which has been marked P-94 cash item $2,100.53, and ask if you have examined that entry in connection with the receiving teller's proof of June 3, 1913, P-33, which shows a credited cash item of $4,100.-53, and ask you to tell us what was the result of your examination of those items? A. The result of my examination of those items is this: I came to the conclusion that when this check came to the Roseville Trust Company on June 3, 1913, Jennings took the check from the exchanges and substituted a charge ticket. All no-good checks, charge tickets and the like are carried in the receiving teller's cash. The next morning they are handed to the paying teller. Jennings took the check from the receiving teller's cash and gave the receiving teller a charge ticket, and put the check in his own cash, thus inadvertently including them in both places, and then had to make his adjustment record showing that he had got his check the next morning from the receiving teller.

Q. When you say adjustment do you refer to the error appearing on the item $2,100? A. I do, yes. In other words, the receiving teller's cash items are $2,000 less on Jennings's book than they are on the receiving teller's book, while Jennings's checks are $2,000 more, one offsetting the other.

Q. (By Mr. Clark.) Mr. Ferguson, does the net result of your examination of this item indicate, or does it not indicate, a misappropriation of the money? A. The net result of this is that the Roseville Trust Company paid a check for $2,000 which was not good.

Q. (By Mr. Hinds.) I call to your attention an item concerning which testimony is given on the paying teller's proof of June 3, 1913, of $2,000, and ask if you have observed that item and have observed its position in the book, and if so, state the result of your examination respecting that item. A. This $2,000 item is Jennings's check and was put in here in order that the work of the day might be made to prove.

Q. What bearing has the result of that particular examination on the conclusion that you have just made previously? A. I think that it corroborates my opinion that a $2,000 check was paid by the Roseville Trust Company and there were no funds there to meet it.

MR. HINDS: I offer that page of the proof-book in evidence.

Page 76 of proof-book formerly marked P-32 now marked Ex. P-98.

Q. What was the result of your examination respecting the position on the page of that $2,000 item that you have just referred to? A. In that it is regular or irregular, is that what you mean?

Q. Yes. A. Irregular.

Q. In what respect is the position of that item irregular? A. Why—

Q. Show to the jury in what respect it is irregular, and what the result of that irregularity is? A. The fact that it is irregular is apparent on the face of it, in that it stands out all by itself and is subtracted from the amount of cash of that day.

Q. Now, proceed. Is that also in Mr. Jenning's handwriting? A. Yes, this is in Mr. Jennings's handwriting. Do you want me to tell anything more about the $2,000 check?

Q. Yes, tell the full result of your examination. A. This $2,000 check, as I have told you, was handed by the receiving teller to the paying teller and carried by the paying teller in his cash. I made a great effort to find how long the check remained in the cash, but inasmuch as there were so many other checks and cash items passing through the cash at the same time it was impossible for me to tell when that check went out of the cash.

Q. (By Mr. Clark.) Mr. Ferguson, we have so much in this case that we really do not want to confuse it any more than is necessary. The tracing of this item would be comparatively of no help in showing what the books show as to the coming in and paying of that check, would it? A. No.

DIRECT EXAMINATION (continued) BY MR. HINDS:

Q. Mr. Ferguson, I do not recall whether in referring to the $2,000 Jennings's check transaction you mentioned as one of the facts which you had found in your examination the fact that at the time that check was drawn Mr. Jennings had

no such balance in the trust company in his account. A. I remember saying that.

Q. That was a fact? A. That was a fact.

Q. What bearing did that have on the result of your examination?

MR. SMITH: I object to what bearing it had on the result.

Question withdrawn.

THE COURT: Which claim is this?

MR. HINDS: The $2,000 Jennings check given to Mr. Meier.

THE COURT: In whose account?

MR. HINDS: Mr. Jennings's own checking account.

EDWARD F. CLORAN, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. HINDS:

Q. Mr. Cloran, what is your occupation? A. Public Accountant and Auditor.

Q. How long has that been your occupation? A. Twenty-one or twenty-two years.

Q. With what firms have you been connected in that occupation? A. I have been identified with the senior accounting staffs of Barrow, Wade, Guthrie & Company, Patterson, Teele & Dennis, the National Audit Company, the American Audit Company, Miller, Franklin & Stevenson, and R. Douglas Greet.

Q. Where are these establishments? A. Barrow, Wade, Guthrie & Company, Patterson, Teele & Dennis, Miller, Franklin & Stevenson and the National Audit Company were all of New York. I was identified with the Boston staff of the American Audit, R. Douglas Greet, and also Miller, Franklin & Stevenson.

Q. Has your experience included the auditing of the accounts of banking institutions? A. It has.

Q. What ones? A. Oh, I have examined a number of them. I examined the Gate City National of Atlanta, Georgia; the defalcation of the Globe National, in Boston, Massachusetts; I have examined the First National and the National Security of Lynn, Massachusetts, the Five Cent Savings Bank of Salem, Massachusetts—

Q. You need not give them all. Has your experience in auditing the accounts of banking institutions included any institutions where it was insolvent and where numerous irregularities were discovered? A. The Globe National, of Boston, and the Gate City, of Atlanta, Georgia, and the Five Cent Savings, of Salem, Massachusetts.

Q. Have you examined the books and records of the Roseville Trust Company? A. I have. I would qualify that. I have examined the books and records of the Roseville Trust Company—the accounts and files of the Roseville Trust Company—the books, record and accounts in so far as they have related to the items contained in the proof of claim that was filed by the banking department.

Q. And those books and records were in the custody of the banking department during your examination? A. They were.

Q. Now, are you ready to take up your investigation of the item of $2000 corresponding to Mr. Jennings's check on June 3, 1913? A. Yes.

Q. (Handing books to witness) Do you need another side book, or have you got what you want? A. I have what I want, I think.

Q. Here is the check-book, the stub-book (handing book to witness). A. This played no part in my investigation.

Q. You simply learned of it at the trial? A. Yes. And this played no part (indicating book).

MR. HINDS: Indicating the pass-book of Mr. Meier in the Merchant's National Bank.

WITNESS: With reference to a $2000 item that my investigation disclosed had been charged under June 3, 1913, to the first teller, appearing in the return items book—

BY THE COURT:

Q. Is that the Reglin account? A. No, this is the $2000 check account, your Honor, of Jennings, the $2000 check of Jennings.

Q. It is not in the saving's bank account? A. No, it is drawn on a checking account, appearing here as marked Exhibit P-95. —indicating to me that an item had come through the clearing house to the Roseville Trust Company, and had been removed by the first teller—

Q. (By Mr. Smith) Had been what? A. Had been removed by the first teller. —and in its place a ticket, or charge ticket, had been substituted in place, or in lieu, thereof, charging the first teller with the $2000, that being evidenced by the fact that if the check remained in there the name would appear there, which was the first teller; the name, such as you see in the other case here, would appear there, which is the name of the maker of the instrument. In this case it is the first teller, indicating that whatever was in there had been removed and this debit ticket put in instead. In an effort to find out just what this particular $2000 item was, I searched the files and searched Jennings's account in the checking ledger, and failed to find out that the $2000 item had been charged to his account.

By Mr. Hinds:

Q. You now refer to this large ledger where the account has been marked P-96? A. P-96.

Q. You say that you failed to find any— A. I failed to find anything in there. I further found that the account would not stand any such charge, inasmuch as under date of May 17, 1913, the balance then standing as to the credit of A. R. or M. L. Jennings was in the sum of $105.90.

By Mr. Clark:

Q. Mr. Cloran, were there any entries made in that account after May 17, 1913? A. There was. It has no date, but it appears to be a withdrawal of the $105.90.

Q. Any others? A. None whatever.

By Mr. Hinds:

Q. So that the balance would be what amount on the date of this check? A. Well, I can't say. There might not have been anything there. That entry following the date that I have mentioned may be a debit on that book. Sometimes when they show an entry, or entries, right along, the dates do not appear. They appear as under the same date. So that the withdrawal of that may be on the date of the balance, May 17th, or some—

Q. What is the maximum amount that could possibly appear in Mr. Jennings's account on that date? A. The maximum amount would be $105.90. Whether or not the amount was there I do not know.

Q. (By the Court) What is the bearing of that fact? A. The fact was, your Honor, that the account did not contain a sufficient sum of money to enable a check of $2000 to have been charged there.

Mr. Clark: Your Honor has in your mind

that this check, differing from all other matters tainly, in excess of $105 there, so that, as we regard it, and press it before this Court, it is equivalent to the actual abstraction of $2000 in cash. I speak of that because all of these other accounts have a name, and the abstraction claimed is said to have occurred with reference to this account and the other account. Here we are only interested in offering to this Court Jennings's account as showing that it could not have paid $2000, and therefore, if a $2000 check drawn on the bank was honored and paid, $2000 of the trust company's cash was abstracted.

MR. SMITH: That does not necessarily follow at all, if your Honor please.

THE COURT: Proceed.

WITNESS: In connection with the return items I endeavored to find from the clearing slips which I found in the files of the company something that would tend to throw light on what this charge at the top, "First teller", was in reality. In those files I found nothing, absolutely nothing; but in bringing this matter to the attention of the banking department, they produced for my examination this and some other papers (indicating). Then I found this to be an exchange slip of the Merchants' National Bank against the Roseville Trust Company for items sent to the Roseville Trust Company, dated June 2, 1913, with the machine slips, which were two in number, attached. This first machine slip, by the way, would be the items received in the Merchant's National Bank against the Roseville Trust Company on June 2, 1913. The second machine slip would be the items received in the Merchant's National Bank against the Roseville Trust Company on the morning of

June 3rd, or before these clearings had been made against the bank. This is of June 2d, amounting to $5205.25. This is the first item, appearing at the top of the ticket. This is in the morning of the 3d, previous to sending the items to the Roseville Trust Company for payment, amounting to $1258.-25, which is the second item. These clearings were paid by the Roseville Trust Company in total. This slip calls for payment to the Union National Bank, of Newark, N. J.

By the Court:

Q. That is, the $5206.25? A. $6464.50, the sum of the two items. Referring to the machine list marked for plaintiff "Exhibit P-47 C," I found at the bottom of the list an item of $2000, which, in conjunction with a check for $1508.33, which appeared just above that, satisfied me that it was identically the same item that that was up there that came through the clearing house.

Q. You say "that up there." What is that? A. The item charged against the first teller under date of June 3d.

By Mr. Hinds:

Q. In what book? A. Return items book.

Q. What exhibit? A. Exhibit P-98. Desiring to find, if possible, in what way this was handled, and being unable to find it in any of the records of the bank, I made an examination of the proof book. A proof book in a bank in a statement of positive items. I refer probably technically to this. I mean each figure represents something substantial; it represents a material asset of the bank; and it is not made up, in any sense of the word, with negative figures. By that I mean that they use no negative figures in a proof to prove a cash. Under June 3, 1913, in plaintiff's Exhibit P-98, I found the proof to be made up of positive figures,

but a negative figure in the amount of $2000 put in there. That $2000 was subsequently put in there, because it is deducted from that figure there to make that figure there.

THE COURT: Referring to what?

MR. HINDS: Page 776, which page has been marked P-98, found in the paying teller's proof, which has been marked P-32 for identification.

WITNESS: That is a negative figure in a proof, and it does not belong in the proof.

BY MR. SMITH:

Q. Will you explain to us what a negative figure is? A. Opposite to a positive figure; that is, instead of being added in here it is deducted from.

Q. That is what you call a negative figure? A. Yes. When we speak of postive figures we take in figures representing assets, and we add them to obtain a proof. Here is a figure that is pushed in and deducted for the purpose of forcing this proof to agree with his cash, the cash items of that day. In handling the proof of cash under date of June 2d in that manner, it necessitated an adjustment of that condition the next day, for this reason; that $2000—this is simply an assumption —that the $2000 was put in here in a negative form, inasmuch as it was a check carried, or some item carried, in the amount of $2000 in the cash items of the paying teller on June 3d, and in finding the total of those cash items that something, a check assumed, was added in, and had to be taken out, because it played no part in his proof that day, inasmuch as the items that were then in the hands of the receiving teller had not come to him and would not come to him until either the close of the day or the morning of the next

day. That item did come to him on the morning of the next day, which was that debit ticket indicated by the receiving teller in the returned items book, plaintiff's Exhibit P-95. That had to be given to the receiving teller, who in all the banks is charged with everything that enters the bank, whether it comes in by the window or through the clearing; he is charged with it, and it has to be accounted for through him; so that he in his proof has to take in his exchanges, and, naturally, to prove the day's business he had to take that $2000 item in, when the $2000 debit ticket came to the paying teller on the morning of the 4th with the receiving teller's cash, the cash items came to him, this was in it. If he was to take in the total amount of cash items turned over to him on the next morning by the receiving teller into his proof, at the same time carrying the original item held in his own cash, he would have $4000 to be accounted for instead of $2000, and the result was that the paying teller's proof on June 3d showed—the receiving teller's proof on June 3d showed that he delivered to the paying teller $4100.53, and the paying teller in the morning in his proof showed that he received from the receiving teller $2100.53.

By Mr. Hinds:

Q. In your examination of the books do you find any erasure involved in the items of the paying teller's proof of $2100.53? A. Yes, it was a steel erasure.

Q. What was the result of your examination of the erasure? A. Nothing more than, I should imagine, that he took in the original the total of the items that came from the receiving teller.

Objected to.

Mr. Clark: We shall consent to the answer being stricken out.

Q. I am going to ask you a hypothetical question, and I am going to ask you to assume the existence of certain facts which you have not found in your examination, but which have been testified to and supported by exhibits during the course of this trial, which has been subsequent to your examination. I am going first to ask you the question, and then I am going to state the assumptions, and then I am going to repeat the question. I ask you whether that check, whose existence you have inferred from the examination of that book, is not the same check which Mr. Jennings gave to Mr. Walter H. Meier on the 31st day of May, 1913? And in answering that question I ask you to assume the existence of the following facts; first, that, as testified to by Mr. Meier, and as shown by his check-book in the Merchants National Bank, the page in which book, May 31, 1913, has been marked P-69; the fact that he received from Mr. Jennings on that date a check for $2000, along with a check for $1508.33; I ask you to also assume it to be a fact, as testified to by Mr. Meier, that he deposited the $2000 check of Mr. Jennings, along with the $1508.33 check of the other Mr. Meyer, in the Merchants National Bank, and I ask you to assume it to be a fact that that deposit is shown in Mr. Meier's pass-book in the Merchants National Bank; I ask you to assume it also to be the fact, as testified to by a gentleman from the Merchants National Bank, that those two checks, along with other checks, drawn upon the Roseville Trust Company, were sent by the Merchants National Bank on the morning of June 3, 1913, to the Roseville Trust Company, and were paid, and I call your attention to the fact that the machine slip contained in the exchanges concerning which you have testified contains in conjunction one with the other an item of $2000 and an item of $1508.33. Now, as-

suming those things to be facts, I ask you as an expert was the check of Mr. Jennings's of $2000, to the order of Mr. Meier, the check concerning which you have drawn inferences from the facts which you found in your own examination? A. It is.

CROSS EXAMINATION BY MR. SMITH:

Q. You could not possibly have answered that question any other way, could you? A. The question answers itself.

Q. This $2000 check that you speak of, of Mr. Jennings's, you say the paying teller took. You do not know anything about that, do you? You don't know whether Mr. Thompson, the receiving teller, gave it to him, or not, do you? A. Well, I didn't intend to imply that there was any force used here.

Q. I do not care whether there was force or not, or whether he went in and, without the consent of Mr. Thompson, took it. You mean that it passed from Mr. Thompson to Mr. Jennings, do you not—the paying teller? A. It passed from Mr. Thompson to Mr. Jennings. What I meant to say was that the receiving teller received from the paying teller, in lieu of this check, a debit ticket against the first teller.

Q. That is as plain as can be, is it not? A. Certainly.

Q. In other words, if Mr. Jennings got this check, he gave to the receiving teller a charge against himself for that amount of money? A. Certainly.

Q. That is as plain as can be? A. Certainly, nothing else.

Q. Nothing mysterious about it, nothing extraordinary about it, is there? It is as plain as day? A. As far as the debit ticket, but there is nothing that indicates, or fixes, the point whether there

was a check or who it was drawn on or who drew the check.

Q. Well, why do you say that, then? A. Well, I know it, because it had to come through the clearings.

Q. Then you knew it was a check? A. Yes, but I didn't know who signed it or on what account the check was drawn.

Q. Well, taking the hypothetical question that was asked you, I assume, now, that you know it was Mr. Jennings's check, do you not? A. I do, yes.

Q. Now, assuming that it was Mr. Jennings's check, the fact that he took the check and gave a charge slip against himself to Mr. Thompson is plainly apparent from the book? A. No.

Q. It is not? A. I do not say anything of the kind; I do not say that Mr. Thompson had any knowledge that the check was there.

Q. What would he have knowledge of as to this charge slip? A. Merely that it was a charge against the paying teller of $2000.

Q. Why do you say that Mr. Jennings took the check from Mr. Thompson, if you think now that Mr. Thompson did not even know that he had it? A. I say there, that, inasmuch as Thompson recorded the debit ticket against the first teller, that I could assume nothing else but that either the paying teller had, either without his knowledge or otherwise, taken the $2000 item out of the clearings and placed therein a debit ticket in its place. I do not know that Thompson ever had knowledge of the check or that Jennings had taken the check. The indications here are that all that Thompson ever saw was a debit ticket.

Q. Then why did you use the language that Mr. Jennings took the check from Mr. Thompson? A. I may have been a little indiscreet.

Q. It was not the exuberance of a paid witness, was it? A. It was not intentional.

AUGUSTUS R. JENNINGS resumes the stand in behalf of defendants.

* * * * * * * * *

BY MR. DEGRAW:

Q. Mr. Jennings, it is charged that you used $2000 of the bank's money to pay to one Meier to purchase an interest in a moving picture concern. Will you explain to the Court and Jury the circumstances of that transaction? A. I was approached by Mr. Charles F. Meyer regarding this proposition, and he explained to me that it was a very good chance to acquire a picture business. At that time Mr. Meyer was one of the proprietors of the Roseville Hotel, and was about to sell his interest there. I was desirous, and had been for some time, of getting out of the banking business. I went down with Mr. Meyer and looked over this proposition, and had a talk with Mr. Walter Meier, went over some figures that he gave us showing the profits of the business for the last five or six months. I came back to the bank. I spoke to Mr. Smith regarding—

MR. CLARK: Now, if your Honor please, so that we may not be untimely again, I make my objection to any conversations with Mr. Smith, on the ground that they include matters which are not relevant or material to this issue, and also on the ground that it is not competent, as previously stated.

THE COURT: For the reasons previously given?

MR. CLARK: Yes.

THE COURT: I shall overrule the objection, and allow the question to be answered.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

WITNESS: I spoke to Mr. Smith regarding the proposition, and asked him what he thought of it. He said he thought it was all right. I asked him then if he could help me out. I told him that I thought I had a party who would be glad to do it, and I wanted to see them first, and in case they didn't care to go into it, I asked him if he would be in a position to help me out in the way of a note. He said he didn't know. I saw the party, and they did not seem inclined to go into the proposition, and I came back to see Mr. Smith, and I told Mr. Smith—

Q. What party was that? A. That party that I had spoken to Mr. Smith about, thinking that I could possibly interest them.

Q. In what way? A. To the extent of putting up the money or loaning the money. The matter dragged along three or four days, and Mr. Meier told me our option was about to expire, and we would have to say yes or no. I again spoke to Mr. Smith, and he said "Go ahead and give them your check for it." I gave the check to them, and it came back to the bank and it was held up at the bank for some time, I can't say how long, possibly a week or ten days. I spoke to Mr. Smith about it again, and he said, "Give me your note for it, and I will fix it up."

Q. If you know, did Mr. Smith know the condition of your bank account there at the Roseville Trust Company?

MR. CLARK: We object on the same grounds if your Honor please.

THE COURT: I shall allow the question.

Plaintiff's counsel pray an exception to this ruling of the court.

Exception noted as ground of appeal.

A. I don't know.

Q. Go ahead. A. I gave Mr. Smith a note for $2000, understanding that it was to be discounted outside of the Roseville Trust Company.

MR. CLARK: I do not like to arise to interrupt, I understand that my objection runs to this whole line of responses. We have here the additional objection that he is now testifying to his understanding.

THE COURT: I think it would probably be better to make specific objections to specific questions. Sometimes some uncertainty arises as to just where the sphere of the objection terminates.

(Answer read.)

THE COURT: One objection is to the use of the word "understanding." It makes the question uncertain. I sustain the objection to the question on that ground.

MR. CLARK: If your Honor please, there is no specific question. The witness is narrating his understanding.

THE COURT: I sustain the objection to the statement which contains the word "understanding on the ground that it makes the answer uncertain.

MR. CLARK: I ask that so much of the witness's answer as relates to his conversation with Mr. Smith on this matter be excluded on the grounds that we have mentioned before.

THE COURT: That motion I shall deny, and give you an exception.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Was this note to be discounted at the Roseville Trust Company? A. No, sir.

MR. CLARK: If your Honor please we object to the question as leading of the worst kind.

THE COURT: Yes, I think it is leading, and it seems to me to ask for the witness's conclusion as to some arrangement which is not detailed. I sustain the objection to it as leading.

Q. Now, Mr. Jennings, did you give a check for this $2000 item? A. I did.

Q. Was it paid by the Roseville bank? A. Yes, sir.

Q. In what manner did that go through the records of the Roseville Bank? A. Paid in the regular way, through the exchanges.

Q. What became of it then?

BY THE COURT:

Q. (Interposing.) Let me understand. Was that drawn on your checking account? A. It was a check drawn by me on the Roseville Trust Company and signed by me.

Q. Was it paid out of your checking account? A. No, sir; it was not.

Q. You had one? A. I did.

BY MR. DEGRAW:

Q. You knew when the check was given that you did not have sufficient funds there to meet the amount of the check in your checking account? A. I did.

Q. (By the Court.) You did have sufficient funds? A. No, I did not.

Q. (By Mr. DeGraw.) You knew that you did not? A. I knew that I did not.

Q. Mr. Jennings, can you show us the record of the check as it appears in the books of the

bank by referring to the bank's books? A. You mean the whole record of the check from the time it came into the institution?

Q. Yes. A. Yes, sir.

Q. What books would you like to have? A. First I want the Merchants National Bank exchange slip of that date.

10

At one o'clock, P. M., the court takes a recess of one hour.

After Recess.

Augustus R. Jennings resumes the stand in behalf of defendants.

20

Direct Examination (Continued) by Mr. DeGraw:

Mr. DeGraw: Have you the Merchants National Bank exchange slip here, Mr. Clark?

(Paper produced by plaintiff's counsel and handed to witness.)

Q. What other records besides the exchange slips do you want? A. The receiving teller's
30 proof and the paying teller's proof.

(Books handed to witness.)

Witness: And the return item book.

(Book handed to witness.)

Q. Any other books? A. I think that is all.

Q. What have you there? A. I have the return item book, the exchange slip—

Q. Refer to them by exhibit number. A. Re-
40 turn item book, marked Exhibit P-26 for identi-

fication; the Merchants National Bank exchange slip, which is marked P-47 B; also the machine list, which is marked P-47 D, and the check here of Charles F. Meyer, which is marked P-47 E; another machine list—I don't know where it came from; I presume from the Merchants National Bank; it is not marked in any way—marked P-47 C; I have the receiving teller's proof book, which is marked P-22 for identification, and the paying teller's proof book, which is marked P-32 for identification.

Q. Now, Mr. Jennings, will you detail circumstances and the course which that item of $2000 took? A. This $2000 item in question was received by the Merchant's National Bank under date of June 2, 1913; it was included in their exchanges of that night, and sent to the Roseville Trust Company under date of June 3d, and received by them on that date.

Q. Now, who would they go to as they came to the bank, those exchanges, in the regular course of business? A. The bookkeeper.

Q. What was done with them then? A. They were checked off to see that these machine lists were correct, and after that they were given to the paying teller to pass on the signatures; they were then returned to the bookkeeper for the correctness of indorsement, and posted to the various accounts.

Q. In the regular course of business what would happen to this item of $2000, or check drawn by you? A. It would be thrown out by the bookkeeper and placed in the basket provided for that purpose by the bookkeeper.

Q. What would happen to it then? A. It would then go to the receiving teller.

Q. And what would he do with it? A. List it in the return items book.

Q. And then what would happen to it? A. If he had not had any instruction from anyone with regard to that check, he would return it to the bank who had sent it to the Roseville Trust Company and get the money on the check.

Q. Can you tell the course that this particular check took, as far as the records of the bank are concerned? A. Yes, sir.

Q. What was it? A. This check was evidently put in the basket by either Mr. Mindnich or his assistant. When I say "the basket," I mean in the window between the bookkeeper's department and the receiving teller's department, in which he placed items that were not good, items returned for indorsement and items returned for signature. I took that check out of this basket, put it in my own cash, and gave Mr. Thompson a first teller's charge—in other words, a charge against my department—for the amount of the check.

Q. Why was that done? A. For the simple reason that I did not think it was necessary to show Mr. Thompson, or any one else, as far as that was concerned, why this check was given.

Q. What then happened to the check? A. I held it in my cash.

Q. For how long? A. I can't say exactly.

Q. What became of it after that? A. Subsequently it was taken out.

Q. When you say you held it in your cash, among what items did you hold it, or where was it held? A. With the cash sundries, or cash items.

Q. You say you do not know what became of it? A. I don't think I said that.

THE COURT: He said it was subsequently taken out.

Q. You said it had been taken out. Well, what was put in its place? A. I don't know.

Q. That would cause your cash to be short on the day on which it was taken out, would it not? A. It would, if something had not been put in place of it.

Q. Mr. Jennings, when you spoke to Mr. Smith regarding this check coming through, tell us, as nearly as you can, what was said.

MR. CLARK: If your Honor please, I renew our objection to this question for the same reasons given for objecting to similar questions earlier, as incompetent and irrelevant.

THE COURT: The ground being that requests or instructions from Mr. Smith are irrelevant?

MR. CLARK: Yes, and on the ground that any statement that was made by Mr. Smith, under circumstances of this case, is not binding on the plaintiff.

THE COURT: That is the same question, I think, on which I have ruled. I shall overrule the objection.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. I think I testified this morning that I spoke to Mr. Smith about the fact that my option was about to expire on this proposition, and Mr. Smith told me to put the check through—in other words, to give Meier a check for the amount—that he would take care of it when it came up.

Q. How was he to take care of it? A. Through the medium of a note.

Q. And where was that note to be discounted.

MR. CLARK: My objection runs to all these questions, if your Honor please.

THE COURT: Upon the grounds just stated?

MR. CLARK: Yes.

THE COURT: I shall allow the question and overrule the objection.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Outside of the Roseville Trust Company.

Q. When was that note given and to whom? A. The note was given a week or ten days after the check was received at the bank.

Q. And to whom? A. Mr. Smith.

Q. (By the Court.) Your note? A. My note; yes, sir.

Q. (By Mr. DeGraw.) Has that note ever been presented to you? A. No, sir.

Q. Now, that $2,000 check, again. You knew at the time that you signed a $2,000 check, you being an employee, on your own account, when you knew you did not have any funds to meet it, that it was a crime, did you not? A. No.

Q. Don't you know now that it was a crime? A. No, sir.

Q. Did you know it to be a crime at the time to permit a check for $2,000 to be paid by the bank, drawn on your account, which was not good for it, you being an employee of the bank? A. No, I did not.

Q. Now, this note that you say you gave to Mr. Smith a week or ten days later for $2,000, what was the period of that note? A. I think three months.

Q. Did you make any effort to pay that sum to the bank? A. No, sir.

Q. You did not have any funds at the time it became due, did you? A. I did not.

Q. You could not have paid it if it had been demanded of you, could you? A. Absolutely not.

Q. And you knew at the time that you made that $2,000 check, and at the time, ten days later, when you gave the note, that you could not pay, did you not? A. No, sir; I did not.

Q. How long was that before the mortgage was foreclosed on the house in which you say you had a $200 equity? A. How long before was that?

Q. Yes. A. I don't remember exactly when that mortgage was foreclosed; it was some time after that. I can't give you the exact date.

Q. And yet your circumstances on June 3, 1913, and ten days later, which would be the 13th, were such that you thought you would be able to pay that $2,000 note when it became due? A. I thought I would be able to take care of that note out of the profits of the business; yes, sir.

Q. What was the date of that note? A. I can't tell you; I don't know exactly when I gave it.

Q. At what bank was it payable? A. Payable at the Roseville Trust Company.

Q. Did you state the period of the note? A. I think I said three months.

Q. Do you know where the note is now? A. I do not.

Q. Have you ever seen it since that date? A. I have not.

Q. Has any demand ever been made for payment of it by anybody? A. No, sir.

Q. Not by the banking department either? A. No, sir.

Q. As far as you know, that note was never found by anybody after the bank closed? A. That I don't know.

Q. Well, do you know of its having been found by anybody? A. I do not know of its having been found; no, sir.

JUROR NO. 12. Your Honor, I would like you to put me right on this thing. Counsel here says to the witness, "Did you not know it was a crime at that time to give a note for $2,000, when you knew that your account in the bank did not have that amount—the amount of money in the bank to give that?" I have been under the impression, and I had it come right home to me, where any well rated citizen can go to any bank and give a note for a certain amount of money. For instance, if the bank that I deal with now—if I went to the president of the bank and asked him if he would let me have $2,000, undoubtedly he would look up my rating, and if I was all right and could give the necessary security, I could get that. And the counsel here says, "Don't you know that that was a crime?" Well, I would like to have the counsel point out to me and the rest of the jurors where it was a crime.

MR. HINDS: I think the juror has misunderstood my question. The question I asked Mr. Jennings was, "Did you not know it to be a crime for you, an employee of the bank" —that was the outstanding feature—"to cause or permit to be paid a $2,000 check drawn upon the bank, at your own institution, in which you did not have funds?" I assert that was a crime, and I shall ask your Honor so to charge. I shall refer your Honor to the statute. I also referred the witness to his having ten days later given his own note to the institution, in the apparent

effort to make his previous crime look regular. I asked him, if, in spite of his having given his own note ten days later, if he did so, if it was any less a crime for him, an employee, to overdraw his account $2,000.

JUROR NO. 12. I understand it now; I misunderstood it.

MR. HINDS: It is no crime for an outside citizen to overdraw his account or to put over a bad note.

MR. HINDS: Now, I refer to Jennings's own $2,000 case.

Q. Mr. Jennings, you say that you kept that $2,000 check of yours which had been paid by the trust company, and for which your account was not good—you say you kept that item in your cage for several days? A. I think I so testified.

Q. During the period when you were holding that cash in your cage, even on your own statement that you later gave Mr. Smith a note for it you had the use of the money twice while it was in your cage, didn't you, while the check was in your cage which the bank had paid? A. I had the use of the money?

Q. You had the use of the bank's $2,000 for that period twice, didn't you? A. The check had been paid.

Q. But you had the use of that $2,000 of the bank's money, on your own statement, didn't you? A. No; I think Mr. Meier had the use of the money.

Q. But it was in your transaction, wasn't it? A. Yes.

Q. Did you make a written proposition to the board of directors, or to the executive committee, for the use of $2,000 of the bank's money, so that you could pay Mr. Meier? A. I did not.

Q. You did not call that matter to the attention of the board of directors at all, did you? A. No, sir.

Q. Didn't you know that it was a crime for you, as the teller of a bank, to obtain the use of $2,000 of the bank's money without making a written proposition to the board of directors? A. No, sir.

MR. SMITH: I object. The question was already asked yesterday, and answered.

THE COURT: You may answer the question.

A. I answered that, no, sir.

Q. Apparently, when you took up your duties as teller of the Roseville Trust Company you didn't read the trust company act to see what duties the law imposes upon a teller, did you? A. No, I don't think I did.

Q. Now, look at P-98 and P-94, which are contained in the paying teller's proof, marked P-32, and state whether those two pages of the proof are in your handwriting? A. Yes, sir.

Q. And that item of $2,100.53 over the erasure is in your hand, is it not? A. It is all in my handwriting.

Q. The $2,000 over there? A. That is in my writing.

Q. Are there any figures in either of those two pages there not in your handwriting except the exhibit marks? A. That is all in my writing.

RE-DIRECT EXAMINATION BY MR. SMITH:

Q. Now, Mr. Jennings, Mr. Hinds has spoken about this $2,000 item of your proof-book. See if you can find it, will you? Will you tell me

whether or not that $2,000 item in your check appears on your proof-book of that date? A. Yes, sir.

Q. Was it there on the day you had the check? A. On June 3d?

Q. Did you put it in your book on that day? A. Yes, sir.

Q. Has it appeared there ever since? A. Yes, sir.

Q. Is that the regular way of putting other items in your book? A. It is not in the regular place.

Q. Where should it appear? A. It should appear up here in the receiving teller's credits.

Q. Instead of that it is down here opposite— A. Put down here, added in at the end of the day, which means I discovered I had a $2,000 error, found it out and added it in there.

Q. That is, $32,000 and $1,000? A. $33,000.

Q. Which is the balance brought forward? A. This $33,000 is the amount on hand, including the checks and cash for the day. This $33,000 is what I received; in other words, what I received from the receiving teller and what I had in the cash on that day.

Q. Has that been on the books ever since that day? A. Yes.

Q. Now, Mr. Jennings, you say that at the time you cashed this $2,000 check that Mr. Smith had told you to cash it and that he would provide for it with this note? A. Mr. Smith told me to give the check and he would take care of it.

Q. Is that the reason you paid him? A. Yes, sir.

Q. Your check, when cashed would have to go through the exchange, wouldn't it? A. It did go through the exchange.

Q. That would go first to whom? A. The bookkeeper.

Q. Then the bookkeeper would see the check? A. Yes, sir.

Q. It would go through him to whom? A. In this instance it would go into the basket and be returned to the receiving teller.

Q. Then the receiving teller would see the check? A. If he got the check he would yes.

Q. From there the check would go to you, I presume, to be paid? A. From there the check would go to me the next day if it wasn't paid and it was held in the cash.

RAYMOND E. SMITH, sworn in behalf of plaintiff in rebuttal.

* * * * * * * * *

Q. Now, Mr. Smith, it has been testified here that a $2000 check of Mr. Jennings on the trust company, dated May 31, 1913, came in to the order of one Walter H. Meier—came in and was paid on June 3, 1913, and was thereafter carried in Mr. Jennings's cash. Did you, at the time, know anything of that transaction? A. I did not know that Mr. Jennings had drawn a check on the Roseville Trust Company. My attention was called to the exchanges on that day by one of the force—I think it was Mr. Jennings—as having been looked over, or looked through, by Mr. Jennings, and a charge ticket of $2000 substituted for something else. I didn't know what the something else was at that time.

Q. By "exchanges" do you mean checks which came in from the Merchants National Bank and other banks? A. Yes, the exchanges came in to us from the Union National Bank, from the various banks. The Union National Bank acted as a clearing house for us.

Q. Those included the Merchants Bank's checks, did they? A. Yes, sir.

Q. Mr. Jennings has said, here, that he asked you to make it possible for him to put up $2000, as his part of the moving picture theatre, about that time, and that you had instructed him to put his own check for $2000 through and that you would take care of it. Did any such conversation occur? A. No, sir; I never instructed Mr. Jennings or never advised him to draw the check.

Q. Did he make such a suggestion to you, about a moving picture venture? A. He came to me and told me he was going to—thought of buying a moving picture place with a Mr. Meyer, and wanted me to help him. I said if I possibly could help him I would.

Q. What further, if anything, did you say? A. I didn't say anything else that I know of.

Q. Did you say anything to the effect or in substance that you desired him to give his check for $2000 on the institution, which you would take care of? A. No, sir; I never did that.

Q. Now, Mr. Jennings has said that eight or ten days after the check was paid he gave you a note, which you promised to have discounted at some other bank. Is that a fact? A. No, sir; I never saw any note at all from Mr. Jennings for $2000.

Q. Did you ever tell him that if he would give you a note you would procure it to be discounted by another bank, or at the Roseville Bank, or any bank? A. No, sir; the only time that we talked that matter over was when he wanted me to help him raise the money. I told him I would do the best I could for him, "but," I said, "at this time money is so tight I don't believe we can raise it." I said, "Of course, we cannot put a note through the Roseville Trust Company. That is the substance of the conversation, when we were talking about raising the money.

Charge.

ADAMS, J.

Gentlemen of the Jury. This has been a long case, and you have followed it with a patient and intelligent attention which the Court is glad to recognize. The able counsel who have represented the respective parties have done everything possible to make easier your work and mine.

What I now desire to do is not to recapitulate all the testimony which we have been hearing for many days, and which has been ably presented, analyzed and discussed in your hearing, and which you, no doubt, remember very well, but rather to assist the jury, and if possible, to simplify this mass of proof, and to adopt a procedure that will take the judgment of the jury separately as to the different items which compose the plaintiff's case, as the plaintiff states it in its own complaint, so that, if your judgment or my ruling as to any one item should not meet the approval of the court of review, the whole case would not have to go down owing to any uncertainty as to just what your verdict did mean, but a correction of that particular item might be made by itself. You are the judges of the facts; that is your province.

This action is brought by a representative of the Roseville Trust Company upon a written contract, which has been called a bond, but is not in form a bond, given by A. Randolph Jennings and his surety, the American Surety Company, to the Roseville Trust Company. The gist of this written contract, which may be called, as it is called by counsel, a policy of indemnity, is this: Mr. Jennings, the principal, and the American Surety Company, as surety, who are the two defendants, in consideration of an agreed annual

premium, bind themselves by this instrument to pay to the Roseville Trust Company such pecuniary loss, not exceeding $10,000, as the trust company shall have sustained of its money, funds or other personal property, or belonging to others, for which the trust company is legally responsible, stolen, embezzled, wrongfully abstracted or wilfully misapplied by said Jennings during his employment in any position in the employ of said trust company, commencing December 12, 1908, and ending upon the termination of such employment.

This action was brought October 5, 1914. The plaintiff's complaint alleges that between December 12, 1908, the commencement of Mr. Jennings's employment, and August 13, 1913, at which latter date the employment terminated, the defendant Jennings was dishonest, and in connection with his employment stole, embezzled, wrongfully abstracted and wilfully misapplied money, funds and other personal property belonging to the plaintiff, as representative of the trust company, and others, to whom the plaintiff was responsible, amounting to a large sum of money. The particulars of this claim, which I read from the complaint, are as follows: "Items of default: In 1911, November 13th, Margaret E. Garrison, deposit, $50; November 17th, Estate of Annie Goeller, deposit, $100; December 5th, Mrs. Anna Sander or Henry C. Sander, deposit, $500. In 1912, March 18th, Catherine Powers, deposit, $700; June 11th, John V. Dwyer, deposit, $900; June 27th, Alice A. Dowling or William F. Burke, deposit, $800; December 17th, H. F. Lowther or Mrs. H. F. Lowther, deposit, $200; December 28th, Ermenia Loprete, false debit, $1000. 1913, March 27th, Ida Chapman, deposit, $225; June 3d, cash, $2000; June 14th, Matilda Reglin, deposit,

$3000." Of these eleven items, nine are deposits, and all, I believe, belonging to the savings bank side of the trust company's business. This claim which I have read was filed December 22, 1913. On so much of it as is valid against the defendants, Jennings and the surety company, interest runs from that date. The defendants in their answer deny this charge. This is the simple issue. The burden of proof is on the plaintiff to convince you that the greater weight of the evidence supports the plaintiff's claim. Proof excluding a reasonable doubt is not necessary. In a criminal case proof excluding a reasonable doubt is necessary to support a verdict. This is not a criminal case. Mere preponderance of proof is enough—the greater weight of the best evidence, as you shall deem it.

I may say at this point, as well as anywhere, something about the claim that the defendant Jennings was justified in what he did because he received instructions or directions from Mr. Smith, the secretary and treasurer. I think that evidence on this subject was competent as part of the history of the case, as showing the relation of the parties and the surrounding circumstances among which business was done; but it seems to me not to go very deep nor very far, and that for two reasons: In the first place, Mr. Smith was not the employer of Mr. Jennings. There is nothing in the evidence to show the existence of a legal relation of employer and employee, master and servant, principal and agent, between those two men. Each was an employee in his own sphere—and these spheres were different—of the corporation, which was not a benevolent institution, created for the purpose of helping widows and orphans; it was a cold-blooded business proposition, like any other trust company. It did not

belong to its officers; it belong to the stockholders, who were the corporation. We have heard very little about them. The administrative and executive officers seem to have been very inattentive. The trust company was created for the purpose of making money, declaring dividends, and the persons who were employed by the corporation to do its business were mere agents for that purpose in their respective spheres. There is nothing to suggest that Mr. Smith had the power to remove Mr. Jennings, that that authority had been conferred upon him by the board or directors or the stockholders. It is abundantly shown that Mr. Smith was the active man. So that is one reason why directions from Mr. Smith have not the force of directions by an employer. But, beyond that and deeper than that, the reason why this line of testimony does not go to the very center of the case is this. In my mind Mr. Jennings either embezzled or he did not. If he did embezzle and steal and do these other things which are described by different formulas, he could not plead in justification that somebody told him to do it. If somebody tells me to pick the foreman's pocket, and I am weak enough and skilful enough to do it, that is no excuse for my conduct. On the other hand, if Mr. Jennings did not embezzle and steal, it is of no importance what instructions he had. They may have led to venial irregularities, but not to what he is charged with. If the instructions did lead to what he is charged with, then that does not excuse him, if he was guilty. There was no coercion. The law excuses a man for doing something which he is compelled to do. A soldier under military discipline is bound to obey orders under penalty of death, but that is not the case in civil relations. The law recognizes coercion by violence and by imprisonment as an excuse, be-

cause the will is not free, and we have an old-fashioned, antiquated common law rule, which has very little common sense to support it, which holds that a woman who commits a crime in the presence of her husband does it under his coercion, and he is responsible. But there is nothing of that sort here, and while this testimony as to directions or commands or instructions by Mr. Smith is very proper evidence, yet it does not go a great way, and it goes only a very little way, if it goes at all, to settle the central question in this case; whether Mr. Jennings acted fraudulently. Whether he did or not, as has been remarked more than once in your hearing, is a question of circumstantial evidence. Nobody saw him take any money; nobody has found any deposit which he made of stolen funds. The case does not lead anywhere on that side. The question is whether from the facts as detailed a reasonable, probable inference arises that he did steal, embezzle, and so forth, money of the bank. The burden of proof is on the plaintiff, and the question still remains. What is the inference which ought to be drawn?

In order to ascertain just what your verdict will mean, I have availed myself of a provision in our Practice Act which enables the Court to ask questions of the jury and get their answers, in order that it may be determined how they reached their verdict, where there are a number of items to be considered.

It seems to me that this would be a natural way of taking up these eleven items to which I have referred, of which nine are deposits. Take up the deposits first. Those deposits, which I have already read to you relate to the accounts of Margaret E. Garrison, the Estate of Annie Goeller, the account of Mrs. Anna Sander or Henry

Charge.

C. Sander, the account of Catherine Powers, the account of John V. Dwyer, the account of Alice A. Dowling or William F. Burke, the account of H. F. Lowther or Mrs. H. F. Lowther, the account of Mrs. Ida Chapman and the account of Matilda Reglin. There are two others, which are not deposits. One is a false debit, in the case of Ermenia Loprete, as to which, I think, substantially the same questions arise, and the other is the question as to the $2000, which is, to some extent, a statutory question.

I shall hand to counsel on each side a copy of the questions that I propose to ask, and before the jury retires I shall give them a copy. I shall now mention what the questions are which have occurred to me as desirable to be answered. For instance, in the Garrison case, the first question is, "Was the sum claimed received by the Roseville Trust Company?" A deposit of $50 appeared on Mrs. Garrison's pass-book in Mr. Jennings's hand. It is a natural presumption, the first impression that the mind would receive, that Mrs. Garrison came to the window with her pass-book and with $50, and handed them both in, and that Mr. Jennings, who was there as receiving teller, entered the deposit and gave her back the book, and she went off with it. It, of course, ought to have shown on the books of the company, but it did not. The books of the company dovetail together like the pieces of a Chinese puzzle, so that the item could have been traced day after day here through the books, if it was there, or its absence detected, if it was not there. The first question, which you may find easy to answer, is, was the sum claimed by Mrs. Garrison received by the Roseville Trust Company?

It does not necessarily follow that because a savings bank pass-book has what is called a de-

posit on it the deposit was actually made; but when you have the fact that the receiving teller entered it and acknowledges his own hand, of course that proof is very much strengthened.

The second question is, "Was the sum claimed stolen, embezzled, wrongfully abstracted and wilfully misapplied by the defendant Jennings?" How is that question to be answered? By the natural logic of the books themselves, making any deduction, any qualification, from your confidence in the books, by reason of the fact, if it be a fact, that they were not satisfactorily kept. If the books seems to have substantially well kept as to this item, or as to items of this class, at that time, and the item cannot be found anywhere, and especially if its loss has been in any way covered up—that does not apply so much to the Garrison claim—why, then, an inquiry at once arises as to what became of it. Who has got it? Has it been fraudulently misappropriated. If you find that the Roseville Trust Company did not receive the deposit, if you say no to the first question, that would end that item, and you would give that no more attention. If you say "yes" to the second question, that this item was stolen, then you would have to look further. If you say "no," that it was not stolen, there. again, your inquiry stops.

It is only when you have answered both of these questions affirmatively that you go on to the third question, which is this: "If the sum claimed was stolen, embezzled, wrongfully abstracted and wilfully misapplied by the defendant Jennings, what loss, if any, has this fraudulent conduct occasioned to the Roseville Trust Company or to the Commissioner of Banking & Insurance, its legal representative?"

You will observe that this bond, or contract of

insurance, has not for its object the humanitarian and philanthropic purpose to discourage fraud at large. The engagement is not broken merely by fraud; it is to secure loss. It is fraud that causes loss that makes a breach of that contract.

So you have those three questions in each one of these nine cases: Was the sum claimed received by the Roseville Trust Company? Was it stolen? And if it was, did that fraudulent conduct by Jennings, assuming that he stole it, occasion any loss to the Roseville Trust Company? If it did, to that extent the plaintiff can recover against these defendants.

I have said here in my memorandum that you are to "Answer Questions I, II and III as to the nine deposit items. In answering Questions I and II say Yes or No, or, if you cannot say either Yes or No, say Not Yes." That means this: That the burden of proof is on the plaintiff. You might not be able to say either "Yes" or "No." You might say it is a fifty-fifty proposition, that one balances the other. If your minds are in that negative state as the result of the testimony, the item is not sustained. If you say "Yes," the item is sustained. If you say "No," it is rejected. If your minds are in equilibrio, the burden of proof being on the plaintiff, it then would not have overcome the doubt; it would not have sustained the full burden. So that it is only when you say "Yes" that those two questions lead to an examination of the third question, which is this: Was loss occasioned? And in answering that question specify the loss, if you find that there was a loss. I have used the Garrison case illustratively; it is the first one on the list. Where I have said "Answer to Question I, Answer to Question II, Answer to Question III," the jury will write their answers. You may not have to an-

swer all three questions. It may be necessary to answer only two of them; it may be necessary to answer only one of them; it may be necessary to answer all three. It depends on the view that you take.

These saving bank accounts run on very similar lines, some of them. There is the Estate of Annie Goeller, deposit, $100. I think everything that I have said in respect to the Garrison deposit is applicable to the Goeller deposit. If I thought there was any difference, I should think it was my duty to state it.

Again, the Sander deposit of $500. That seems to me to be an account which presents the same questions to the mind. The same inquiries arise and the same questions have to be answered.

The fourth item is the Catherine Powers deposit of $700. There are complexities about the Powers account, and I probably have the testimony here. I have taken the pains to have as much of the testimony written out as possible, and if you should be in doubt in going over these matters as to what the evidence is, if you should want to hear any bit of evidence read, I should be very glad to respond to any such request. At present I shall only say that the questions that arise as to the Powers deposit are the same. That also applies to the John V. Dwyer deposit, $900, and the Alice A. Dowling or William F. Burke deposit, $800, and, again, to the H. F. Lowther on Mrs. H. F. Lowther deposit, $200. The same questions arise there. Each account has certain peculiarities, and you have had the whole thing thoroughly threshed out. The Ida Chapman deposit, $225, I think, is just about the same. The Matilda Reglin deposit, $3000, is, I think, more in confusion. The same questions, of course,

arise, but the problem may not be so simple. Those are questions that ultimately would have to be answered, and if you feel when you retire that you need to hear more of the testimony read —I cannot give you testimony to take to your own room—I shall be happy to respond to any such request.

The case of Ermenia Loprete, false debit, $1000, is different, because it is not a deposit; it is a false debit; but very much the same questions arise. First, was there a false debit? Was there a debit which was false? If there was, was it or did it involve a stealing, embezzlement, wrongful abstraction and wilful misapplication by the defendant Jennings? If you answer both of those questions "Yes," then you come to the third question, which would be this: If the answer to Question II is "Yes," what loss, if any, has this fraudulent conduct occasioned to the Roseville Trust Company or to the Commissioner of Banking & Insurance, its legal representative?

These remarks direct your attention to ten of these eleven items.

The other item is an item of $2,000, which presents another question. I perhaps cannot better refer to it than by reading two of the requests to charge which have been handed to me on behalf of the plaintiff. "That the statute law of the State of New Jersey (4 Compiled Statutes, p. 5661) makes it a crime for a teller of a trust company to knowingly become liable to said trust company by reason of overdrawn account, and since defendant Jennings has conceded that he permitted the trust company to pay his $2,000 check without funds in his account to meet it, the jury is charged"—(I am requested to charge) —"that the defendant Jennings wilfully misap-

plied the said $2,000 and the jury's verdict must be for the plaintiff, so far as this item is concerned, to the extent of whatever loss they find the trust company suffered through this transaction."

That is the first request.

The third request relates to the same matter, and is as follows: "That the defendant Jennings has admitted that by means of the payment of his $2,000 check upon his overdrawn account he knowingly obtained the use of $2,000 of the trust company's funds for a period of a week or ten days until he, as he claims, gave Raymond E. Smith his note for a like amount, which, as he claims, was to be discounted at another bank. This is the version of the testimony which is most favorable to the defendants, plaintiff's version being that no such arrangement was made by Jennings with Smith, and no note delivered. That upon defendant's own admissions Jennings, as a teller of the trust company, knowingly procured a loan of $2,000 from the trust company for a period of a week or ten days, without submitting in writing to a meeting of the board of directors or executive committee of the trust company a proposition to make such loan, stating the amount, terms and security, if any, offered therefor. This was a crime. (4 Comp. Stat., p. 5661.) And the jury is charged that the transaction was a wilful misapplication by Jennings of $2,000 of the trust company's money. The jury must find for the plaintiff, for the amount of whatever loss they find the trust company suffered thereby."

This calls upon the Court to collate and compare and construe the language of a statute and the language of this contract. It is claimed that the language of the contract falls within the

language of the statute, and that in this transaction which I have described the defendant Jennings was guilty of a misapplication of the funds of the bank, within the meaning of the contract. The language of the statute, which is an act entitled "An Act concerning trust companies," is this: "Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statement of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly." That is section 17.

You will remember that Mr. Jennings's account of the matter was that he wanted to borrow $2,000, and he went to Smith, and Smith said that he would do what he could for him, and that he gave Smith his check, which Smith took upon an understanding that Jennings was to take it up, and that he did give his own check, or some check or note, to pay it, which Smith denies. Smith denies the whole transaction.

Section 15 of the act referred to is this: "No trust company shall make any loan to its president, vice-president, treasurer, secretary, cashier, or to any of its directors or any of its clerks, tellers, bookkeepers, agents, servants or other persons in its employ until the proposition to make such loan, stating the amount, terms and security, if any, offered therefor, shall have been submitted in writing by the person desiring the same to a meeting of the board of directors of such company, or of the executive committee

of such board, if any, and accepted and approved by the vote of a majority of those present constituting a quorum; no such corporation shall permit its president, its vice president, its secretary, treasurer or cashier, or any of its directors, clerks, tellers, bookkeepers, agents, servants or other persons in its employ to become liable to it by reason of overdrawn account; any president, vice president, director, secretary, treasurer, cashier, teller, clerk or agent of any such corporation who knowingly violates this section, or who aids or abets any officer, clerk or agent in any such violation, shall be guilty of a misdemeanor and punished accordingly."

Unquestionably the conduct of Mr. Jennings with respect to this $2,000 transaction was a violation of this statute. Undoubtedly he owes the trust company $2,000. Undoubtedly in that respect he is guilty of a misdemeanor. It is not merely what the statute says, but whether the statutory case is also a case within the language of this contract—whether to overdraw your account is a stealing, embezzlement, misappropriation or misapplication of the funds of the bank. I am not sure that it is; I am inclined to think that it is not. The language of the contract and the language of the statute can be forced together by argument; but it seems to me that that is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case, and denying the first and third requests to charge.

Here I may as well put this thought before you. People generally act from motives—bank tellers and bank secretaries and other people. Here is a series of transactions where deposits

in savings bank accounts, if made, and the proof strongly indicates that they were made, did not get on the books of the bank, or where only a part of them got on the books of the bank, through the agency of Mr. Jennings, his act, calmly admitted by him and plainly shown, and he, being asked on the stand how he accounted for this, could give no explanation. Now, why did he do it? What was the motive? If he acted from an intelligent motive, what was it? Was it a pecuniary motive? And if so, was it an honest or a fraudulent motive?

I have already occupied considerable time, and I think I may now go on with the requests to charge with which I have been favored by both sides.

I have already mentioned the first and third requests on behalf of the plaintiff. The second request is this: "That if the jury find as to any item that the dishonesty of the defendant Jennings or any wilful misapplication by him of the funds of the trust company resulted in a loss to the trust company, their verdict as to that item must be for the plaintiff, even though the jury should find that the defendant Jennings did not himself benefit by his said dishonesty or wilful misapplication." That I charge. Whether Jennings made or lost is not of the gist of the inquiry; the gist is not whether he made, but whether the company lost.

I charge the fourth request, and it is this: "That if the jury find that the treasurer, Smith, was himself engaged in defrauding the trust company, then the surety company will not be discharged, even though the jury may believe that Smith knew Jennings to be a defaulter, though the surety company was not notified within ten

days after Smith's discovery of that fact." That goes, I think, somewhat on the rule that notice to a fraudulent agent is not notice to the principal.

I think the fifth request presents matters that are questions of fact for the jury. I shall read it: "That the version of the Reglin, Powers, Dwyer and Dowling items most favorable to the defendants is the story of defendant Jennings that he permitted Raymond E. Smith to abstract from his (Jennings's) teller's cage the amounts charged, which alleged abstraction he admittedly knew to be wrong; that he (Jennings) admittedly committed falsifications of, or irregular omissions from, the records of the trust company in order to cover up the real character of those transactions; that he (Jennings) admittedly connived at and participated in said abstractions contrary to his plain duty as teller; that said Jennings was thus guilty of wilfully misapplying the funds of the trust company, whether or not Jennings personally profited therefrom, and the jury must find a verdict for the plaintiff which shall include whatever loss they may find that the trust company suffered respecting such items." This asks the Court rather to do too much. I want to stay within my own province, if I can. I think these are questions for you. I shall deny the request for that reason.

The sixth request is this: "That the surety company will not be discharged even though it be a fact that the trust company could never have suffered the loss, if its directors and officers had not been neglectful of their duty." That, I think, is sustained by the Courtney case, decided by the Supreme Court of the United States, reported in 186 U. S., 360, 361. I charge it. We must

have some mercy on the stockholders; they are the corporation.

The seventh request I charge: "That the mere fact that the trust company's books would on investigation have shown Jennings to be a defaulter will not discharge the surety company, if in fact he was not known by the trust company to be a defaulter." I charge that.

I also charge the eighth request: "That the omission from the plaintiff's proof of loss of the date of termination of Jennings's employment will not discharge the defendant surety company if the jury find that the plaintiff faithfully employed the printed form of proof of loss furnished by the defendant surety company, or if the jury find that the surety company had already acquired that information from the letter of October 6, 1913, or from the investigation of the investigator Felter, or any other source, or that the surety company was not prejudiced by the omission." This particular item did not cut any figure in the testimony, that I remember.

I charge the ninth request: "That the omission from the plaintiff's proof of loss of the date of discovery of said loss will not discharge the defendant surety company if the jury find that the plaintiff faithfully employed the printed form of proof of loss furnished by the defendant surety company, or if the jury find that the surety company had already acquired that information from the letter of October 6, 1913, or from the investigation of the investigator Felter, or any other source, or that the surety company was not prejudiced by the omission." That is pretty much the same as the last, and I shall charge it.

Those, I think, are all the requests on behalf of the plaintiff.

Charge.

The learned counsel for the defendants have presented me with certain requests to charge, the first of which I charge, excepting the last seventeen words. I shall first read it in full: "Plaintiff must prove by a preponderance of evidence that defendant Jennings stole, embezzled, wrongfully abstracted or wilfully misapplied moneys of the Roseville Trust Company, or of others to whom said company was legally responsible, by reason whereof the bank suffered pecuniary loss, before a recovery herein can be had against the defendant American Surety Co."—(and then come the words which I do not charge:)—"and in weighing the evidence, the jury must consider that the presumption is that Jennings is innocent. "The latter part suggests the idea that it may be thought that the rule of criminal evidence applies here, and that reasonable doubt must be excluded. I should not like to charge anything that would create that impression. Therefore I shall not charge those words. This is a civil action. It deals with criminal matters, but it is, none the less, a civil action, and it is to be determined by the preponderance of proof. I do not think the presumption of innocence cuts any figure in it.

I charge the second proposition: "Mere suspicion is not proof and plaintiff must prove that Jennings stole, embezzled, wrongfully abstracted, or wilfully misapplied moneys of the Roseville Trust Company, or of others to whom said company was legally responsible, or produce evidence from which a reasonable inference that he did steal, embezzle, wrongfully abstract or wilfully misapply such moneys may be drawn, and that by reason thereof the bank suffered pecuniary loss. In default of such proof a verdict must be re-

turned for defendant American Surety Company."

I charge the third request, changing the word "must" to the word "should." I shall read it, emphasizing the word "should." "In considering what weight is to be given to the books of the bank, and the testimony given as a result of examination thereof, the jury *should* take into consideration the testimony that the books of the bank do not correctly set forth the debits and credits of customers"—(that is, they do not in all cases)—"the testimony that they were not correctly kept; the testimony that false entries were made therein and all other testimony relating thereto."

The fourth request I charge, with some modification. I shall read it as it stands first: "From the fact that it appears from the testimony that Jennings might possibly have stolen, embezzled, wrongfully abstracted or wilfully misapplied funds of the bank the jury cannot find that he did so; that he did steal, embezzle, wrongfully abstract or wilfully misapply such funds must appear from direct evidence, or such circumstances must be shown as would justify the inference that he did so, and would exclude the idea that such stealing, etc., was done by another person or persons." I should rather say this: "such circumstances must be shown as would justify the inference that he did so as the more probable, and that the idea that such stealing, etc., was done by another person or persons was less probable. It is often the case that we have to deal in courts of law with probabilities and not with certainties.

The fifth request I shall read, but I shall deny it, because I think it presents a question of fact

for the jury: "There can be no recovery against defendant American Surety Company upon the item March 18, 1912, Catherine Powers, $700, nor for the item June 11, 1912, John V. Dwyer, $900, even though the jury should believe that Jennings stole, embezzled, wrongfully abstracted or wilfully misapplied the same, since it appears that such items were subsequently returned, and therefore the bank suffered no pecuniary loss, the surety company being liable only where the bank suffers pecuniary loss from such conduct." I shall leave this whole question to you. The entire question of whether loss was sustained by the trust company belongs to you.

I am going to deny the sixth request, for a reason that I shall give. The request is this: "In considering whether or not Jennings should be charged with the item of December 28, 1912, Loprete, $1,000, the jury must take into account the testimony that the withdrawal entry was made in her book in error and was corrected later, and she has not lost anything thereby, and that her husband says there is to his credit $1,000 to which he is not entitled, and the testimony that there appears under date of December 28, 1912, in the books of the bank a withdrawal of $1,000 by Mr. Loprete which is not charged against him on the ledger." I deny that request for this reason: The trial judge is not called upon to emphasize items of testimony, or pick out or cull out from the mass and give prominence to certain particulars, provided his charge is generally correct. The jury will consider all the evidence.

The seventh request I charge: "If the jury believe that Jennings did not steal, embezzle, wrongfully abstract or wilfully misapply the

$2,000 item which he is charged to have so stolen, embezzled, wrongfully abstracted or wilfully misapplied, then, although he may owe that sum to the bank, there can be no recovery in this action for such item against the defendant American Surety Company."

The eighth request is this: "The indictments are no proof of embezzlement. They simply mean a charge against the persons named therein and are not evidence of the facts." This constitutes the first paragraph, and I charge so much of it. The second paragraph I deny. It reads as follows: "The fact that the law says that it is a crime for an officer or employee of a trust company to permit his check to be paid when there are not sufficient funds on hand to meet the same, is not proof of any of the facts in issue in this case and is no proof of theft or embezzlement." I have disposed in my own way of the item of $2,000, disallowing it, so that I shall not charge this.

The ninth request I deny except as I have previously charged. It is this: "Plaintiff must prove the performance of all the conditions of the bond. The bond requires notice within ten days of its discovery of any fact which ought to cause suspicion or belief that there has been any act of dishonesty or grave dereliction of duty of the employee which has caused or is likely to cause any loss to the employer. The evidence shows that Jennings was requested by an officer and director of the trust company to resign in July, 1913, and the first notice to the surety was October 8, 1913 (Exhibit P-1 A). It is for you to say whether such facts as the bank then had should have been communicated to the surety company within ten days, as provided by the

bond. If those facts did cause suspicion or belief of dishonesty and were not communicated to the surety, then the plaintiff cnanot recover from the surety company." That is what I am asked to say to the jury. It is well settled that mere suspicion is not enough. This goes beyond that, and says "belief." I believe that I have already in previous instructions, especially with reference to the requests on behalf of the plaintiff, covered that branch of the subject.

The tenth request I shall deny as a question of fact for the jury, but I shall read it: "Mr. Jennings being receiving teller, and at times acting as paying teller, or vice versa, and it being his duty to receive deposits and enter them in pass-books, no inference of guilt on his part can be drawn from the fact that he received the deposits in question and entered them in the pass-books."

The eleventh request I shall deny as a question of fact for the jury, but I shall read it: "Relative to the Loprete item, the only testimony of loss being that a withdrawal of $1,000 appeared on the debit side book and the ledger to have been made by Ermenia Loprete on December 28, 1912, which was subsequently found to have been erronously or fraudulently entered, and no testimony being offered in any way connecting Mr. Jennings with such entry or withdrawal, and it appearing from the testimony of R. E. Smith, secretary and treasurer of the bank, that he had caused false charges to be made against the accounts of many depositors, and it further appearing that a person other than Jennings acted as paying teller a part of that day, and no proof being offered of any connection of Jennings with a withdrawal of $1,000 on the day in question from the Loprete

account, or any other account, and a loss of that sum to the bank on that day, no recovery can be had against defendant American Surety Company on that item." This, of course, opens a very wide inquiry as to the whole subject, which I am not at all inclined to foreclose by charging this proposition. I leave it to the jury.

If I have forgotten anything, I should be glad to be reminded of it. I do not think that I have anything further to say, except that, if you find that the plaintiff is entitled to anything, it is entitled to interest on each item which you find it is entitled to from December 22, 1913. Interest, if it has to be paid, is due from December 22, 1913, at six per cent., and you will have to calculate it. When you have gone through with these questions and answers and have got out a result, if you find that there are any items which the defendants owe to the plaintiff, just figure interest on those items from that date, and add the whole thing up, and bring in principal and interest in one sum, not leaving it to the Court to make the computation.

MR. SMITH: If your Honor please, I understand that the $2,000 item is disallowed; is that what your Honor said?

THE COURT: Yes. I do not think it is fairly described by the statute as being within the terms of the contract.

MR. CLARK: If your Honor please, the trial has been so long that I should like to have an opportunity to say just a few words to your Honor on that $2,000 item, entirely apart from the statute, either after the jury goes out or now, as your Honor directs.

THE COURT: I should prefer to have you do so after the jury retires.

The jury retires.

MR. HINDS: Your Honor, I respectfully except to that portion of your Honor's charge which instructed the jury that, unless there was an affirmative answer given to Questions I and II, referring to the nine deposit items, they need not answer Question III; the basis of my exception being that it might be possible and proper, if the proof were such, for the jury to find affirmatively as to Question I, negatively as to Question II, and still proceed to Question III, and find affirmatively for the plaintiff, so that we might have findings by the jury as to that important question contained in Question III, leaving the question narrowed down only as to Question II.

THE COURT: I do not quite see how that could be; but, however, take your exception.

Plaintiff's exception noted as ground of appeal.

MR. HINDS: I also respectfully except to that part of your Honor's charge where, in referring to the possible contingency arising that the minds of the jury might be, as your Honor expressed it, fifty-fifty with respect to any issue of fact, your Honor said that they should find for the defendant, if it should appear that the plaintiff should not have overcome doubt. It is that particular expression as to not overcoming doubt to which I except, as I think that is not the test of the standard of proof. We are not required to overcome doubt; we are merely required to overbalance.

THE COURT: I have no objection to adopting your view as to that.

Plaintiff's exception noted as ground of appeal.

MR. HINDS: I also respectfully except to that

portion of your Honor's charge wherein your Honor withdrew from the jury the item of $2,000, first, for the same reasons for which I have excepted to your Honor's refusal to charge our request respecting that item, and for the further reason that there is some evidence in the case warranting a finding for the plaintiff, even though the mere violation of the statute did not constitute a wilful misapplication of the funds.

THE COURT: I shall hear Mr. Clark on that point.

MR. CLARK: If your Honor please, the distinction that I want to make clear to your Honor is this: that this $2,000 check transaction, for this particular man, holding this particular position, is equally equivalent in the eyes of the law, in the purpose of this bond, as if he had taken $2,000 out of the drawer and had given it to Mr. Meier in purchasing that moving picture business. While it is entirely possible, and probable, that if the bookkeeper had overdrawn his account in the trust company, it might be a misdemeanor, and still not be such a misapplication that a surety company could be held for, when, as here, the check is made by the man who has got to pay the check, the man who takes the check out of the clearings, by his own statement, when they come in, and gives to Thompson merely a charge slip in its place, and then subsequently fails to disclose the transaction on the books of the company, it is not merely a question of a depositor being an employee and overdrawing his account. It is exactly the same, in the way that this particular transaction was handled, as if this particular man had taken $2,000 out of the drawer, or if he had cashed his own check in the bank and had taken the money, because what he did was to give

a check. And, mind you, as your Honor will remember, there was no entry ever made on Jennings's account for this, indicating that there was nothing to tie Jennings up to the transaction. If we had not had the benefit of his open admission in this court that he had given that check and had done with it what he says he did, there would have been a question for the jury of some confusion, because the best we could show was that an item came up and was paid in the exchanges the same day; that Walter Meier took Jennings's check and did so and so with it. But, as the case stands, there is the strongest proven stealing in the entire case. There is not an item in the entire case which your Honor would be more entitled to take from the jury and direct them to bring a verdict for than that $2,000, and it is unnecessary for us to bring in any question with regard to that statute, with regard to whether the doing contemplated by that statute, a wrongful doing by an employee, was done; and we say that for this man to do as he did was exactly the same as if he had taken $2,000 out of the cage.

THE COURT: You may be right, but I shall let my charge stand.

Plaintiff's exception noted as ground of appeal.

MR. SMITH: If your Honor please, I should like to take an exception to that part of your Honor's charge which said that any instructions of Smith to Jennings would not be a justification for what Jennings did.

Defendants' exception noted as ground of appeal.

MR. SMITH: I also desire to except to that part of your Honor's charge wherein you said that Question II should be answered logically from the

books; my idea being that Question II should be answered not only from the books, but from the testimony of the various witnesses. The books were false, and Smith admitted that he would take moneys from one depositor and apply them to the account of another.

Defendants' exception noted as ground of appeal.

THE COURT: If you think the use of the word "doubt" is of enough importance, I shall call the jury back.

MR. CLARK: No, if your Honor please, but there is another matter, which my friend asked your Honor to charge, that might give them an unnecessary slight advantage on an appeal, in that there is in the bond, as I recall it, some word referring to suspicion on the part of the employer. We are quite content to have the question submitted to the jury in that form, because your Honor has covered it broadly in the question as to who was the employer and in other directions, but I think your Honor did state in your charge that there was no requirement in this case to convey a suspicion, and I am afraid that the bond proves otherwise. Since my friend's request to charge raises that question, it is entirely possible that its omission might be fatal.

THE COURT: According to the general rule that the cases as law down, mere suspicion is not enough, I believe.

MR. SMITH: I do not think he is referring to that, your Honor. He refers to that provision of the bond which requires that, if the company becomes suspicious of any acts on the part of the bonded employee, they should notify the company within ten days. I think that is what Mr. Clark refers to.

MR. CLARK: Yes. I think it is No. 5.

THE COURT: Nothing has been said during the progress of the trial, and I saw nothing, until I got the requests to charge yesterday, about this particular phase of the case, and I did not notice just what the language of the bond was.

MR. SMITH: I shall withdraw that request, if your Honor please. That was written by Mr. Dawson. My idea of the request made was this: I had an idea that they were going to try to prove by Mr. Smith that he knew or had suspicions of Mr. Jennings's stealings prior to the time the notice was given. There was no such evidence.

THE COURT: Then perhaps I ought to say something to the jury about it. Which request was it?

MR. SMITH: I think it is No. 9, the latter part of No. 9. Your Honor denied the request, anyhow.

THE COURT: Yes. I do not know what counsel think I ought to do about this. The suggestion came from you, Mr. Clark. The request is withdrawn now.

MR. CLARK: Yes, and that disposes of it, if your Honor please, and it makes it entirely unnecessary to recall the jury.

THE COURT: I do not think so either.

MR. HINDS: Your Honor, may I add to my exceptions an exception which I omitted?

THE COURT: Certainly.

MR. HINDS: I respectfully except to that portion of your Honor's charge wherein your Honor charged as requested by the defendant respecting the $2000 item. I cannot enumerate the request by number, but I think that will identify it.

THE COURT: Yes. I think I can tell you which it was; I think it was the seventh.

MR. SMITH: Yes, sir; it was the seventh. That is the only request I had on that.

Plaintiff's exception noted as ground of appeal.

THE COURT: Do you want me to speak to the jury about that question of doubt?

MR. CLARK: No, I think your Honor cleared it up in another part of your charge, so that that is of no importance.

THE COURT: The foreman of the jury has sent word saying that the jury wants to know whether the $2000 is in or out. I shall tell them that it is out.

MR. CLARK: Your Honor's mind is made up on that, is it?

THE COURT: Yes, my mind is made up. I do not say that I am right, but my mind is made up.

The jury returns into court.

THE COURT: Mr. Foreman, I understood the inquiry from you in this way: that the jury was in some uncertainty as to whether the $2000 was in or out of the case. Is that it?

THE FOREMAN: Yes, sir.

THE COURT: According to my view, it is out. Counsel for the plaintiff do not agree with me, but that is my ruling, and if I am wrong, as I often am, it may be corrected hereafter.

The jury again retires.

PLAINTIFF'S REQUESTS TO CHARGE AND EXCEPTIONS.

Plaintiff's counsel requests the Court to charge the jury as follows:

(1) That the statute law of the State of New Jersey (4 Compiled Statutes, p. 5661) makes it a crime for a teller of a trust company to knowingly become liable to said trust company by reason of overdrawn account, and since defendant Jennings has conceded that he permitted the trust company to pay his $2000 check without funds in his ac-

count to meet it, the jury is charged that the defendant Jennings wilfully misapplied the said $2000 and the jury's verdict must be for the plaintiff, so far as this item is concerned, to the extent of whatever loss they find the trust company suffered through this transaction.

Denied.

Plaintiff's counsel prays an exception to the refusal of the Court to charge as requested. Exception noted as ground of appeal.

(2) That if the jury find as to any item that the dishonesty of the defendant Jennings or any wilful misapplication by him of the funds of the trust company resulted in a loss to the trust company, their verdict as to that item must be for the plaintiff, even though the jury should find that the defendant Jennings did not himself benefit by his said dishonesty or wilful misapplication.

Charged.

(3) That the defendant Jennings has admitted that by means of the payment of his $2000 check upon his overdrawn account he knowingly obtained the use of $2000 of the trust company's funds for a period of a week or ten days until he, as he claims, gave Raymond E. Smith his note for a like amount, which, as he claims, was to be discounted at another bank. This is the version of the testimony which is most favorable to the defendants, plaintiff's version being that no such arrangement was made by Jennings with Smith, and no note delivered. That upon defendant's own admissions Jennings, as a teller of the trust company, knowingly procured a loan of $2000 from the trust company for a period of a week or ten days, without submitting in writing to a meeting of the board of directors or executive committee of the trust company a proposition to make

such loan, stating the amount, terms and security, if any, offered therefor. This was a crime. (4 Comp. Stat., p. 5661.) And the jury is charged that the transaction was a wilful misapplication by Jennings of $2000 of the trust company's money. The jury must find for the plaintiff, for the amount of whatever loss they find the trust company suffered thereby.

Denied.

Plaintiff's counsel pray an exception to the refusal of the Court to charge as requested. Exception noted as ground of appeal.

(4) That if the jury find that the treasurer Smith was himself engaged in defrauding the trust company, then the surety company will not be discharged even though the jury may believe that Smith knew Jennings to be a defaulter, though the surety company was not notified within ten days after Smith's discovery of that fact.

Charged.

(5) That the version of the Reglin, Powers Dwyer and Dowling items most favorable to the defendants is the story of defendant Jennings that he permitted Raymond E. Smith to abstract from his (Jennings's) teller's cage the amounts charged, which alleged abstraction he admittedly knew to be wrong; that he (Jennings) admittedly committed falsifications of, or irregular omissions from, the records of the trust company in order to cover up the real character of those transactions; that he (Jennings) admittedly connived at and participated in said abstractions contrary to his plain duty as a teller; that said Jennings was thus guilty of wilfully misapplying the funds of the trust company, whether or not Jennings personally profited therefrom, and the jury must find a verdict for the plaintiff which shall include what-

ever loss they may find that the trust company suffered respecting such items.

Denied.

Plaintiff's counsel pray an exception to the refusal of the Court to charge as requested. Exception noted as ground of appeal.

(6) That the surety company will not be discharged even though it be a fact that the trust company could never have suffered the loss, if its directors and officers had not been neglectful of their duty.

(7) That the mere fact that the trust company's books would on investigation have shown Jennings to be a defaulter will not discharge the surety company, if in fact he was not known by the trust company to be a defaulter.

Charged.

(8) That the omission from the plaintiff's proof of loss of the date of termination of Jennings's employment will not discharge the defendant surety company if the jury find that the plaintiff faithfully employed the printed form of proof of loss furnished by the defendant surety company, or if the jury find that the surety company had already acquired that information from the letter of October 6, 1913, or from the investigation of the investigator Felter, or any other source, or that the surety company was not prejudiced by the omission.

Charged.

(9) That the omission from the plaintiff's proof of loss of the date of discovery of said loss will not discharge the defendant surety company if the jury find that the plaintiff faithfully employed the printed form of proof of loss furnished by the defendant surety company, or if the jury find that the surety company had already acquired that information from the letter of October 6, 1913, or

from the investigation of the investigator Felter, or any other source, or that the surety company was not prejudiced by the omission.

Charged.

DEFENDANTS' REQUESTS AND EXCEPTIONS.

Defendants' counsel request the Court to charge the jury as follows:

(1) Plaintiff must prove by a preponderance of evidence that defendant Jennings stole, embezzled, wrongfully abstracted or wilfully misapplied moneys of the Roseville Trust Company, or of others to whom said company was legally responsible, by reason whereof the bank suffered pecuniary loss, before a recovery herein can be had against the defendant American Surety Company, and in weighing the evidence, the jury must consider that the presumption is that Jennings is innocent.

Denied except as charged.

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(2) Mere suspicion is not proof and plaintiff must prove that Jennings stole, embezzled, wrongfully abstracted, or wilfully misapplied moneys of the Roseville Trust Company or of others to whom said company was legally responsible, or produce evidence from which a reasonable inference that he did steal, embezzle, wrongfully abstract or wilfully misapply such moneys may be drawn, and that by reason thereof the bank suffered pecuniary loss. In default of such proof a verdict must be returned for the defendant American Surety Company.

Charged.

Charge.

(3) In considering what weight is to be given to the books of the bank, and the testimony given as a result of examination thereof, the jury must take into consideration the testimony that the books of the bank do not correctly set forth the debits and credits of customers, the testimony that they were not correctly kept, the testimony that false entries were made therein and all other testimony relating thereto.

Charged.

(4) From the fact that it appears from the testimony that Jennings might possibly have stolen, embezzled, wrongfully abstracted or wilfully misapplied funds of the bank the jury cannot find that he did so; that he did steal, embezzle, wrongfully abstract and wilfully misapply such funds must appear from the direct evidence, or such circumstances must be shown as would justify the inference that he did so and would exclude the idea that such stealing, etc., was done by another person or persons.

Charged as modified.

(5) There can be no recovery against defendant American Surety Company upon the item March 18, 1912, Catherine Powers, $700, nor for the item June 11, 1912, John V. Dwyer, $900, even though the jury should believe that Jennings stole, embezzled, wrongfully abstracted or wilfully misapplied the same, since it appears that such items were subsequently returned, and therefore the bank suffered no pecuniary loss, the surety company being liable only where the bank suffers pecuniary loss from such conduct.

Denied.

Defendants' counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Charge.

(6) In considering whether or not Jennings should be charged with the item of December 28, 1912, Loprete, $1000, the jury must take into account the testimony that the withdrawal entry was made in her book in error and was corrected later, and she has not lost anything thereby, and that her husband says there is to his credit $1000 to which he is not entitled, and the testimony that there appears under date of December 28, 1912, in the books of the bank a withdrawal of $1000 by Mr. Loprete which is not charged against him on the ledger.

Denied.

Defendants' counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(7) If the jury believe that Jennings did not steal, embezzle, wrongfully abstract or wilfully misapply the $2000 item which he is charged to have so stolen, embezzled, wrongfully abstracted or wilfully misapplied, then, although he may owe that sum to the bank, there can be no recovery in this action for such item against the defendant, American Surety Company.

Charged.

(8) The indictments are no proof of embezzlement. They simply mean a charge against the persons named therein and are not evidence of the facts.

Charged.

The fact that the law says that it is a crime for an officer or employee of a trust company to permit his check to be paid when there are not sufficient funds on hand to meet the same, is not proof of any one fact in issue in this case and is no proof of theft or embezzlement.

Denied.

Charge.

Defendants' counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(9) Plaintiff must prove the performance of all the conditions of the bond. The bond requires notice within ten days of its discovery, of any fact which ought to cause suspicion or belief that there has been any act of dishonesty or grave dereliction of duty of the employee which has caused or is likely to cause any loss to the employer. The evidence shows that Jennings was requested by an officer and director of the trust company to resign in July, 1913, and the first notice to the surety was October 8, 1913 (Exhibit P-1 A). It is for you to say whether such facts as the bank then had should have been communicated to the surety company within ten days as provided by the bond. If those facts did cause suspicion or belief of dishonesty and were not communicated to the surety, then the plaintiff cannot recover from the surety company.

Denied except as charged.

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(10) Mr. Jennings being receiving teller, and at times acting as paying teller, or *vica versa*, and it being his duty to receive deposits and enter them in pass-books, no inference of guilt on his part can be drawn from the fact that he received the deposits in question and entered them in the pass-books.

Denied.

Defendants' counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Charge.

(11) Relative to the Loprete item, the only testimony of loss being that a withdrawal of $1000 appeared on the debit side book and the ledger, to have been made by Ermenia Loprete on December 28, 1912, which was subsequently found to have been erroneously and fraudulently entered and no testimony being offered in any way connecting Mr. Jennings with such entry of withdrawal, and it appearing from the testimony of R. E. Smith, secretary and treasurer of the bank, that he had caused false charges to be made against the accounts of many depositors, and it further appearing that a person other than Jennings acted as paying teller a part of that day, and no proof being offered of any connection of Jennings with a withdrawal of $1,000 on the day in question from the Loprete account, or any other account, and a loss of that sum to the bank on that day, no recovery can be had against defendant American Surety Company on that item.

Denied.

Defendants' counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Verdict and Postea.

This action was tried before Judge Frederic Adams, to whom the same was referred for trial, with a jury, at the Essex Circuit on November 21st, 22nd, 23rd, 24th, 27th, 28th and 29th, 1916.

The case having been heard and submitted to the jury, they returned their verdict as follows:

Verdict for the plaintiff $6,475, together with interest thereon from the 22nd day of December, 1913, amounting to $1,140.68, making a total of $7,615.68, which verdict includes the answers to the Court's several questions as follows:

As to 9 of the items of default set forth in the complaint (as hereinafter enumerated) the following questions were put to the jury by the Court:

Question I:

"Was the sum claimed received by the Roseville Trust Company?"

Question II:

"Was the sum claimed stolen, embezzled, wrongfully abstracted and wilfully misapplied by the defendant Jennings?"

Question III:

"If the sum claimed was stolen, embezzled, wrongfully abstracted and wilfully misapplied by the defendant Jennings, what loss, if any, has this fraudulent conduct occasioned to the Roseville Trust Company or to the Commissioner of Banking and Insurance, its legal representative?"

The jury's answer to said three questions respecting each of 9 certain items of default as set forth in the complaints were as follows:

"Item 1:

MARGARET E. GARRISON DEPOSIT, $50.

Answer to Question I: Yes.
Answer to Question II: Yes.
Answer to Question III: $50.

Item 2:

ESTATE OF ANNA GOELLER DEPOSIT, $100.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $100.

Item 3:

MRS. ANNA SANDER OR HENRY F. SANDER DEPOSIT, $500.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $500.

Item 4:

CATHERINE POWERS DEPOSIT, $700.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $700.

Item 5:

JOHN V. DWYER DEPOSIT, $900.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $900.

Item 6:

ALICE A. DOWLING OR WILLIAM F. BURKE DEPOSIT, $800.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $800.

Item 7:

H. F. LOWTHER OR MRS. H. F. LOWTHER DEPOSIT, $200.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $200.

Item 8:

MRS. IDA CHAPMAN DEPOSIT, $225.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $225.

Item 9:

MATILDA REGLIN DEPOSIT, $3000.

Answer to Question 1: Yes.
Answer to Question II: Yes.
Answer to Question III: $3000."

As to a 10th item of default as alleged in the complaint, the following questions were put to the jury by the Court and answered as follows:

"Item 10:

"ERMENIA LOPRETE, FALSE DEBIT, $1000.

"Question I:

"Was there a false debit of $1000? A. Yes.

"Question II:

"If there was a false debit, was it or did it involve a stealing, embezzlement, wrongful abstraction and wilful misapplication by the defendant Jennings? A. No.

"Question III:

"If the answer to the next previous question, Question II, is Yes, what loss, if any, has this fraudulent conduct occasioned to the Roseville Trust Company or to the Commissioner of Banking and Insurance, its legal representative? (No answer.)"

The Court charged the jury that it disallowed the item of plaintiff's cause of action set forth in the complaint (in Schedule B thereof) as "Item of Default, June 3, 1913, cash $2000", and instructed the jury not to include such item or any part thereof in their verdict (if it should be for the plaintiff), and no questions were put to the jury respecting such item, and such item was not included in their verdict for the plaintiff.

WHEREUPON IT IS ADJUDGED that the plaintiff recover of the defendant the sum of $7,615.68 and his costs, which are taxed at the sum of $, making in the whole the sum of $

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PAYING TELLER'S PROOF. June 4 1913.

CHECKS PAID ROSEVILLE TRUST CO.	CHECKS PAID—ALL OTHERS			
	FOREIGN	INVESTMENT DEPT. DRAFTS	GENERAL	REC. TELLER'S DEBITS
225	28	30	5833	
5	25	115	8000	
1950	10	20	805833	
250	150	25	103243	
10	6	76 15		
10	350	25	909076	
15	18775	25		
465	75675			
15	7485	126 15		
35	2065			
100	150			
5	125			
5	2488			
25	3			
15	3355			
8	45			
1	850			
5	6250			
50	103243			
75				Receiving Teller's Credits.
2060				
25				
30				
15				
50				
5				
970				
100				
2205				
10034				
25457				
8				
492				
10				
5				
145				
350				
2470				
1149				
1000				
1520				
7155				
115				
1425				
2375				
40				
310177				
20				
35				
3420				
40				
25				
10				
15				
326612				

Checks Paid		
Roseville Trust Co.	326612	
Investment Dept. Drafts	12615	
Receiving Teller's Debits	909076	12483.03
Reserve Cash		
Bills	300	
Gold		
Silver	1500	
Nickels and Pennies	260	2060.
Current Cash		
Bills	3262	
Gold	365	
Silver	688	
Nickels and Pennies	15343	
Cash Itemized	1852794	22996 37
Receiving Teller's Credits		
Balance brought forw's Paying Teller	2290349	37539.40
Receiving Teller		
Bills	12325	
Gold	20	
Silver	15195	
Nickels and Pennies	3843	
X Cash Itemized	210053	37539 40
	37539 40	

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1718

Lurich		71 55	6/3	1st Teller	2000 -
		15 20		Interbeth	100 34
WG Matilda	2	15 -			254 57
Jam.	9	17 65			8 -
	4	32 -			4 92
Lubs	1	50 -			22 05
Devita Clinton		5 -			100 -
Fusca		5 -		Bellows	150 -
Clair		35		Morel	19 50
Bellah	3	5 55			255 -
Idea		125 20			225 -
		2526 29			5 -
				Mottlau	5 -
				Lurich & Co	23 75
					14 25

15 18 16 4
2526 29
12655.35

776
8 98

PAYING TELLER'S PROOF. January 3 1913.

CHECKS PAID ROSEVILLE TRUST CO.	CHECKS PAID—ALL OTHERS			
	FOREIGN	INVESTMENT DEPT. DRAFTS	GENERAL	REC. TELLER'S DEBITS
15	100	20	10	
30	30	20	7500	
5	1 25	100	1	
5	40	75	751125	
5	50	2		
10	3870	2	2	
5	1987	60		
60	50	6	75 5 75	
10	70 12	32	10344	
10	10	15		
50	9	5	855248	
20	100	10		
20	46944	346		
20	6250	66		
24	21	5		
1473	2250	1114		
5	3250			
10	26			
10	550			
25	3897			Receiving Teller's Credits.
5	10			
50	1320			
20	10			
3	1086			
10	3333			
10	16550			
25	100			
15	17843			
40				
1425			47	
25	10344 3		524	
4450			10	
60 58			25	
100			35	
20			1701 10	
10			5	
6040			508	
25			25	
250			50	
7				
2				
5			31418	
10				
55				
1350				
50				
25				
5				
35				
20				
4				
21				
1117				

Checks Paid		137418 ✓
Roseville Trust Co.		117 ✓
Investment Dept. Drafts		855248 ✓ 103436
Receiving Teller's Debits		
Reserve Cash		
Bills	300	
Gold		
Silver	1500	
Nickels and Pennies	10	1810
Current Cash		
Bills	636	
Gold	33485	
Silver	67905	
Nickels and Pennies	16051	
Cash Itemized	1933308 ✓	1093449
Receiving Teller's Credits		
Balance brought forw's Paying Teller	186163	33247.15
Receiving Teller		
Bills	10487	
Gold	50	
Silver	47305	
Nickels and Pennies	13567	70003
Cash Itemized	751035	31747.15

New Jersey Court of Errors and Appeals.

ROSEVILLE TRUST COMPANY, by GEORGE M. LAMONTE, as Commissioner of Banking & Insurance of the State of New Jersey.

Plaintiff-Appellant,

vs.

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendants-Respondents.

At Law.
On Appeal.

Statement.

The above action was brought by the Roseville Trust Company (in liquidation) against A. Randolph Jennings, a teller in its employ, and the American Surety Company, surety on the teller's fidelity bond (p. 6); by the terms of such bond, the defendants bound themselves to pay plaintiff "such pecuniary loss not exceeding $10,000. as the employer shall have sustained of employer's money, funds, or other personal property (or belonging to others for which the employer may be legally responsible), stolen, embezzled, wrongfully abstracted or wilfully misapplied by said employe during his employment * * *."

The case was submitted to the Jury and the Jury found against the defendants as to certain items mentioned in the complaint aggregating

$6475.00. As to one of the items, to wit, an item of $1,000.00, the Jury found in favor of the defendants.

This appeal involves an item of $2,000.00 which the trial Court withdrew from the Jury upon the ground that this item did not come within the terms of the bond. From such ruling of the Trial Court, plaintiff appeals.

Plaintiff's Grounds of Appeal.

Plaintiff, in his notice of appeal, sets forth two grounds, to wit:

1. The court charged the jury as follows:

> "* * * whether to overdraw your account is a stealing, embezzlement, misappropriation or misapplication of the funds of the bank. I am not sure that it is; I am inclined to think that it is not. The language of the contract and the language of the statute can be forced together by argument; but it seems to me that it is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case and denying the first and third requests to charge * * * I have disposed in my own way of the item of $2,000., disallowing it * * *.
>
> "MR. SMITH: If your Honor please, I understand that the $2,000. item is disallowed; is that what your Honor said?
>
> "THE COURT: Yes, I do not think it is fairly described by the statute as being within the terms of the contract."

2. The court denied the request of plaintiff's counsel to charge the jury as follows:

> "(1) That the statute law of the State of New Jersey (4 Compiled Statutes, p. 5661) makes it a crime for a teller of a trust company to knowingly become liable to said trust company by reason of over-

drawn account, and since defendant Jennings has conceded that he permitted the trust company to pay his $2,000. check without funds in his account to meet it, the jury is charged that the defendant Jennings wilfully misapplied the said $2,000. and the jury's verdict must be for the plaintiff, so far as this item is concerned, to the extent of whatever loss they find the trust company suffered through this transaction. Denied.

* * *

"(3) That the defendant Jennings has admitted that by means of the payment of his $2,000. check upon his overdrawn account he knowingly obtained the use of $2,000. of the trust company's funds for a period of a week or ten days until he, as he claims, gave Raymond E. Smith his note for a like amount, which, as he claims, was to be discounted at another bank. This is the version of the testimony which is most favorable to the defendants, plaintiff's version being that no such arrangement was made by Jennings with Smith, and no note delivered. That upon defendant's own admissions Jennings, as a teller of the trust company, knowingly procured a loan of $2,000. from the trust company for a period of a week or ten days, without submitting in writing to a meeting of the board of directors or executive committee of the trust company a proposition to make such loan, stating the amount, terms and security, if any, offered therefor. This was a crime. (4 Comp. Stat. p. 5661). And the jury is charged that the transaction was a wilful misapplication by Jennings of $2,000. of the trust company's money. The jury must find for the plaintiff, for the amount of whatever loss they find the trust company suffered thereby. Denied."

New Jersey State Library

Facts relative to the $2,000. item.

Jennings, one of the defendants, was the paying teller of the Roseville Trust Company. Raymond E. Smith was the Treasurer and the only active Director thereof. None of the other directors or officers was active or took any part in the management of the institution. Jennings, according to his testimony, was desirous of going into a different line of business. He was approached by one Charles F. Meyer with the proposition that Meyer and Jennings should purchase a certain moving picture theatre from one Walter H. Meier. Jennings liked the proposition and with Meyer looked into the matter, going into facts and figures relative to the business and obtained an option to purchase. He then spoke to Mr. Smith about the proposition. Smith thought well of it. Jennings thereupon asked Smith if he could help him in the way of a note. Smith said he didn't know. Some time later, the option being about to expire, Jennings again spoke to Smith and Smith told him to "Go ahead and give them your check for it." Jennings did so. At the time Jennings drew the check. Although he had an account in the bank he had not sufficient funds therein to meet the check. He knew this. The check came into the bank through the exchanges, going first to the bookkeeper (p. 72) and being by him put in a basket which was in the window between the cages of the bookkeeping department and the receiving teller, in which no good items, checks requiring verification of signatures, etc. were placed. Jennings took it therefrom and substituted a "first teller's charge" therefor, and thereafter carried the check in his cash for several days. Shortly thereafter he again took up the matter with Mr. Smith and gave to Mr. Smith

a note for the amount, Smith saying "Give me your note for it, and I will fix it up" (p. 67). The check given by Jennings was paid although never charged to his account.

The check for $2,000 came into the bank through the exchanges on June 3rd. On that day Jennings took the same from the basket and substituted the charge slip. He entered on his proof book on June 3rd as having received from the receiving teller $2,000 *more than he actually received from him* (pp. 42, 43).

On the morning of June 4th the receiving teller turned over to the paying teller (Jennings) the amount shown by the receiving teller's proof book to have been received by him during the date of June 3rd, and included therein the $2,000 charge slip made by Jennings. Jennings, however, having already charged himself on June 3rd with the $2,000, did not include the $2,000 charge slip in his proof book for June 4th. In other words his proof book for June 3rd showed him $2,000 *over* while his proof book for June 4th showed him $2,000 short. Otherwise the books balanced.

Smith's Denial of Jennings's Story.

Smith, the Treasurer, denies that he authorized Jennings to draw the $2,000 check and denies that Jennings gave him a note for $2,000 thereafter (pp. 80, 81).

Plaintiff's Contention.

Plaintiff contends that the denial by Smith of Jennings' story created a dispute of testimony, and that, therefore, in determining whether the item should be allowed it was entitled to that view of the disputed testimony which is most favorable to it.

ARGUMENT.

1. Assuming, for the purpose of the argument, that such be the case, we, therefore, come to the

Admitted Facts.

Jennings' account in the bank did not at the time he drew the $2,000 check, nor at any other time, contain a sum sufficient to pay the same. He knew this. He had no permission from the Board of Directors to overdraw. He did draw a check for $2,000 on his account which did overdraw his account. When the check came through the exchanges into the bank, he took the same out of the basket and substituted a charge against himself as first teller, and placed the check in his cash, and carried it there for some days. As paying teller he was charged with all the cash (consisting of bills, specie and cash items, i. e. checks, notes etc. He remained charged with this sum.

Under such circumstances it could not be held that he had *stolen, embezzled, wrongfully abstracted or wilfully misapplied* the funds of the bank. He had charged himself on the books of the bank with $2,000. He had it is true, overdrawn his account.

The allegation that because, he having charged himself with the $2,000 check on his proof book on June 3rd, and finding that he had been charged by the receiving teller with the $2,000 charge slip on June 4th, deducted the same from his proof book on June 4th (thus balancing the transaction) he is guilty of making false entries in the books, is unfounded and cannot prevail.

Undoubtedly, merely to overdraw one's account in a bank does not constitute stealing, embezzling, wrongfully abstracting or wilfully misapplying the funds of the bank. Plaintiff, however, contends

that by reason of Sections 15 and 17 of the act known as an "Act concerning Trust Companies" (Laws 1899, Chapter 174; 4 Comp. Stat. 1910, p. 5661) the overdrawing of his account by Jennings (who was a teller in the bank) was unlawful and did constitute a stealing, embezzling, wrongful abstraction and wilful misapplication of the funds of the bank.

Sections 15 and 17 of the Act above mentioned are as follows:

"LOANS TO OFFICERS, OVERDRAFTS, PENALTY. No trust company shall make any loan to its president, vice president, treasurer, secretary, cashier, or to any of its directors, or any of its clerks, tellers, bookkeepers agents, servants or other persons in its employ until the proposition to make such loan, stating the amount, terms and security, if any, offered therefor, shall have been submitted in writing by the person desiring the same, to a meeting of the board of directors of such company, or of the executive committee of such board, if any, and accepted and approved by a vote of the majority of those present constituting a quorum; * * * "

"15 (Continued). " * * * no such corporation, shall permit its president, its vice president, its secretary, treasurer or cashier or any of its directors, clerks, tellers, bookkeepers, agents, servants or other persons in its employ to become liable to it by reason of overdrawn account; any president, vice president, director, secretary, treasurer, cashier, teller, clerk or agent of any such corporation who knowingly violates this section, or who aids or abets any officers, clerk, or agent in any such violation, shall be guilty of a misdemeanor and punished accordingly.

"17. MAKING FALSE STATEMENTS, REPORTS, ENTRIES IN BOOKS AND EXHIBITING FALSE PAPERS PUNISHABLE. Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statement of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, witih intent to de-

ceive any person authorized to examine as to the condition of such trust company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor, and punished accordingly."

While it is true that the overdrawing of his account by Jennings (he being a teller of a Trust Company) was prohibited by the terms of the Act, and, by its terms, a misdemeanor, still such overdrawing is not necessarily a stealing, embezzling, wrongful abstracting or wilful misapplying of the funds of the bank within the terms of the bond sued upon. The terms of the bond were unquestionably applicable to those cases where the principal stole or embezzled, or *with intent to injure and defraud the bank,* wrongfully abstracted or wilfully misapplied the funds of the bank.

The Trial Court after reading to the jury the third request to charge of the plaintiff, to the effect that such overdrawing was a violation of the bond said (Record, p. 92, etc.) :

"This calls upon the Court to collate and compare and construe the language of a statute and the language of this contract. It is claimed that the language of the contract falls within the language of the statute, and that in this transaction that I have described the defendant Jennings was guilty of a *misapplication* of the funds of the bank within the meaning of the contract * * *." (Here the Court reads Sections 15 and 17 of the Trust Company Act.)

"Unquestionably the conduct of Mr. Jennings with respect to this $2,000 transaction was a violation of this statute. Undoubtedly he owes the Trust Co. $2,000. Undoubtedly in that respect he is guilty of a misdemeanor. It is not merely what the statute says, but whether the statutory case is also a case within the language of this contract—whether to overdraw your account is a stealing embezzlement, misappropriation or misapplication of the funds of the bank. I am not sure

> that it is. I am inclined to think that it is not. The language of the contract and the language of the statute can be forced together by argument; but it seems to me that that is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case, and denying the first and third requests to charge."

There is no question that Jennings overdrew his account, nor is there any question that he owes the bank $2,000, for an overdraft is really a loan (*Hennessy v. Memphis National Bank,* 129 Fed., 557), and may be recovered by action properly brought.

We submit, therefore, that under the most favorable view for the plaintiff, the evidence submitted was not sufficient to justify a recovery under the bond for this item of $2,000.

(2) Jennings' testimony discloses that he was authorized by the Managing Director (and the only active Director) of the bank to draw the $2,000 check.

Jennings' testimony disclosed that before drawing the $2,000 check he talked the matter over with Smith, the managing director of the bank, and, acting under his instructions, he drew the check which overdrew his account.

Now, while it is true that to overdraw one's account *with an intent to injure and defraud the bank* may amount to a wrongful abstraction or willful misapplication of the funds of the bank (*Evans v. U. S.,* 153 U. S., 584; *U. S. v. Britton,* 107 U. S., 655; *U. S. v. Breese,* 173 Fed., 402; *U. S. v. Norton* 205 Fed., 593), we submit an overdrawing of one's account *unaccompanied with an intent to injure and defraud the bank* does not amount to such a wrongful abstraction or to a willful misapplication (*U. S. v. Batchelor,* 156

U. S., 426; *U. S. v. Breese,* 173 U. S., 402; *U. S. v. Dow,* 82 Fed., 904).

The intent with which an overdraft is made is, therefore, important. Appellant admits this in his brief (p. 27). If such overdraft is made without intent to injure and defraud the bank, there is no wrongful abstraction or wilfull misapplication. It is important, then, for us to ascertain with what intent Jennings overdrew his account.

Jennings states that he spoke to Mr. Smith, the treasurer of the bank, about having Mr. Smith help him out and that Mr. Smith said to him, "Go ahead and give them your check" (p. 67), and he would take care of it (p. 73). That acting under such instructions he gave the check. When the check came in he took it out of the basket and substituted a charge account *against himself* for it. He entered up the check against himself in his proof book for that day. In other words, he charged himself with having received $2,000 *more* from the receiving teller than he actually received (p.). Here no intent to injure or defraud the bank is manifest. On the following day, the receiving teller having charged the "teller's charge slip" for $2,000 against him, he having already charged himself with the amount of the check, did not charge himself in his proof book for that day (June 4th) with the "teller's charge slip". No intent to injure or defraud the bank yet appears.

Plaintiff argues, however, that because Jennings carried the check in his cash for a few days, without the same being charged to his account, that an intent to injure and defraud is manifest, and this is strengthened by the fact that the check was never charged to the account of Jennings although the same was paid. Jennings states that the check was carried in his cash because Mr. Smith, who, he says, had told him to give his check, and he (Smith) would take care of it, had

not done so, but that subsequently he (Jennings) gave to Smith his note payable in three months for the amount of the check (p. 75).

The check was subsequently taken out of the paying teller's cash and something was put in place of it (p. 73). Who took the check out of the teller's cash does not appear, but it did appear that Mr. Smith had often taken from the teller's cages checks and other cash items and substituted other cash items therefor. Jennings states that he doesn't know what was put in its place (p. 73). The presumption would naturally follow that Smith had credited the note (or the proceeds thereof) to the account of Jennings and charged the check against it.

The transaction then resolved itself unto the situation that Jennings, under the authority of the Treasurer and sole active and managing director of the bank, overdrew his account to the extent of $2,000 and had given his note therefor. In other words he had borrowed from the bank $2,000 upon his note.

We respectfully submit that the case is barren of testimony tending to establish *an intent to injure and defraud* the bank upon the part of Jennings, and that while he may owe the bank $2,000 by reason of his overdraft, the evidence establishes that he did not steal, embezzle, wrongfully abstract or wilfully misapply the funds of the bank within the meaning of the bond given, and that the Trial Court did not err in withdrawing the $2,000 item from the consideration of the jury.

(3) Should it be held that the Court erred in disallowing the $2,000 item there should be a trial de novo.

The most favorable view of the testimony of Jennings and Smith for the plaintiff is that it presented a disputed question of fact as to the intent of Jennings to injure or defraud the bank;

Jennings affirming that he drew his check overdrawing his account upon the instructions of Smith that he would take care of it and that he afterwards gave to the bank (through Smith) his note for the amount of the check drawn, and Smith denying the entire transaction. If Jennings did overdraw his accout with the permission of and under the instructions of Smith and afterwards gave to the bank (through its managing director and officer) a note for the amount thereof, no intent to injure or defraud the bank appears, nor could it be held that Jennings had stolen, embezzled, wrongfully abstracted or wilfully misapplied the funds of the bank. The truth or falsity of the testimony of Smith and Jennings must, under such circumstances, determine the motive or intent of Jennings in overdrawing.

Should the Appellate Court find that the Court erred in disallowing the $2,000 item and should have submitted the question as to the liability of the defendant to the jury, then a new trial should be had.

Respectfully submitted,

EDWARDS & SMITH,
Attorneys of Defendant,
American Surety Company.

EDWIN F. SMITH,
Of Counsel.

New Jersey Court of Errors and Appeals.

ROSEVILLE TRUST COMPANY, by George M. La Monte, as Commissioner of Banking and Insurance of the State of New Jersey,

Plaintiff-Appellant,

against

A. RANDOLPH JENNINGS and AMERICAN SURETY COMPANY,

Defendants-Respondents.

Statement.

The plaintiff appeals from a judgment in its favor entered on a verdict in the Essex Circuit, in so far as said judgment fails to include a certain $2,000 item of damages and interest thereon, which the trial court disallowed and withdrew from the jury's consideration.

The action was brought by the Roseville Trust Company (in liquidation) against its teller and the surety on the teller's fidelity bond (p. 6), by the terms of which bond the defendants bound themselves to pay plaintiff "such pecuniary loss, not exceeding Ten thousand dollars, as the Employer (plaintiff) shall have sustained of Employer's money, funds or other personal property (or belonging to others for which the employer may be legally responsible), *stolen, embezzled, wrongfully abstracted or wilfully misapplied by said Employe* * * *." (Italics ours.)

As to nine of the items listed in the complaint (p. 13), aggregating $6,475, the jury found that the money had been stolen, embezzled, wrongfully abstracted and wilfully misapplied by the defendant-respondent Jennings, and that loss to that extent had been occasioned to the Roseville Trust Company by such fraudulent conduct (pp. 118 to 120). As to a tenth item of $1,000 the jury found for the defendants (p. 120).

The only item involved in this appeal is a further item of $2,000 as to which the trial court refused to direct a verdict for plaintiff, but of its own motion disallowed the item as a matter of law, and withdrew it from the jury, on the ground that the money was neither "stolen", "embezzled", "wrongfully abstracted", nor "wilfully misapplied" (pp. 94, 101, 103, 106). The two questions presented here are:

(1) Did the trial court err in disallowing the item?

(2) Did the trial court err in refusing to direct a verdict for plaintiff with respect thereto?

The Grounds of Appeal.

Technically, the rulings which we claim were erroneous comprise such portions of the charge to the jury as disallow the $2,000 item, and the denial by the trial judge of plaintiff's requests to charge as to that item (comprising virtually a motion to direct a verdict thereon for plaintiff). The notice of appeal sets forth these two grounds as follows (pp. 1 to 3):

> 1. The court charged the jury as follows:
> " * * * whether to overdraw your account is a stealing, embezzlement, misappropriation or misapplication of the funds of the bank. I am not sure that it is; I am inclined to think that it is not. The language of the contract and the language of the

statute can be forced together by argument; but it seems to me that is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case, and denying the first and third requests to charge. * * * I have disposed in my own way of the item of $2,000, disallowing it, * * *

"MR. SMITH: If your Honor please, I understand that the $2,000 item is disallowed; is that what your Honor said?

"THE COURT: Yes, I do not think it is fairly described by the statute as being within the terms of the contract."

2. The court denied the request of plaintiff's counsel to charge the jury as follows:

"(1) That the statute law of the State of New Jersey (4 Compiled Statutes, p. 5661) makes it a crime for a teller of a trust company to knowingly become liable to said trust company by reason of overdrawn account, and since defendant Jennings has conceded that he permitted the trust company to pay his $2000 check without funds in his account to meet it, the jury is charged that the defendant Jennings wilfully misapplied the said $2000 and the jury's verdict must be for the plaintiff, so far as this item is concerned, to the extent of whatever loss they find the trust company suffered through this transaction. Denied. * * * (3) That the defendant Jennings has admitted that by means of the payment of his $2000 check upon his overdrawn account he knowingly obtained the use of $2000 of the trust company's funds for a period of a week or ten days until he, as he claims, gave Raymond E. Smith his note for a like amount, which, as he claims, was to be discounted at another bank. This is the version of the testimony which is most favorable to the defendants, plaintiff's version being that no such arrangement was made by Jennings with Smith, and no note delivered. That upon defendant's own admissions Jennings, as a teller of the trust company, knowingly pro-

cured a loan of $2000 from the trust company for a period of a week or ten days, without submitting in writing to a meeting of the board of directors or executive committee of the trust company a proposition to make such loan, stating the amount, terms and security, if any, offered therefor. This was a crime. (4 Comp. Stat., p. 5661.) And the jury is charged that the transaction was a wilful misapplication by Jennings of $2000 of the trust company's money. The jury must find for the plaintiff, for the amount of whatever loss they find the trust company suffered thereby. Denied."

Exceptions were, of course, duly taken (pp. 104, 105, 106, 108, 110, 111).

Most of the essential facts involved in the $2,000 item are undisputed. While Jennings' story, in an attempted *justification* of the transaction, is positively denied by another witness, the facts of the *transaction itself* are all admitted by the defendants, and indeed are shown beyond dispute by the books and records of the trust company:

Undisputed Facts Respecting the $2,000 Item.

In June, 1913, the defendant Jennings was the paying teller of the Roseville Trust Company. According to his own story (p. 66 et seq.), he was approached by a Mr. Charles F. Meyer with a proposition that he and Jennings should together purchase a certain moving-picture concern from one Walter H. Meier, who was about to sell out. Jennings, as he says, "was desirous, and had been for some time, of getting out of the banking business" (p. 66). The proposition appealed to him, and on June 3rd, 1913, he drew a check for $2,000 upon his personal checking account in the Roseville Trust Company to the order of said Walter H. Meier for his share of the purchase price. Jennings' balance was not sufficient

to pay the check (p. 69), being on that day only $105.90 (p. 58), and he admits that he was well aware at the time he drew the check that he had not sufficient funds in his account to pay it (p. 69).

Walter H. Meier deposited the $2,000 check in his own account with the Merchants' National Bank (p. 25) and the check was duly presented with others to the Roseville Trust Company by a so-called "exchange" messenger from the Union National Bank, "clearing" for the Roseville Trust Company (pp. 49, 63, 64). In the ordinary course of business the check when it came in with the others in the "exchanges" should have gone to the bookkeeper with the other checks for verification of signature and date, and to see whether the ledger balance was sufficient to pay it. Had this check gone to the bookkeeper in the usual way, the fact that there were not sufficient funds to pay it would have at once appeared, and the check would not have been paid, but would, in the usual course, have been returned to the Merchants' National Bank as worthless (pp. 71, 72).

Jennings, however, removed the check from the basket before it got to the bookkeeper, and substituted a memorandum slip charging the "first teller" (himself) with $2,000. He testified (p. 72) that he did this

> "For the simple reason that I did not think it was necessary to show Mr. Thompson, or anyone else, as far as that was concerned, why this check was given."

The effect of this abstraction was that *the check was paid* by the Roseville Trust Company, *but not out of Jennings' account* (p. 69).

As to the memorandum slip charging Jennings with $2,000, this would inevitably have required Jennings to produce its equivalent in cash or valid check (pp. 40, 73) unless the slip itself could be

suppressed by Jennings—and he accordingly did suppress it, in the following manner:

According to the usual routine the $2,000 charge memorandum or slip would be held by Thompson, the receiving teller, as a "cash item" until the close of that day (June 3rd, 1913), and then turned over by him, along with his cash and other "cash items", to paying teller Jennings, as part of the cash and other items with which Jennings should start his work for the following day, June 4th (pp. 34, 52). Thompson's testimony, supported by his receiving teller's proof-book, showed that he accordingly did turn over at the close of June 3rd this $2,000 charge slip to Jennings, as part of a number of "cash items" aggregating $4,100.53 (p. 40).

Now Jennings' proof-book should correspondingly show on June 4th, 1913, that he received $4,100.53 in "cash items" from Thompson, the receiving teller (pp. 42, 46, 62), but it actually does show only $2,100.53 (Exhibit P-94, following P-120). Jennings admitted that the figures on that page of his proof-book were all in his own handwriting, including the digit "2" in the figure "$2,100.53" (p. 78). The "2" has obviously been written over some other digit which has been erased (see photograph of Exhibit P-94). A footing of the column containing the figure $2,100.53 will indicate that if the amount of "cash items", as received from the receiving teller, had been correctly entered as $4,100.53, Jennings' proof would have been out of balance (Exhibit P-94) and that the balance has been "forced" by said physical falsification. Neither the $2,000 slip nor the $2,000 check was found among the trust company's records. Jennings admitted that he made no effort to repay the money to the trust company and that he had no funds (p. 74).

Defendant Jennings then was admittedly guilty of the following fraudulent acts in connection with the $2,000 check:

1. He drew and negotiated his $2,000 check on the trust company, knowing that his balance was insufficient.
2. He caused the check to be paid by the trust company.
3. He abstracted the check itself.
4. He contrived that the check should not even be charged to his account.
5. He falsified his proof-book for the purpose of concealing the abstraction.

Jennings' "Explanation".

Absolutely the only defense interposed by defendants was an attempt by Jennings to justify the transaction by stating that he had been told by Raymond E. Smith, the treasurer of the institution:

> "Go ahead and give them your check for it" (p. 67),

and that a week or ten days *after the check had been paid* Smith said:

> "Give me your note for it and I will fix it up" (p. 67).

Jennings says he then gave Smith his note for $2,000 (p. 68) payable (he thinks) in three months, at the Roseville Trust Company (p. 75). He admits that payment was never demanded and that he never even saw the note again. He admits that he never made any effort to pay the note when it became due; that he then had no funds (p. 74). His explanation was:

> "I thought I would be able to take care of that note out of the profits of the business" (p. 75).

It is important, while considering Jennings' ac-

count of his alleged dealings with Smith, to observe what Jennings did *not* claim in this connection:

(1) Jennings did not claim that the alleged note arrangement was even *discussed* with Smith until several days after the check transaction was completed.

(2) Jennings did not claim any other authority for his acts respecting the check except that Smith said to "go ahead and give" it.

(3) Jennings did not claim that Smith instructed him to abstract the check, and cause it to be paid.

(4) Jennings did not claim that Smith instructed him to prevent the check from being truthfully charged as an over-draft against Jennings' account.

(5) Jennings of course did not claim that Smith instructed him to falsify his books for the purpose of covering up the transaction.

(6) Jennings did not claim that the proceeds of the alleged note were ever credited to his account, or entered on the books at all; and admitted that it was never authorized by the directors (p. 78).

Smith's Refutation of Jennings' "Explanation".

While, as we shall show in Point II (*infra*), the testimony of Jennings respecting Smith's alleged part in the transaction would not constitute a defense, even if true, it is important to observe that *Smith positively denied the whole story.* Smith testified that he did not even know Jennings drew the $2,000 check (p. 80). Smith denied that he either instructed or advised Jennings to draw the check (p. 81); and denied that Jennings gave him a note, or that he ever saw such a note, or that he ever told Jennings he would procure the discount of a note (p. 81).

The Trial Court's Reasons for Its Ruling.

In the course of the trial it was pointed out that Jennings' *admitted* conduct respecting the $2,000 check incidentally involved the committing of three distinct crimes by him.

The statutory provisions referred to are found in the "Act Concerning Trust Companies", Laws of 1899, Chapter 174; 4 C. S., p. 5661, and are as follows:

"15. *Loans to officers. Overdrafts. Penalty.* No trust company shall make any loan to its president, vice-president, treasurer, secretary, cashier, or to any of its directors, or any of its clerks, tellers, bookkeepers, agents, servants or other persons in its employ until the proposition to make such loan, stating the amount, terms and security, if any, offered therefor, shall have been submitted in writing by the person desiring the same, to a meeting of the board of directors of such company, or of the executive committee of such board, if any, and accepted and approved by a vote of a majority of those present constituting a quorum; * * *"

15 (Continued). " * * * no such corporation shall permit its president, its vice-president, its secretary, treasurer or cashier, or any of its directors, clerks, tellers, bookkeepers, agents, servants, or other persons in its employ to become liable to it by reason of overdrawn account; any president, vice-president, director, secretary, treasurer, cashier, teller, clerk or agent of any such corporation who knowingly violates this section, or who aids or abets any officer, clerk, or agent in any such violation, shall be guilty of a misdemeanor and punished accordingly.

"17. *Making false statements, reports, entries in books and exhibiting false papers punishable.* Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statement of facts, or false entries in the books of such

> trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor, and punished accordingly."

The trial court, unfortunately for plaintiff, considered Jennings' offense solely from the point of view of whether a *mere* violation of either of these criminal statutes, *as such,* constituted a violation of the bond, and concluding that it did not, disallowed the item entirely, saying (p. 94):

> "Unquestionably the conduct of Mr. Jennings with respect to this $2,000 transaction was a violation of this statute. Undoubtedly he owes the trust company $2,000. Undoubtedly in that respect he is guilty of a misdemeanor. It is not merely what the statute says, but whether the statutory case is also a case within the language of this contract—whether to overdraw your account is a stealing, embezzlement, misappropriation of misapplication of the funds of the bank. I am not sure that it is; I am inclined to think it is not. The language of the contract and the language of the statute can be forced together by argument; but it seems to me that that is a forcing process and not a natural process, and I am therefore inclined to dispose of this eleventh item by saying that the evidence does not show a breach of the contract in this case, and denying the first and third requests to charge."

Our contention of course is that while Jennings' offense *incidentally* involved the crime of overdrawing his account and the other two crimes, it involved much more besides. It involved his taking $2,000 of the Trust Company's money by a deliberate and felonious scheme of which the overdraft was only one feature, and which included, in addition (1) the abstraction of

the check itself, (2) the suppression of a proper charge against his account, and (3) the physical falsification of the books.

That the learned trial judge misunderstood the transaction is apparent from his summarization of Jennings' "explanation" (p. 93):

> "You will remember that Mr. Jennings' account of the matter was * * * *he gave Smith his check,* which Smith took upon an understanding that Jennings was to take it up and that he did give his own check or some check or note, to pay it * * *."

As we have seen, Jennings gave the check to Walter H. Meier (not to Smith) according to Jennings' own testimony, and it was not until a week or ten days after the check had been paid that the matter of the note was even discussed between them (pp. 29, 74).

In this same connection, it should be observed that the learned trial judge did not once throughout the long trial give any hint that he regarded plaintiff's claim on the $2,000 item as invalid, or even doubtful. The first intimation of this view came in the course of the charge to jury, when Judge Adams discussed the transaction (beginning at page 93) and disposed of the item by disallowing it (pp. 94, 101, 103).

Plaintiff's counsel requested "an opportunity to say just a few words on that $2,000 item, *entirely apart from the statute*" (p. 103) hoping that a reconsideration of the ruling might be the result of a correct summarizing of the facts, and of relegating the criminal statutes to their proper, incidental role. But this opportunity did not come until after the jury had retired; then after the matter was explained, the Court said (p. 106):

"You may be right, but I shall let my charge stand."

The Court will not be misled by the granting of defendant's seventh request to charge (pp. 100, 101, printed again at p. 115) which would seem to indicate that the $2,000 item was left to the jury. This was obviously an inadvertence, because *after* granting the seventh request the court said (p. 101): "I have disposed in my own way of the item of $2,000 disallowing it," and again at p. 103 repeated the ruling, and after defendant had excepted (p. 108) to the granting of the seventh request to charge, the jury itself brought the matter again to the Court's attention and the following colloquy took place (p. 109):

"THE COURT: The foreman of the jury has sent word saying that the jury wants to know whether the $2000 is in or out. I shall tell them that it is out.

"MR. CLARK: Your Honor's mind is made up on that, is it?

"THE COURT: Yes, my mind is made up. I do not say that I am right, but my mind is made up.

"The jury returns into court.

"THE COURT: Mr. Foreman, I understood the inquiry from you in this way; that the jury was in some uncertainty as to whether the $2000 was in or out of the case. Is that it?

"THE FOREMAN: Yes, sir.

"THE COURT: According to my view, it is out. Counsel for the plaintiff do not agree with me, but that is my ruling, and if I am wrong, as I often am, it may be corrected hereafter.

"The jury again retires."

Outline of Appellant's Contentions.

Under Point I we show that it was amply proved that Jennings "wrongfully abstracted" and "wilfully misapplied" the $2,000, and the trial court erred in disallowing the item.

(a) In determining whether the item was properly disallowed the plaintiff is entitled to the benefit of that view of the *disputed* testimony which is most favorable to plaintiff.

(b) Jennings' dealings respecting the $2000 clearly amounted to a "wrongful abstraction," as that term has been uniformly defined by the courts.

(c) Jennings' dealings respecting the $2000 clearly amounted to a "wilful misapplication," as that term has been uniformly defined by the courts.

(d) The fact that Jennings' acts involved the commission of three distinct crimes is a cumulative, though not an indispensable, indication that the acts amount to a "wilful misapplication," and "wrongful abstraction."

Our second point is that under the view of the disputed evidence which was most favorable to defendants, Jennings' acts amounted to a "wrongful abstraction" and a "wilful misapplication," and the trial court erred in not directing a verdict for plaintiff.

(e) Even if it were true that Smith instructed Jennings to issue the check, that fact would not relieve defendants.

(f) Even if it were true that Jennings later gave Smith a note for $2,000, that fact would not relieve defendants.

(g) Plaintiff's requests to charge were in effect a motion to direct a verdict for plaintiff as to the $2,000 item.

(h) It appearing from the record that plaintiff must inevitably recover, this Court should itself modify the judgment by including the $2,000 item.

The "State of Case" on this appeal is greatly abridged, by consent, containing only such portions of a very long record as bear upon this particular item.

For a full understanding of the situation it should also be explained, that the defendant American Surety Company, upon rule to show cause by Judge Adams, moved for a new trial as to three out of the nine items included in the verdict for plaintiff. After argument before the Chief Justice and Justices Parker and Kalisch the rule was discharged, upon the following opinion:

"PER CURIAM:

"The defendant company entered into a bond with the trust company to protect it against loss by the theft, embezzlement, wrongful abstraction, or wilful misappropriation of funds by Jennings, the teller. The plaintiff had a verdict for the full amount of its claim.* The rule to show cause was limited to three items: first, a deposit of Catherine Powers amounting to $700, and made March 28, 1912; second, a deposit of John V. Dwyer, amounting to $900, and made on June 11, 1912, and, third, a deposit of $3000 made by Matilda Reglin on the 14th of June, 1913. Jennings himself admitted the defalcation, and the manipulation of the deposit slips by him for the purpose of covering it up, but claimed that the money had been really abstracted by Smith, the cashier of the trust company,

*This is slightly incorrect, inasmuch as the Trial Court disallowed the $2,000 item and the jury's verdict was for defendant on one item of $1,000 (p. 120). This feature was, of course, not material on the motion for new trial.

without interference by him. Jennings, although he himself had received the deposit. Smith having been called as a witness on behalf of the plaintiff testified that he had no knowledge or recollection of these transactions. The jury evidently did not believe the defendant's testimony, and accepted that of Smith. It cannot be said that they were not fully justified in doing so. Moreover, even if Jennings' story is to be believed, these funds were in his custody, and he permitted Smith to take them with full knowledge of the latter's purpose in doing so. In addition, he had manipulated the evidence of the receipt of these deposits for the very purpose of providing for their abstraction without discovery by the trust company. This being so he was himself the original abstractor, as much so as if he had put the funds in his own pocket and afterward turned them over to Smith. The rule to show cause will be discharged."

POINT I.

That Jennings "wrongfully abstracted" and "wilfully misapplied" the $2,000 item was amply proved, and the trial court erred in disallowing the item.

(a) In determining whether the item was properly disallowed the plaintiff is entitled to the benefit of that view of the disputed testimony which is most favorable to plaintiff.

An issue of fact arose out of Smith's positive denial of Jennings' testimony that Smith instructed him to "give the check" and that later, at Smith's direction, he gave Smith a note for the amount.

We shall show later (Point II, *infra*) that such testimony, if true, would not relieve defendants. It is enough here to say that even if Jennings' story did tend to excuse his act, the trial court was not justified in accepting that

story and rejecting Smith's denial thereof, and refusing to allow the jury to decide this issue of fact (if it was really necessary that it be decided at all).

38 *Cyc.* (Trial) 1567;
Underfeed etc. Co. vs. Hudson etc. Co., 70 N. J. L., 649; 58 Atl., 296;
Weatherbee vs. Rug Co., 80 N. J. L., 364; 78 Atl., 190;
Nixon vs. Nixon, 87 Atl., 454;
Gallagher vs. McBride, 63 N. J. L., 422; 44 Atl., 203;
Synear vs. Wharton, 48 N. J. L., 97, 2 Atl., 664;
Bartow vs. Brands, 15 N. J. L., 248;
Coxe vs. Field, 13 N. J. L., 215.

Let us consider the facts therefore on the assumption that Jennings' story of Smith's instructions and the giving of the note was *false*, and determine whether such facts entitle plaintiff to judgment on the $2,000 item. In short does the following amount to a "wrongful abstraction" or a "wilful misapplication"?

A teller of a trust company, *without the permission or knowledge of any officer,* director or any other person, draws a $2,000 check on said trust company, abstracts the check itself from the "clearings," causes the check to be paid, but not charged to his account, and falsifies the books to conceal the transaction. He hopes to repay the trust company out of the profits of a moving picture concern, but fails to do so.

While the question seems hardly to require the citation of authorities, we shall next consider the foregoing facts in the light of the interpretation which the courts have placed upon the phrases "wrongful abstraction" and "wilful misapplication."

(b) Jenning's dealings respecting the $2,000 check clearly amounted to a "wrongful abstraction" as that term has been uniformly defined by the courts.

"To abstract * * * means to 'take from' or 'withdraw,' so that to abstract the moneys from the bank is to take and withdraw from the possession and control of the bank its moneys, funds, and credits. To constitute the offense of abstracting, it should be done without the knowledge and consent of the bank, and with intent to injure and defraud it or some other company or person. Abstracting the funds of the bank may be done by one act or a succession of acts. It may be done under the color of loans, discounts, or *checks*. The means used would be immaterial if the result is the wrongful withdrawal of funds or moneys from the bank without its actual knowledge and consent, and to convert the same to the use and benefit of the abstractor." (Italics ours)

U. S. v. Breese, 173 Fed. 402, at p. 406. (affd. 203. Fed. 824).

"* * * No previous lawful possession, as in the crime of embezzlement, is necessarily in order to the commission of this offense (abstraction); nor is it material by what means, contrivances, or devices the abstraction of its funds from the possession of the bank is effected and accomplished. It may be done by one act or a succession of acts, or it may be effected by fraudulent schemes and contrivances, under the color of loans, discounts, *checks,* or entries. The methods of its accomplishment do not change the character of the act. If the ultimate result is to wrongfuly obtain funds or moneys of the bank, without its knowledge or consent, and convert the same to the wrong-doer's use and benefit, the instrumentalities resorted to or em-

ployed to effect that end in no way change the criminal character of the act." (Italics ours)

U. S. v. Harper, 33 Fed., 471, at p. 480.

"* * * the accused, having access to the books and funds of the bank by virtue of his position as a director therein, had deliberately taken the money of the bank without the consent of anyone, and had appropriated it to his own use, leaving in exchange therefor two notes which were utterly worthless, and rested upon no consideration whatever as between himself and the stable boy whose signature he had obtained. Such an act, if committed, was a wilful misappropriation or *abstraction,* of the funds of the bank by a director thereof. The two notes were properly admitted in evidence." (italics ours).

Dorsey v. U. S., 101 Fed., 746, at 755 (writ denied 178 U. S., 613).

(c) Jenning's dealings respecting the $2,000 check clearly amounted to "wilful misapplication" as that term has been uniformly defined by the courts.

In *Fidelity & Deposit Co., v. Courtney,* 186 U. S. 342, the Supreme Court of the United States affirmed a judgment (103 Fed., 599) against the surety upon the bond of one McKnight, president of a national bank, for certain sums "alleged to have been embezzled and *misapplied*" (p. 343) by him. While the opinion dealt with other questions than the definition of the word "misapplied" it is significant that though the suit was resourcefully and exhaustively defended by the defendant surety company, defendant was not able to escape judgment on certain items of "misapplication" which were curiously like the one in the case at bar

(except that the latter was *worse* in several respects, since it included the abstraction of the check voucher, the suppression of a charge against the guilty drawer's account, and the falsification of the books). The items of misapplication we refer to were described in the opinion (at page 353) as follows:

> "On January 21, 1896, to pay his own debt, McKnight drew his individual check (he having an individual account with the bank), for $1253, to the order of a person to whom he was personally indebted. This check was paid. McKnight instructed the cashier not to have this check charged up but to carry it as cash, and it was so carried until March 12, 1896, when McKnight directed that the check be debited to the account of S. E. Edmunds & Co., which was done. Subsequently, and prior to the 12th of March, 1896, another check was drawn by McKnight, on his individual account, for $1650, and was paid and carried by the cashier, by McKnight's direction, as cash, until March 12, 1896, when it was charged up to the Louisville Deposit Collateral account. This latter was an account on the books of the bank of which McKnight had the management and control as president of the bank, but in which he had no personal interest. It was shown that the carrying of these checks by the cashier in his cash as money was called to the attention of the vice-president of the bank, who made inquiry on the subject as to why it was done and was informed that it was done at the request of McKnight, the latter presumably directing the checks to be charged as above stated, in consequence of such inquiry."

The case of *Keliher v. U. S.*, 193 Fed. 8, wherein the Circuit Court of Appeals, First Circuit, construes the word "misapplied," is strikingly in point, in that the offense of the accused bank clerk consisted of an overdraft on his own deposit

account, suppression of entries, secretion of check vouchers, and payment through the clearing house (exactly as in the case at bar). The Court said (p. 14):

"He (defendant) claims that the indictment nowhere sets out the manner in which the funds of the bank were *misapplied* by Coleman. We have no doubt that this criticism is suggested rather by redundancy than by any deficiency in its allegations. It is to be borne in mind that the indictment alleges that Coleman was not only a clerk but a depositor; and it is by virtue of the fact that he thus occupied a double position that he was able to complete the frauds on which these proceedings are based. We call specific attention to the fact that *the basis of the indictment is over-drafts by Coleman as a depositor, and also that he as bookkeeper knowingly and fraudulently neglected to inform the proper officers of the institution in regard to the over-drafts.* * * * * * The transactions were accomplished through checks on the bank, given by Coleman to the order of one Reinhardt, which came into the bank *through the Clearing House,* which *checks were not entered up* on its account books, but were *taken and secreted* by Coleman; the whole being accompanied with entries made by him on the accounts of other depositors which enabled him to *bring out his trial balance.* The indictment is complicated by the allegations that the bank in question had credits of certain amounts named with the National Shawmut Bank, and that Coleman did '*misapply*' these credits in the way stated, namely, that the checks came in the usual way through the Clearing House back to Coleman as bookkeeper, as the indictment points out; so that through the operation of the Clearing House the bank in question here was deprived of the amounts due from the National Shawmut Bank, and its credits there 'were applied to the benefit of Cole-

man'. To explain these complicated transactions simply: If Reinhardt had produced Coleman's check at the counter of the bank in question here, and the paying teller had paid them in bills, and passed them over to Coleman as bookkeeper to be entered up, and they had been entered up in the regular way, Coleman would have stood, under the circumstances alleged, as having openly overdrawn his account. A single transaction of that character, if disclosed, would, of course, not necessarily or even presumably have involved a criminal intent or act, as he might have had credit with his own bank for the amount of any particular check; but by not entering the checks on the books of the bank, and by concealing them from the officers of the bank, he would have shown a fraudulent intention to abstract the amounts of the checks from the funds of the bank, which would render him criminally liable. The substance of the transactions as they appear on the face of the indictment, though they traveled a long road, are the same as what we thus describe.' (Italics ours)

"Among the acts enumerated is the act of *misapplying* money of the association, and, as I conceive, a conversion, by a director, of money of the bank of which he has acquired the possession or control by means of his *over-draft, drawn without right,* and with intent to defraud, would constitute a *misapplication* of money * * * (italics ours)

U. S. v. Warner, 26 Fed. 616.

"* * * the charge is *wilful misapplication* of the funds of the bank by discounting worthless and unsecured notes for his own use; and therefore *the only intent necessary* to be proved was that the plaintiff-in-error *did the acts complained of purposely or designedly.*" (Italics ours).

Pearce v. U. S. 192 Fed., 561.

Of course, it cannot be contended that in the case at bar Jennings did not do the acts complained of *purposely* or *designedly.*

It is true that many of the cases cited by us as construing the words "misapply" and "abstract" have to do with those terms as they occur in criminal statutes. The respondents should not complain of this, however, for obviously in applying a penal statute a *stricter* conformity of acts to statutory language is required, than in applying the words of a fidelity bond written by a professional bonding company, which according to the uniform modern rule, is regarded as a *policy of insurance,* and construed liberally in favor of the employer.

American Surety Co. vs. Pauly No. 1, 170 U. S., 133, at page 144.

Justice v. Empire State Surety Co., 209 Fed., 105.

Curry v. Equitable Surety Co., 148 Pacific, 914.

Young v. American Bonding Co., 228 Pa., 373.

U. S. Fidelity etc. v. Poetker, 180 Ind. 255; see court's language at page 263.

Green v. U. S. Fid. & Guar. Co., 185 S. W. (Tenn.), 726, 727; citing

City Trust, etc., Co. v. Lee, 204 Ill., 69;

Champion, etc., Co. v. American Bonding, etc., Co., 115 Ky., 863.

Moreover, the draftsman of the bond in suit (inferably the bonding company itself) has made itself answerable for money or funds "stolen, embezzled, wrongfully abstracted or wilfully misapplied." These are almost the precise words used in the criminal statute governing

national bank officials which has had uniform and nation-wide application for many years, and the terms of which have been so frequently and thoroughly defined by the courts, as to suggest, almost irresistibly, why similar terms have been employed in a carefully prepared instrument like this fidelity bond. (*U. S. Rev. Stat. Sec.* 5209, *Comp. Stat. Sec.* 6772).

In fact, in fidelity bonds, even the words "larceny" and "embezzlement" are construed so as to indicate merely "dishonesty and fraudulent breach of any duty or obligation upon the part of the officer in connection with his duties * * *."

Green v. U. S. Fid. & Guar. Co. (*supra*);
citing
City Trust, etc., Co. v. Lee (*supra*);
Champion, etc., Co. v. Amer. Bonding, etc., Co. (*supra*).

But it is unprofitable to consider whether Jennings' acts were not actually such as to warrant the use, also, of the terms "stolen" and "embezzled," because much less of a showing of guilt is required to bring a transaction under the weaker terms, "wrongfully abstract" and "wilfully misapply."

"The proof to establish a case of *wilful misapplication* of funds, or an *abstraction* of the moneys or funds of the bank, would be inadequate to make a case of embezzlement."

U. S. v. Cadwallader, 59 Fed., 677 at p. 680.

"Whether or not the illegal taking of the money constituted embezzlement is immaterial. Under the allegations Geiger illegally *abstracted* and *misapplied* the money."

Geiger vs. U. S., 162 Fed., 844, at p. 848 (C. C. A.)

"* * * But it is evidently the intention of the statute not to use the words 'embezzle' and 'wilfully misapply' as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of *wilful misapplication*" (italics ours).

U. S. vs. Northway, 120 U. S., 327 at p. 332 (Matthews, J.).

"These offenses are stated disjunctively in the statute: 'Any president, director, or cashier who embezzles,' or, 'who abstracts' or 'who wilfully misapplies.' A casual reading of this section might induce an unobserving person to assume that the three words were synonymous, or nearly so, but there is a distinction to which I desire very briefly to call your attention. The crime of embezzlement is a species of larceny, and is applicable to the stealing of property by clerks, agents, servants, parties acting in fiduciary capacities, and, under this statute, by a president, cashier, or director of a national bank. In order to constitute this crime it is necessary that the property embezzled should come *lawfully* into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes. It is distinguishable from the crime of larceny in this respect, that the property come *lawfully* into his possession, and is unlawfully taken by him. In the crime of larceny, on the contrary, it is unlawfully taken and retained. The crime of *abstraction,* made so by the statute, applies to cases where one for his own benefit takes the prop-

erty of another; but it is not necessary that any position of trust should exist between the parties; nor is it necessary that the property should come lawfully into the possession of the person abstracting it. The other crime is the *wilful misapplication* of the funds, credits and money of the bank; and by the word 'willfully,' the congress meant 'designedly'—where one of the persons mentioned in the section *designedly* and knowingly misapplies the property of the bank. It is not necessary that the party who misapplies should derive any benefit from the transaction."

U. S. vs. Lee, 12 Fed., 816, 818.

In *U. S. vs. Fish,* 24 Fed., 585, the *misapplication* involved, along with other devices, as in the case at bar, the payment of a check (over-draft) by means of a clearing-house credit. What the Court said (at p. 592) is applicable to the facts at bar:

"The defendant is also convicted of the *misapplication* charged in the twenty-second count. In this count the misapplication of $250,000 is alleged to have been accomplished by causing this sum to have been paid upon checks drawn upon the bank by Grant & Ward in excess of the amount which the firm was entitled to draw and have paid by the bank. In regard to the conviction upon this count, *it is said that the evidence showed that these checks came through the clearing-house, and all that the accused did was to pay to the clearing-house a lawful debt due the clearing-house.* Therefore, it is said, his act was not an act done to defraud the bank, but to fulfill an obligation of the bank to the clearing-house. But the checks, when presented to the bank, were recognized by the accused. By his direction they were not returned to the bank which had presented them at the clearing-house, as might have been done, and by his direction they

were retained by the Marine Bank and charged to Grant & Ward in their account with the bank, constituting an over-draft to that amount. This overdraft on the bank by the defendant's firm the defendant permitted, as the jury have found, with the intent to defraud the bank of the money. The fact that the checks came to the bank by way of the clearing-house, and that they were charged against the account of Grant & Ward after the bank had settled its account with the clearing-house, does not change the character of the transaction, so far as the defendant is concerned. The checks were paid out of the moneys of the bank as the indictment charges. What the defendant did was to allow his firm to overdraw its account under circumstances warranting a finding of the jury that he did this act with intent to defraud the bank of the money. Such an act done with such an intent, is misapplication of the moneys of the bank within the meaning of Section 5209, and the conviction upon the twenty-second count was proper" (italics ours).

It should be remembered that in the case at bar Jennings himself procured the payment of his check, and the suppression of its entry against his account, by removing the check from the "clearing" basket, thus preventing its automatic return marked "No funds" to the Merchants National Bank, and thus allowing it as a credit through the clearing-house. This, as Jennings himself said, constituted *payment* (p. 69). Indeed, it may be interesting to read at this point what Jennings frankly testified to on direct examination by his own counsel (p. 69):

"Q. Now, Mr. Jennings, did you give a check for this $2,000 item? A. I did.

"Q. Was it paid by the Roseville bank? A. Yes, sir.

"Q. In what manner did that go through the records of the Roseville Bank? A. Paid in the regular way, through the exchanges.

"Q. What became of it then?

"By the Court:

"Q. Let me understand. Was that drawn on your checking account? A. It was a check drawn by me on the Roseville Trust Company and signed by me.

"Q. Was it paid out of your checking account? A. No, sir; it was not.

"Q. You had one? A. I did.

"By Mr. Degraw:

"Q. You knew when the check was given that you did not have sufficient funds there to meet the amount of the check in your checking account? A. I did.

"By the Court:

"Q. You did have sufficient funds? A. No, I did not.

"By Mr. Degraw:

"Q. You knew that you did not? A. I knew that I did not."

(d) **The fact that Jennings's acts involved the commission of three distinct crimes is a cumulative, though not indispensable, indication that the acts amounted to a "wilful misapplication" and "wrongful abstraction."**

As we have seen from the authorities quoted above, the question whether an over-draft is an abstraction and wilful misapplication depends upon the intent. A fraudulent intent is in New Jersey conclusively presumed when an employee of a bank deliberately over-draws his account, such an over-draft being forbidden by the trust company act (quoted *supra*), and being moreover a misdemeanor *per se*. The law presumes that Jennings was familiar with that statute, and it is not difficult to believe that as an *actual fact,* as well as a legal presumption, Jennings, an experienced bank employee, knew in general the important features of the New Jersey trust com-

pany statute, and it would be absurd to contend that Jennings did not know that it was a crime for him to falsify the books. And assuming that there was any truth in his story about the note, Jennings must be presumed to have known that it would be a crime for him even to procure a loan from the trust company without the formalities described by statute (see statute quoted). Neither the complaint nor the theory upon which the action was tried indicates that recovery was sought *on the basis* of these criminal statutes. Their only importance is to furnish cumulative indication of Jennings's fraudulent intent in misapplying the $2,000, which intent is to be conclusively presumed from his acts.

> "It is urged that, if all that the last 16 counts set forth be proven (charging that defendant 'wilfully misapplied' the 'moneys, funds and credits' of the Mercantile National Bank), the proceeding amounts to no more than an overdraft. An overdraft may be legal or it may be criminal according to the intent of the person committing it, as inferable from the surrounding circumstances shown in the proof."
>
> *U. S. vs. Heinze,* 161 Fed., 425, 428.

Among the "surrounding circumstances," in the Jennings case, were (1) the fact that it was a bank teller who was guilty of the overdraft, a criminal act *per se* in New Jersey; (2) the fact that the check itself, a valuable record, was abstracted by Jennings so that his account was not charged, though the check was paid, (3) the fact that Jennings deliberately falsified the books to conceal the transaction, a criminal offense in New Jersey and every other jurisdiction that we know of, (4) the fact that Jennings was desirous of getting out of the banking business and had no other prospect of repaying the money except "out of the profits."

POINT II.

Under the view of the disputed evidence which was most favorable to defendants, Jennings's acts amounted to a "wrongful abstraction" and a "wilful misapplication," and the Trial Court erred in not directing a verdict for plaintiff.

(e) **Even if it were true that Smith instructed Jennings to issue the check, that fact would not relieve defendants.**

The learned trial judge himself charged to the latter effect at p. 85:

> "In my mind Mr. Jennings either embezzled or he did not. If he did embezzle and steal and do these other things which are described by different formulas, he could not plead in justification that somebody told him to do it."

If it was a wilful misapplication for Jennings to take this money, it was none the less so because Smith told him to do so (assuming that Smith did tell him), particularly since Jennings did not even claim that Smith told him to abstract the check, or cause the check to be paid, or prevent a charge being made against Jennings' account or falsify the books. In fact, even if Smith had instructed Jennings to do all of these fraudulent things (which is not even claimed) they would none the less constitute a "wrongful abstraction" and "wilful misapplication" by Jennings. It should be noted that up to the point where Jennings wrote out a check for $2,000 and delivered it to Walter H. Meier he as yet committed no offense *against the bank.* If he had done nothing further, the check would automatically have been taken from the "clearing" basket and

sent back to the Merchants National Bank because of insufficient funds, so that Walter H. Meier, and not the Roseville Trust Company, would have been the injured party. Even if Jennings told the truth in saying that Smith told him to "go ahead and give the check," Smith's instructions did not authorize anything more than defrauding Walter H. Meier by giving him a worthless check. The real offense against the trust company had its inception when Jennings by abstracting the check caused it to be paid, and prevented his account from being charged therewith.

Not only is the rule well settled that the instructions of a superior officer will not justify a misapplication of funds, but the courts have gone so far as to say that such conduct will not be excused even by authorization of the entire board of directors.

> "Surely, evidence that the defendant acted with the sanction, consent, or ratification of these men could not be admissible. * * * The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or wilful misapplication of the funds of the bank. *Minor vs. Bank,* 1 Pet., 44, 7 L. Ed., 47. The authority of the officers of the bank and of its board of directors extends only to legitimate transactions honestly intended for the benefit of the bank. *U. S. vs. Harper* (C. C.), 33 Fed., 484.
>
> *Breese vs. U. S.,* 106 Fed., 680, at p. 685.

The United States Supreme Court has held, in an action against the surety on a fidelity bond:

> "* * * that the acts of ordinary agents or employees of the indemnified corporation conniving at or cooperating with the wrongful act of the bonded employee will not be imputed to the corporation."

Fidelity and Deposit Co. vs. Courtney, 185 U. S., 342, at p. 361, and numerous cases cited and quoted there.

(f) **Even if it were true that Jennings later gave Smith a note for $2,000, that fact would not relieve defendants.**

It has, in a number of the reported cases, been a feature of the "wrongful abstraction" or "wilful misapplication" that the accused bank officer, in the effort to give an air of respectability to his peculations, went through the form of *giving a note* executed either by himself or by some other irresponsible person. The courts have uniformly refused to regard the giving of such note as a defense, especially where the accused, or other maker, was without funds. There is a particular reason in the case at bar why the giving of a note (even if it occurred) would not excuse Jennings' act, in the fact that such transaction is expressly forbidden by the trust company act (*supra*). Moreover Jennings does not even claim that a note was given until many days after the check transaction had been completed. Not only was the note never paid, but Jennings never had any prospect of paying it, except "out of the profits." The following cases are authority for the proposition that a "wrongful abstraction" or "wilful misapplication" are none the less such because of the formality of a note:

Evans vs. U. S., 153 U. S., 584, p. 591 *et seq.* (distinguishing *U. S. vs. Britton,* 108 U. S., 193);
U. S. vs. Youtsey, 91 Fed., 864, 866;
Stout vs. U. S., 227 Fed., 799, 801;
Walsh vs. U. S., 174 Fed., 615, at pp. 618 and 620;
U. S. vs. Breese, 173 Fed., 402, 406 (affd., 203 Fed., 824) (quoted *supra*);

U. S. vs. Harper, 33 Fed., 471, 480 (quoted *supra*);

Dorsey vs. U. S., 101 Fed., 746 (writ denied, 178 U. S., 618); (quoted *supra*).

Pearce vs. U. S., 192 Fed., 561 (quoted *supra*).

(g) **Plaintiff's requests to charge were in effect a motion to direct a verdict for plaintiff as to the $2,000 item.**

We have made a separate heading of the foregoing only for the sake of logical completeness. We scarcely anticipate that respondents will contend that plaintiff's first and third requests to charge (pp. 109, 110) were not in effect a motion to direct a verdict for the plaintiff on the $2,000 item. The qualifying phrase at the end:

> "* * * to the extent of whatever loss they find the trust company suffered through this transaction * * *"

obviously does not limit the effect of the request to charge, inasmuch as there was only one possible amount that the jury could conceivably find as the loss, viz., $2,000.

Certainly there was a great deal more formality of procedure about plaintiff's said requests to charge (regarded as a motion for direction of verdict) than there was on defendants' part respecting the same item. For the Court "disallowed" the claim of *its own motion.*

(h) **It appearing from the record that plaintiff must inevitably recover, this Court should itself modify the judgment by including the $2,000 item.**

Garr vs. Stokes, 16 N. J. L., 403;

State vs. Hoxsey, 39 N. J. L., 489; 495.

"Since * * * there is no question as to plaintiffs' damages, the Court should have directed a verdict for plaintiffs; and, as the essential facts are not disputed and are such as could not be changed upon a new trial, it is our duty, in order to save the delay and useless formality of a new trial, not only to reverse the judgment appealed from, but also to direct a judgment for the plaintiffs."

Miller vs. Schloss, 159 A. D., 704; 144 N. Y. Supp., 996, at p. 1001.

The judgment appealed from should be modified to the extent that it fails to include said $2,000 item of damages and interest thereon; and, as to such item, judgment should be directed for plaintiff, upon suitable findings of the undisputed facts (if this Court should regard them as necessary), to be settled upon notice.

Respectfully submitted,

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