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**Notice of Appeal.**

(Filed, November 23, 1925.)

**New Jersey Supreme Court**

10

AUGUSTE BERNDT, Plaintiff, v. THE HOBOKEN BANK FOR SAV- INGS in the City of Hoboken, Defendant.	}	Action at Law.
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To LEVENSON, COMEN & LEVENSON, Esqs.,  
Attorneys for plaintiff:

20

Gentlemen:

Take notice that the defendant, The Hoboken Bank for Savings in the City of Hoboken, appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

Dated, October 23, 1925.

30

Respectfully,

PIERSON & SCHROEDER,  
Attorneys for Defendant-Appellant.

JOHN D. PIERSON,  
Of Counsel.

Endorsed as follows:

40

*Grounds of Appeal.*

Service of the within notice is acknowledged  
this 2nd day of November, A. D., 1925.

LEVENSON, COMEN & LEVENSON,  
Attorneys for Plaintiff.

10 (Filed, November 23, 1925.)

**Grounds of Appeal.**

(Filed, December 1, 1925.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

20

AUGUSTE BERNDT,  
Plaintiff-Respondent,

v.

THE HOBOKEN BANK FOR SAV-  
INGS in the City of Hoboken,  
Defendant-Appellant.

Action at Law.

30 To LEVENSON, COMEN & LEVENSON, Esqs., attor-  
neys for plaintiff-respondent:

Gentlemen:

Take notice that the defendant-appellant, The  
Hoboken Bank for Savings in the City of Hoboken,  
will rely upon the following grounds of appeal in  
the above entitled cause:

40 1. Because the court refused to grant the motion

*Grounds of Appeal.*

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of the defendant for a non-suit upon the evidence given by the plaintiff at the trial.

2. Because the court refused to grant the motion of the defendant for the direction of a verdict in its favor and against the plaintiff upon the evidence given at the trial.

10

Dated, November 28, 1925.

Respectfully,

PIERSON & SCHROEDER,  
Attorneys for Defendant-Appellant.

JOHN D. PIERSON,  
Of Counsel.

20

Endorsed:

Service of the within grounds of appeal acknowledged this 30th day of November, A. D., 1925.

LEVENSON, COMEN & LEVENSON,  
Attorneys for Plaintiff-Respondent.

(Filed, December 1, 1925.)

30

40

**Summons.**

(Served, April 19, 1924.)

THE STATE OF NEW JERSEY (L. S.)

TO

10 THE HOBOKEN BANK OF SAVINGS  
IN THE CITY OF HOBOKEN, a cor-  
poration of the State of New Jersey.

YOU are summoned to answer the annexed com-  
plaint of AUGUSTE BERNDT, in an action at law  
in the New Jersey Supreme Court, and take notice  
that unless you file your answer to said complaint  
with the Clerk of the Supreme Court at Trenton,  
within twenty days from the date of service upon  
20 you of this writ and the annexed complaint, the  
plaintiff may proceed with the suit and judgment  
may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Jus-  
tice of our Supreme Court, at Trenton, this 17th  
day of April 1924.

EDWARD J. KELLEHER,  
Clerk.

30 LEVENSON BROTHERS,  
Attorneys.

This summons and complaint were duly served.

**Complaint.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

<p style="text-align: center;">AUGUSTE BERNDT, Plaintiff, v. THE HOBOKEN BANK FOR SAV- INGS, in the City of Hoboken, a corporation of the State of New Jersey. Defendant.</p>	}	<p style="text-align: center;">Action at Law.</p>	10
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Plaintiff residing in the Borough of Paramus,  
in the County of Bergen and State of New Jersey,  
respectfully says: 20

1. On the ninth day of May, 1918, and for a  
long time prior thereto plaintiff was a depositor in  
the defendant Bank under a savings bank book No.  
76749.

2. On the said ninth day of May, 1918, and for  
a long time prior thereto plaintiff has continued  
to make deposits to the said savings account and  
had only made one withdrawal therefrom to the  
extent of \$139.70. 30

3. On or about the first day of April, 1924,  
plaintiff made an examination of her pass book  
aforesaid and for the first time learned that said  
pass book showed a withdrawal of Nine hundred  
(\$900) Dollars on the ninth day of May, 1918,  
which plaintiff alleges and avers that said with-  
drawal was not made by her or by any one in her 40

*Complaint.*

---

behalf, nor did plaintiff at any time sign any withdrawal slip, voucher, check or paper authorizing, empowering or directing the defendant to pay out to plaintiff or to any one the said sum of \$900.00 on the ninth day of May, 1918, or any other date.

10 4. Plaintiff alleges that the said defendant paid out from her funds under deposit in the defendant bank under pass book No. 76749 the said sum of \$900.00 on the ninth day of May, 1918, without designation, right, power or authority in writing or otherwise by the plaintiff to the defendant.

20 5. Plaintiff alleges that she at no time ever received the said sum of \$900.00 from the said Bank or that said money was withdrawn by her on any signed voucher, or was withdrawn by any one who had legal power, right or authority to withdraw same.

6. Plaintiff has demanded from defendant the said sum of \$900.00 together with interest at four per cent. from May 9, 1918, and defendant has neglected and refused to pay same.

30 7. Judgment will be demanded for the sum of Nine hundred (\$900) Dollars with interest at four per cent. from May 9, 1918.

LEVENSON BROTHERS,  
Attorneys for Plaintiff.

An affidavit of merits was demanded and duly filed.

**Answer.**

(Filed May 9, 1924.)

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

<p style="text-align: center;">AUGUSTE BERNDT, Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">THE HOBOKEN BANK FOR SAV- INGS in the City of Hoboken, a corporation of the State of New Jersey, Defendant.</p>	}	<p>10</p> <p>Action at Law</p>
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Defendant, a corporation of the State of New Jersey, of the City of Hoboken, County of Hudson and State of New Jersey, says that:

1. Paragraph one of the complaint is admitted.
2. Defendant admits that plaintiff since the opening of her account and prior to May 9, 1918, made deposits and that she had only made one withdrawal prior thereto to the extent of \$139.70.
3. Paragraph three is denied.
4. Defendant admits that it paid out and charged against the sums on deposit in its bank in pass book No. 7649 the sum of \$900 on the ninth day of May, 1918, but denies that the said payment was without designation, right, power or authority in writing or otherwise by the plaintiff to the defendant.
5. Paragraph five is denied.

20

30

40

6. Defendant admits that plaintiff demanded said sum of \$900 and that it refused to pay the same, but says its refusal was because the said plaintiff had been paid the said sum, and defendant alleges that the said payment was properly charged against her account and in her said pass book and that the plaintiff had no right to receive the said sum of \$900.

7. Defendant denies that the said sum of \$900 with interest, demanded by the plaintiff from the defendant is due, and denies that any part of it is due.

#### FIRST SEPARATE DEFENSE.

8. Plaintiff presented her bank book at the defendant's bank on May 9, 1918, and presented therewith an order or receipt for the payment of the said sum of \$900 which was paid to her and charged against her account in said book and in said bank.

#### SECOND SEPARATE DEFENSE.

9. If the said plaintiff did not personally present said bank book and secure said money, she carelessly and negligently permitted her bank book to be presented by some one who fraudulently impersonated her and who is familiar with her signature and could actually reproduce the same in said bank at the time, who wrongfully presented an order or draft for said \$900 and presented the bank book in connection therewith and received the said sum of \$900 which was entered at the time upon said book.

10. The bank used due care and caution in paying the said sum of \$900.

11. The said bank book was never out of the possession of the said plaintiff to the knowledge of defendant and was presented by the plaintiff at different times after the withdrawal of the said sum of \$900 to have deposits credited thereon and credits of interest entered thereon. The bank received no notice on such several occasions that any claim was made that the said deposit was illegally drawn. 10

12. The said defendant because of her carelessness and negligence is precluded from recovering from the said defendant the said sum of \$900.

### THIRD SEPARATE DEFENSE.

13. At the time that the said plaintiff opened her said account with the defendant bank she consented to be bound by the by-laws thereof and became bound by the by-laws thereof and received a bank book which contained printed therein abstracts from the by-laws relative to the withdrawal of deposits. 20

14. Section 5 of said by-laws as printed in said bank book is as follows:

“Drafts for money may be made personally or by order in writing of the depositor or by power of attorney, but no person shall have the right to demand the whole or any part of his or her money, without producing the pass-book in order that such payment may be entered therein, and such entry is to be evidence of the payment of the money specified.” 30

15. At the time of the payment of said sum of \$900, plaintiff's pass-book was presented to said 40

bank and the payment thereof was entered therein and defendant alleges that such entry is evidence of the payment of the money therein specified.

#### FOURTH SEPARATE DEFENSE.

10 16. Paragraph thirteen of the third defense is here repeated.

17. Section 22 of the said by-laws as printed in said bank-book is as follows:

20 “This Institution will not be responsible to depositors for any fraud that may be practiced on them by any person presenting a depositor’s book, and thereby drawing money without their knowledge or consent, although the strictest caution will at all times be used to prevent fraud.”

18. If said sum of \$900 was not collected by plaintiff it was collected through fraud practiced upon her by some person presenting her depositor’s book and thereby drawing money without her knowledge or consent.

#### FIFTH SEPARATE DEFENSE.

30 19. The plaintiff negligently and fraudulently permitted a stranger in her behalf to present her bank book and secure for her use and benefit the said sum of \$900 and the said plaintiff is bound by the payment thereof.

PIERSON & SCHROEDER,  
Attorneys for Defendant.

**Reply.**

(Filed May 1, 1924.)

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

<p style="text-align: center;">AUGUSTE BERNDT, Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">THE HOBOKEN BANK FOR SAV- INGS in the City of Hoboken, a corporation of the State of New Jersey, Defendant.</p>	}	<p>10</p> <p style="text-align: center;">Action at Law.</p>
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Plaintiff replying to the answer interposed by the defendant in the above entitled cause respectfully says: 20

1. She denies paragraph eight of the first separate defense.

2. She denies paragraph nine of the second separate defense.

3. She denies paragraph ten of the second separate defense. 30

4. She denies paragraph eleven of the second separate defense.

5. She denies paragraph twelve of the second separate defense.

6. She denies paragraph thirteen of the third separate defense.

7. She denies paragraph fourteen of the third separate defense. 40

8. She denies paragraph fifteen of the third separate defense.

9. She denies paragraph sixteen of the fourth separate defense.

10 She denies paragraph seventeen of the fourth separate defense.

11. She denies paragraph eighteen of the fourth separate defense.

12. She denies paragraph nineteen of the fifth separate defense.

LEVENSON, COMEN & LEVENSON,  
Attorneys for Plaintiff.

20

**Postea.**

(Filed, March 26, 1925.)

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

AUGUSTE BERNDT,  
Plaintiff,

v.

30

THE HOBOKEN BANK FOR SAV-  
INGS, in the City of Hoboken,  
a corporation of the State of  
New Jersey,  
Defendant.

} Action at Law.

40 This case was tried before Judge Willard W.  
Cutler, with a jury at the Hudson Circuit on March  
12, 13, 1925.

*Judgment.*

The jury rendered a general verdict against the defendant and in favor of the plaintiff for one thousand one hundred and eighty-eight dollars and one cent (\$1,188.01).

Signed, March 25, 1925.

WILLARD W. CUTLER,  
Judge.

10

Endorsed :

Damages \$1,188.01  
Costs 50.64

—————  
\$1,238.65

(Filed, March 26, 1925.)

**Judgment.**

20

(Entered, March 26, 1925.)

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

AUGUSTE BERNDT,  
Plaintiff,

v.

THE HOBOKEN BANK FOR SAV-  
INGS, in the City of Hoboken,  
a corporation of the State of  
New Jersey,  
Defendant.

30

Whereupon it is adjudged that the plain-  
tiff, Auguste Berndt, recover of the de-  
fendant, The Hoboken Bank for Sav-

40

*Testimony.*

ings, in the City of Hoboken, a corporation of the State of New Jersey, Eleven  
 \$1188.01 Hundred and Eighty-eight Dollars and  
           50.64 one cent and his costs which are taxed  
 \_\_\_\_\_ at Fifty Dollars and Sixty-four Cents,  
 \$1238.65 making in the whole the sum of Twelve  
 10           Hundred and Thirty-eight Dollars and  
           Sixty-five Cents.

Judgment entered March 26, 1925.

WM. S. GUMMERE,  
 C. J.

**Testimony.**

20

NEW JERSEY SUPREME COURT.

	AUGUSTE BERNDT, Plaintiff,	}
	v.	
	HOBOKEN BANK FOR SAVINGS, Defendant.	
30	_____	

Before—Hon. WILLARD W. CUTLER, J., and a Jury.

Jersey City, N. J., Mar. 12, 1925.

## APPEARANCES:

LEVENSON, COMEN & LEVENSON, Esqs., for the plain-  
 tiff.  
 40   PIERSON & SCHROEDER, Esqs., for the defendant.

*Auguste Berndt—Direct Examination.*

A jury having been empanelled and found satisfactory they were sworn.

Mr. Comen opened to the jury on behalf of the plaintiff.

Mr. Pierson opened to the jury on behalf of the defendant.

10

AUGUSTE BERNDT, sworn, testified through an interpreter.

Direct Examination by Mr. Comen:

Q. Your full name is Auguste Berndt? A. Yes.

Q. Where do you live now? A. Now I live at Rochelle Park—Paramus.

Q. In the State of New Jersey? A. Yes.

20

Q. You are a depositor in the Hoboken Bank for Savings? A. Yes.

Q. How long have you been a depositor in that bank? A. Since 1901 I think.

Q. During that time did you have occasion to withdraw any funds from the bank? A. Yes, with interest, one hundred and thirty-nine dollars.

Q. Did you have occasion to make any deposits in that bank? A. Yes.

Q. On those occasions on which you made withdrawals from the bank did you go to the bank yourself? A. Yes, sir. I never sent nobody else for a cent.

30

Q. On those occasions on which you withdrew money from the bank did you sign any withdrawal cards? A. Yes, indeed, every time.

Q. Did you on any occasion send anybody to the bank with a withdrawal card? A. No, no, no.

Q. Did you on any occasion authorize anybody to

40

withdraw funds from that bank on your behalf?

A. No, I do it myself.

Q. On May 9, 1918. there is shown in your bank book a withdrawal of nine hundred dollars. Did you withdraw that money? A. No, sir, I did not need any.

10 Q. On July 25, 1919, there is a deposit in the Hoboken Bank for Savings of a thousand dollars. Did you make that deposit? A. Surely I did. That was including the money of my husband.

Q. Tell the court and the jury just where that money came from. A. Do you mean the thousand dollars in question?

Q. The thousand dollars deposit July 25, 1919. A. That included money of my husband amounting to eight hundred dollars. The other was my money, 20 the money that I saved personally.

Q. What is the source of that money that was given to you by your husband? A. My husband had his own bank book and then during the war my husband intended to draw money himself to save the money home. I kept the money at home as long as the war lasted.

Q. How much money was saved in that manner? A. Altogether twenty three hundred dollars.

Q. What was done with the rest of that money? A. What "rest" are you talking about? 30

Q. The rest of that balance of a thousand dollars? A. There is some in the bank now yet.

Q. You say that some of that money was given to you by your husband? A. Yes.

Q. Where did the rest of the money come from? A. That I saved personally? I saved myself.

Q. Where did you get the money from that you saved yourself? A. I worked for it.

Q. Where did you work? A. In the laundry.

40 Q. When did you work in that laundry? A.

*Auguste Berndt—Direct Examination.*

I was there five years. During the war and a few years previous to the war.

Q. Can you tell me exactly what years you were there? A. 1914 until 1919.

Q. Where is that laundry that you worked in? A. Willow Avenue, City of Hoboken.

Q. And where did you live at the time? A. 10  
For a while I lived in Hoboken in Grand Street; then my husband moved to Paramus and I remained there because it was too far, and went to Mrs. Plummer, a friend of mine.

Q. Did you have your own home there or did you board with somebody at that address? A. Yes, I boarded there.

Q. Did you live there on March 9, 1918? A. Yes.

Adjourned to March 13, 1925.

20

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Trial Resumed.

March 13, 1925.

AUGUSTE BERNDT, resumes.

Direct Examination by Mr. Comen (continued): 30

Q. You testified yesterday that you were employed in Hoboken in a laundry. A. Yes.

Q. During what period were you so employed in a laundry in Hoboken? A. From 1914 to 1919.

Q. From 1914 until 1919? A. Yes.

Q. How much did you earn a week in that laundry? A. \$16 a week.

Q. During that period from 1914 to 1919 you

40

testified yesterday that you lived in Hoboken? A. Yes—no—until 1917, but after this we moved to the country. My husband had been in the country already and I still remained in Hoboken until 1917.

10 Q. Where did you live after 1917? A. At a woman's house in Hoboken.

Q. Then you did live in Hoboken after 1917? A. We moved out to the country.

Q. You say that after 1917 you lived in Hoboken. Then you say you moved to the country? A. We were still in Hoboken in 1917. The year afterwards, in April, we moved to the country and I remained in Hoboken.

20 Q. Oh, then you mean your husband moved out of Hoboken and you remained in Hoboken? A. Yes, indeed, so it is.

Q. So you remained in Hoboken until what time? A. For three months.

Q. Until what year? A. The same year, 1918.

Q. Do you remember what month in 1918? A. April the 8th.

Q. How many years were you employed in the laundry, Mrs. Berndt? A. Five years.

Q. Beginning in what year? A. 1914.

Q. 1914, and five years is 1919. A. Yes.

30 Q. Then did you leave Hoboken in 1918 or 1919?

A. I don't remember, I don't exactly remember, but I think 1919.

Q. At the time you were employed in Hoboken where was your bank book? A. In my bed.

Q. In what bed? A. The one in which I slept.

Q. Do you mean you left your bank book in the bed when you went away, when you left the house?

A. I left it there, yes.

Q. Is this the bank book? A. Yes.

*Auguste Berndt—Direct Examination.*

Mr. Comen: I offer it in evidence.  
(Admitted and marked Exhibit P-1.)

Q. Can you write your name in English? A. Oh, yes.

Q. Will you write your name on this sheet? A. (Witness does so.)

10

Q. Is that the way you signed the slip in the bank when you first made a deposit? A. I always put my signature to it.

Q. Did you ever sign your names in any other way? A. No.

Q. Do you always sign the withdrawal slips in the same manner? A. Just the same manner.

Mr. Comen: I offer the signature in evidence.

20

(Admitted and marked Exhibit P-2.)

Q. When did you first discover that the nine hundred dollars was charged to your book? A. I needed money and I took the bank book and discovered that there was nine hundred dollars in it. Then I went to the bank and asked them about it. The man at the bank said I took it out.

Q. Did you at any time withdraw nine hundred dollars from the Hoboken Bank for Savings? A. Never.

30

Q. Did you during 1918 withdraw any funds from the Hoboken Bank for Savings? A. No.

Q. You stated a few minutes ago that during the time you were employed in Hoboken you earned sixteen dollars a week. A. Yes.

Q. How much did your husband earn during that period? A. At that time my husband was sick. He picked rags and made quite an amount of money with it.

40

Q. How much did he earn? A. Ten dollars in two weeks, twelve dollars, eight dollars.

Q. Was your husband engaged in any other kind of work before he picked rags? A. Before he got sick he worked.

Q. What was his work? A. Longshoreman.

10 Q. Until when was he so employed? A. Until he got sick, 1915.

Q. 1915? A. Yes.

Q. Where was he working at that time as a longshoreman? A. Hamburg Dock.

Q. Where did you live at that time? A. Grand Street, 91, City of Hoboken.

Q. Until when did you live in Hoboken at that address? A. From there we moved to the country, in 1918—1917 or 18—1918.

20 Q. You said yesterday that you did not make any deposits in this bank for several years. A. Some years? It is in the bankbook what I paid in.

Q. (Question repeated.) A. Oh, yes.

Q. When did you make a deposit in 1919 you testified yesterday that that money was derived from the earnings that you saved and that your husband saved? A. Yes.

Q. For how long had you saved that money without depositing it in the bank? A. From when on?

30 Q. Yes, from when on? A. Oh, the thousand dollars?

Q. The thousand dollars deposit in 1919. A. Oh, yes, eight hundred dollars my own money and two hundred dollars of my husband's.

Q. For how long had you saved that money without depositing it in the bank? A. From 1918 every week I put some aside.

Q. Where did you put it aside? A. I kept that for myself.

40 Q. Why did you not make a deposit during all

this time that you put it aside? A. I put it there when the war was on.

Q. You testified yesterday that you did not make any deposits during the war because your husband was German. A. Yes. He expected to lose it.

Q. And for that reason you did not deposit it until after the war had ended? A. Yes; he was afraid of it. 10

Cross Examination by Mr. Pierson:

Q. What was your husband's first name? A. Herman.

Q. When were you married to him? A. 1894.

Q. Had he been married before? A. No, no.

Q. When you opened this account in the Hoboken Bank for Savings in 1901 where did you then live? A. In Clinton Street. 20

Q. Hoboken? A. Yes.

Q. Are you sure about that? A. Yes, that is where we started.

Q. The money you put in that from time to time from 1900 to 1910, where did that money come from? A. Formerly as a girl I had money in New York.

Q. In a bank? A. Yes.

Q. Did you bring that to Hoboken? A. Yes, by and by. 30

Q. Do you know when you brought that over? A. This money I brought to Hoboken about 1902.

Q. Are you pretty sure about that? A. Yes. I got the money from New York by and by, from the bank in New York, every year, and brought some over to the bank in Hoboken.

Q. Were you working at that time after your marriage? A. No, my man was working and I attended to the household. 40

Q. So that these various amounts that were put in this account for some years after 1900 were obtained from the New York bank? A. Yes, and some was the money of my husband's.

10 Q. That is, your husband would give you the money, and then what you could save you would put in the bank? A. Yes, I did. That is the way it was. After the sum accumulated I took it to the bank.

Q. Up to about how long altogether did you live in Hoboken, you and your husband both? A. We bought some land; then we moved out and stayed a few years in the country; then we came back to Hoboken.

Q. When did you come back to Hoboken? A. From the country?

20 Q. Yes; when did you come back into Hoboken from the country? A. In 1901 we returned to Hoboken.

Q. Did you live in Hoboken then until you went out to Rochelle Park? A. Yes.

Q. And that was when? A. 1918.

Q. Will you fix the time your husband went to live at Rochelle Park just as near as you can? A. That was in April, 1918, and I remained at Hoboken, for it was too far for me to go to the country.

30 Q. Did you go out over Sundays? A. Yes.

Q. When did your husband get sick? A. He had a stroke, that was in 1915, and up to that time he had work.

Q. And you had kept house? A. Yes.

Q. And then he stayed at home after that and you started to work? A. Well, then I had to work.

Q. And you boarded in Hoboken after your husband moved out to Rochelle Park? A. Yes, I lived there, yes.

40 Q. With whom did you live? A. Mrs. Pommer.

Q. What did you have there, a furnished room?

A. Yes.

Q. And a bed in it? A. I slept on a lounge.

Q. In your room? A. Yes indeed the front room.

Q. When did you go to live with Mrs. Pommer?

A. The day we moved to the country, I remained here, the eighth of April, 1918.

10

Q. So you lived in Hoboken up to April, 1918, is that right? A. That is the time I moved to Mrs. Pommer and my husband went to the country.

Q. But just before that you and your husband were both living in Hoboken? A. Yes.

Q. When you went to live with Mrs. Pommer you took your bank book with you, did you? A. Yes, indeed.

Q. And where did you keep it? A. In the bed—on the lounge upon which I slept.

20

Q. Was this a bed or was it a lounge? A. A lounge.

Q. Where did you keep the bank book? A. Under the bed sheet.

Q. Was your room locked during the day? A. No, it was open.

Q. Did Mrs. Pommer ever see your bank book? A. I don't know if she did.

Q. She never said anything to you about it, did she? A. Nothing at all.

30

Q. Did she ever say anything about your having a nice lot of money in it? A. Oh, she spoke about it once and said, "Oh, you saved quite a little amount of money."

Q. So she did see your bank book and knew it was there? A. She must have seen it; otherwise she would not know it.

Q. How long did you stay with Mrs. Pommer? A. About three months.

Q. Where did you go then? A. Then I went out to my husband.

40

*Auguste Berndt—Cross Examination.*

Q. Now, you worked for this laundry for five years you say, is that right? A. And then I went back to Hoboken and worked from the country.

Q. You mean you went in every day? A. Every day.

10 Q. In all of the years you had that bank book, from 1900 until the present day, did you ever loose it? A. No.

Q. You always had it, did you, every day? A. I always had it in the trunk.

Q. You always had it in the trunk? A. Yes.

Q. Where was your trunk when you were boarding with Mrs. Pommer? A. I only had a small box there for my own belongings.

Q. And you did not keep the bank book in that box, did you? A. No, in bed.

20 Q. The bank book shows that on July 25, 1919, you put in a thousand dollars? A. Yes. Eight hundred dollars from my husband's bank book.

Q. When did you get that out of your husband's bank book? A. When the war started—at the time the war started.

Q. Do you mean the war between the United States and Germany? A. Yes.

Q. You are sure about that, are you? A. That is the time I got it.

30 Q. When the United States and Germany got to fighting then your husband thought it was time to get his money out of the bank, is that it? A. Yes.

Q. You are sure about that, are you? A. Sure.

Q. He was afraid Germany was going to whip the United States? A. Because the Americans were against the Germans.

Q. Where was this eight hundred dollars that you drew out of the bank? A. I had them in my trunk.

40 Q. No; where was it deposited, the money that you drew out? A. In the same bank.

Q. Was that your husband's money or was it your money? A. I saved it for him on my name.

Q. It was in your name? A. Yes, my name. My husband did not want to go to the bank, so I said I will go alone.

Q. When did you open that account, have you any idea? A. That I cannot say exactly, it is too long ago. 10

Q. Do you know where the money came from that it was started with? A. My husband was working as a longshoreman.

Q. Did he give you the money and you save it or did he save it himself? A. He gave the money up to me.

Q. And you put it in the bank? A. What was left, yes.

Q. Did any of that come from the New York bank? A. Not on that book of my husband's. 20

Q. Can you tell whether this is that book representing that which you say was your husband's money or not? Just look at it and see if you can tell. A. Sure, that is the book.

Mr. Pierson: I ask that this book be marked for identification.

(Marked D-1 for identification.)

Q. Now, you think it was about eight hundred dollars you got from your husband? A. Yes. 30

Q. And you had earned about two hundred dollars which you added to it? A. Yes, I saved that to it.

Q. Just see if you find any withdrawal of eight hundred dollars in that book, D-1 for identification.

A. There is something that is tore out on this. That I took out it don't say here.

Q. I am showing you this other book which your 40

lawyer has offered in evidence, P-1. That shows that on May 9, 1918 there was nine hundred dollars charged to your account, does it? You see that, don't you? A. Yes.

Q. That shows that? A. Yes.

10 Q. Isn't that what you think is the eight hundred dollars drawn out and put back the next year? A. No.

Q. Where had the eight hundred dollars come from? A. Of course that was the money of my husband's.

Q. Why was one your husband's money any more than the other? A. What?

20 Q. Why was the money in one bank book your husband's money any more than the money in the other bank book? A. We wanted to have it together after this. We would not keep any extra book any longer.

Q. That is after the money was drawn out of your man's book, then you only had one book after that? A. Only one book.

Q. Is that (indicating) your signature? A. Yes.

Mr. Pierson: I ask that that be marked for identification.

(Marked D-2 for identification.)

30 Q. Is that (indicating) your signature? A. Yes.

Mr. Pierson: I ask that that be marked for identification.

(Marked D-3 for identification.)

Q. Is that (indicating) your signature? A. Yes.

Mr. Pierson: I ask that that be marked for identification.

40 (Marked D-4 for identification.)

*Auguste Berndt—Cross Examination.*

Q. Is that (indicating) your signature? A.  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-5 for identification.)

Q. Is that (indicating) your signature? A. 10  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-6 for identification.)

Q. Is that (indicating) your signature? A.  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-7 for identification.)

20

Q. Is that (indicating) your signature? A.  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-8 for identification.)

Q. Is that (indicating) your signature? A.  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-9 for identification.)

30

Q. Is that (indicating) your signature? A.  
Yes.

Mr. Pierson: I ask that that be marked  
for identification.

(Marked D-10 for identification.)

Q. Is that (indicating) your signature? A.  
Yes.

40

*Auguste Berndt—Cross Examination.*

Mr. Pierson: I ask that that be marked for identification.

(Marked D-11 for identification.)

Q. Is that (indicating) your signature? A. Yes.

10 Mr. Pierson: I ask that that be marked for identification.

(Marked D-12 for identification.)

Q. Is that (indicating) your signature? A. Yes.

Mr. Pierson: I ask that that be marked for identification.

(Marked D-13 for identification.)

20 Q. Are those your signatures (showing witness a sheet containing four signatures)? A. Yes.

Mr. Pierson: I ask that that be marked for identification.

(Marked D-14 for identification.)

Q. Every time you got any of those payments represented by these receipts I have shown you you called at the bank with your bank book, did you? A. Yes, and I signed at the bank.

30 Q. You say that of that thousand dollars you deposited, two hundred dollars was your money and eight hundred dollars your husband's money. Now how long were you saving that two hundred dollars? A. From 1917 to 1919.

Q. About two years? A. Yes.

Q. You deposited money right along, in the bank didn't you? A. Yes.

Q. In December, 1915, you deposited two hundred dollars? A. Yes.

40 Q. June 1st, 1916, you deposited two hundred dollars? A. Yes.

Q. August 29 of the same year you deposited two hundred dollars? A. Yes.

Q. And July 17, 1917, you deposited one hundred and sixty dollars? A. Yes.

Q. That was after your husband was sick, wasn't it? A. Yes.

Q. And 1916? A. Yes.

10

Q. And 1915? A. Yes.

Q. Now that was right after you drew the money out of your man's bank book, wasn't it? December 17, 1915, you drew out five hundred and eighty-nine dollars, is that right? A. But I got money extra besides this.

Q. Then you took that money and put it in your other bank book? A. Sure, yes.

Q. And some of this amount of seven hundred and sixty dollars that you put back the next year or two was the money you drew out of this bank, is that right? A. Yes, everything together.

20

Q. In 1913—this is the book you said was your husband's money? A. Yes.

Q. In February and then in November, 1917, and March and May and June and July, 1918, there were withdrawals, were there not? A. Yes.

Q. This was after your husband began to get sick, was it not? A. Yes.

Q. Then you began to draw out some money to help along? A. I took the money out before 1917.

30

Q. You took it all out before that, but in 1915 and 1914 you drew out because you needed a little money because your husband was sick, isn't that right? A. And then I took it out altogether.

Q. All these deposits, were they taken by you to the bank? A. Yes.

Q. And you took the bank book with you every time, did you not? A. Yes.

Plaintiff rests.

40

10 Mr. Pierson: I move for a non-suit on the ground that there has been no negligence shown on the part of the bank. A savings bank is only required to use ordinary care. There has been no proof that there was not ordinary care used in this case, the burden of proof being on the depositor to show want of ordinary or reasonable care. I move for a non-suit on the further ground that the by-law printed in the bank book which she has produced and offered in evidence provides, under section five that money may be withdrawn in various ways and the entry in the book is to be evidence of the payment of the money. I also base my motion on section twenty-two of the by-laws as printed in the bank book.

20 The Court: I think there is enough in the case as it stands now to go to the jury. You have now simply the case that this lady presents a bank book and she says that she never received the money. That puts the defendant on the stand to show whether it is so or not.

Mr. Pierson: Exception.

30

HARRY E. PICKENBACH, sworn for the defendant.

Direct Examination by Mr. Pierson:

Q. What is your position in the Hoboken Bank for Savings? A. Secretary.

40 Q. How long have you been connected with the Hoboken Bank for Savings? A. Almost-thirty-three years.

*Harry E. Pickenbach—Direct Examination.*

Q. What different positions have you held during that time? A. Well, I started in as, I suppose you might call it, office boy and have gone all the way up holding every position to my present one of secretary.

Q. Have you been in a position where you were required to pay out money to depositors during that period? A. Yes. 10

Q. What positions were they? A. Teller.

Q. How many years did you act as teller? A. Over a period of twenty years. Previous to being a regular teller I would make the payments at various times as a substitute, so it covered a period of more than twenty years.

Q. In your business as teller is it necessary for you to pass upon signatures of depositors? A. Yes. 20

Q. To compare signatures? A. Yes.

Q. Did you become acquainted with the rules of the bank as to withdrawals of money? A. Yes.

Q. And did you have a certain settled practice of your own? A. Yes.

Q. In this 20 odd years have you compared a large number of signatures? A. Yes.

Q. And successfully compared them? A. I don't understand you.

Q. In other words have your decisions been disputed? A. Never. 30

Q. When a depositor comes there whom you do not know what is your practice, regular practice, if any? A. The practice is a careful examination of the signature to see that it compares with our signature of record, and then if there is any doubt in the teller's mind he is to ask the questions which we record from the depositor when the account is opened relating to the depositor's pedigree, as a further means of identification. 40

10 Q. And if the signature compares, then what do you do—if the signature compares when you do that—I mean compares favorably? A. If there is no question in the teller's mind as to the validity of the signature the money is paid without asking the questions—which, of course, would be unnecessary.

Q. And if after both the questions are asked and the signatures compared there was still any doubt then what would the bank do, or what would you do? A. We would require personal identification of the depositor.

Q. Has that been the system you have uniformly practiced in this twenty odd years you occupied as teller? A. Absolutely.

20 Q. Do you have a very large number of depositors in that bank? A. At the present time about 19,000.

Q. Is it possible for a paying teller to know any large number of those, to know them personally? A. To know them personally?

30 Q. To know them personally so that he would not need to compare signatures? A. Speaking from my own experience, I know many thousands of them personally, as I have lived in Hoboken practically all my life and I know the people coming in there and getting acquainted with them in various ways—people coming in there for money.

Q. And there would always be many thousands that you would not know? A. Oh, of course.

Q. I show you a card marked D-10 for identification and ask you what that is. A. The card is the signature card that the depositor signed when the account was opened. This is the signature card of the bank.

Q. What number? A. 76749.

40 Q. This writing on the back is what? A. That

*Harry E. Pickenbach—Direct Examination.*

is my writing. I assume that is when the account was opened.

Q. And these are matters which you take for additional identification? A. Yes.

Q. I show you another marked D-11 for identification. What is that? A. That is a similar card to that. That is to say, it is the same kind of card as that, number 115939, by the same depositor, another account, a signature card that was signed at the time of the opening of the account. 10

Mr. Pierson: I offer those cards in evidence.

(Admitted and marked Exhibits D-10 and D-11.)

Mr. Pierson: I offer in evidence the admitted withdrawal receipts that have been marked D-2, 3, 4, 5, 6, 7, 8 for identification. 20

(Admitted and marked respectively Exhibits D-2, 3, 4, 5, 6, 7 and 8.)

Mr. Pierson: I also offer in evidence D-12 and D-9 and D-13 for identification.

(Admitted and marked in evidence Exhibits D-12, D-9 and D-13.)

Q. May I call your attention to these finger prints on Exhibit D-10—were they put on at the time the card was taken or later? A. They were put on some time during the year 1924. 30

Q. After she questioned the receipt? A. Yes, to avoid any further disputes that there might be.

Q. I show you a card here with an admitted signature on it—76749, and with pencil writing on it, and ask when and why that was prepared? A. That was taken last year, 1924, at the same time this fingerprint was taken. 40

Mr. Pierson: I offer that in evidence.  
(Admitted and marked Exhibit D-10)  
(A).

10 Q. I show you a paper purporting to be a withdrawal receipt under date of May 9, 1918, and ask you what that is? A. This is a receipt that was signed, Auguste Berndt, for nine hundred dollars, book number 76749, dated May 9, 1918. It is one of our regular counter receipts. It is not a negotiable order. It is not negotiable outside the bank. It is signed by the depositor in the presence of the teller.

20 Q. Are these receipts kept at a counter for the public or do they ask for them when they want to withdraw? A. These receipts have never been kept outside of the counter inside the bank. They have never been kept outside the bank. Our reason for that is that it would be a nuisance to the depositor to have these receipts outside, for the class of the majority of our depositors is such that they would use these slips just as often for deposit slips and it would lead to a great deal of confusion. We prefer to make out our own receipt, which was done in this case. That is why I can say positively these receipts were never kept outside.

30 Q. Who filled in this receipt? A. I did in my capacity as teller at that time.

Q. In other words, when this was withdrawn you were at the window and filled out this at the request of the person who drew the money? A. Yes.

Q. And it was then taken to the counter? A. Yes.

Q. You have counters there for that purpose? A. Yes.

40 Q. And in whose writing is the number of the bank book, this number (indicating)? A. That is my writing.

*Harry E. Pickenbach—Direct Examination.*

Q. So that you had the number when the slip was given out? A. Yes.

Q. So that the bank book had been presented at the time you filled in the slip? A. Yes.

Q. Then the person, with the bank book and the slip went to a counter which was provided, signed it and brought it back? A. No. The depositor presents the book and says, "I want nine hundred dollars." The teller makes out this slip and puts the book aside. The depositor signs that slip. Then the teller takes the nine hundred dollars and puts it in this book and has it ready for the depositor when this slip comes in. The book is not passed out again, it is put aside to await the return of the signed receipt. 10

Q. When is the book passed out? A. After the payment is made. 20

Q. Will you look at the entry of the payment? In whose handwriting is that? A. That is mine.

Q. And it bears the same date as the receipt? A. Yes.

Q. Just take that book and note how many times it has been presented to the bank, if you can tell from the entries after this nine hundred dollar entry was made and before the withdrawal of the—do you know what time she first claimed this nine hundred dollars should not have been entered? A. Yes, on the 4th of April, 1924. 30

Q. Before the 4th of April, 1924, and after the withdrawal of that nine hundred dollars, tell us on what different dates that bank book had been presented to your bank? A. The bank book was presented at the bank for deposit of a thousand dollars on July 25, 1919, on July 1st or thereabouts for the purpose of crediting the July 1st interest in 1919, the book was presented in other words credits amounting to eighty-seven dollars and 40

- eighty-two cents were entered. Then the book was presented again on April 1, 1920, when a deposit of two hundred dollars was made. It was presented again January the 1st, 1921—interest. It was presented again in 1920 on May the 28th when a deposit of one hundred dollars was made.
- 10 That is the last. Then it was presented on April 4 when this interest credit was made, and that was the time that the question as to the nine hundred dollars arose—six years afterwards.

The Court: Do you know this lady personally?

A. At that time I cannot say positively that I did. I am not sure as to that time.

- 20 Mr. Pierson: I offer the bank book marked D-11 for identification, being 115939. I desire to offer in evidence this draft of May 9, 1918, for nine hundred dollars.  
(Admitted and marked Exhibit D-15.)

30 Q. I present you here various receipts, cards and so on, containing admitted signatures, and also one which was written this morning, marked P-2, and which you have not seen before. Have you examined these others? A. I have.

Q. Have you examined those signatures carefully and compared them with the signature on this nine hundred dollar receipt which has been disputed? A. I have.

Q. In your opinion is the signature on the nine hundred dollar withdrawal receipt in dispute the genuine signature of the plaintiff in this case? A. It is.

40 Q. Being of that opinion, you feel that any pay-

ing teller would have been justified in making a payment on that signature and the production of the bank book? A. Yes.

Q. What makes you arrive at that opinion, what leads you to that conclusion? A. In my experience in handwriting, signatures—

10

Mr. Comen: I object to the question. I think the question, properly stated, should be, are the signatures the same or are they not? Not what would be the conclusion.

The Court: He may answer that question.

A. I thought, your Honor, that it compared favorably with the signature of record.

20

The Court: And that (indicating Exhibit D-10) you consider your record signature?

A. Yes.

Q. That D-10 would be the signature which you would have at that time, would it not? A. Yes.

Q. In other words, when a receipt like this is presented you would not have access to other receipts which had come in previously and had been filed away—not immediate access? A. No.

30

Q. Is there anything about this disputed signature that might make it look any different from the others? A. Why, it would appear that this signature has been made with a different kind of a pen than some of the others.

Q. How did the pen differ? A. It would have the appearance of being a fine pen. Perhaps a new pen.

Q. I show you Exhibit D-9 and ask you if there is anything about the visible appearance of that

40

that makes it seem to differ from the others? A. This signature appears to be very much different.

Q. That is a genuine signature, is it? A. Yes.

Q. Made in your presence or at a time when you knew of it? A. This draft was signed in the presence of the teller who succeeded me. This was  
10 done last April, but I initialed this because in case of any future controversy—I signed that so that there would be no question as to the authenticity of this signature.

Q. This is one of the signatures she admitted?

A. Yes.

Q. Does this differ more from the signature on the signature card than the one she disputes? A. Very much.

20 The Court: Which is the one she disputes?

A. This one.

The Court: Did she admit D-13?

A. Yes.

Q. Look at those and point out the resemblances in all of those signatures that you desire to call attention to. A. The depositor's name is Auguste  
30 Berndt. The depositor does not always make the same kind of an A.

Q. What is the difference in the A? A. One is the round A, the other you might call the sharp A.

Q. An A with a cross, more like the printed A? A. Yes. Those are two genuine signatures.

Q. Will you look through those and show in which ones this round A, the A with one stroke, first appears? A. I do not quite get that, coun-  
40 sellor.

Q. I want you to look through those and show in which one this round A, the A with one stroke, first appears, the A that is more like the O. A. That would be in this one.

Q. In other words it first appears in the disputed receipts? A. Yes.

Q. Does it appear after that? A. Yes, always. 10

Q. In other words about the time that this withdrawal was made there must have been a change in the form of her A? A. Yes.

Q. If it was genuine, made by her; and if it were not genuine, somebody must have known it had been made? A. Yes.

Q. Now, go on to the other letters. A. The next letter, u, is not dissimilar in any marked way that I can see. The g is not dissimilar.

Q. What is the characteristic of the g throughout all of these signatures? A. Well, the lower loop for instance tilts toward the left instead of coming right down straight, and the upper part of the g is never joined to this down stroke, there is always a slight space between. 20

Q. That is characteristic of every one of those signatures, is it, including the disputed one? A. Yes.

Q. How about the "U-s"? A. The "us" is never joined to the "t." That is to say, in the disputed one and the others, the signature of record, the "us" are written together and the "t" starts fresh. That is to say in every instance including the disputed one and the others. 30

Q. Where does the t begin, uniformly, with reference to the s? A. The beginning of the t is usually on top of the s or almost on top of the s. It does not start from the bottom of the s from the line. I think you will find in 75 per cent. of 40

signatures the t would start from the bottom; it would hardly start here; but in this case it always starts either on top of the s or right near the top of the s and comes up that way.

Q. How about the e, the last letter of Auguste?

10 A. There is not anything that is unusual about that; that seems to be uniform.

Q. Now look at the B's—the capital B of Berndt.

A. There is the same point that applies to other characteristics of this signature; the B in the signature of record is different from that one there, different from all her other signatures.

20 Q. As a matter of fact her admitted signature to card 76749 has a different B from any other "Berndt" on any of the other signatures that have been offered in evidence, is that so? A. Yes. There is not one here like it.

Q. Are those changes in the B and A to which you have called attention characteristic of the signatures of depositors? A. Yes. That is why we have identification questions.

Q. You reject withdrawals because of those changes? A. Yes. That is why we have the identification questions.

30 Q. You do not know whether in this case any identification questions were asked or not? A. I would not state that. It is impossible for me to answer that question.

40 Q. Just go briefly over the rest of the "Berndt" Are the e and the r the same practically? A. No. Here the e is a letter where there is not likely to be much of a difference, but the r is different again from some of the other signatures. It is like some that are admitted to be genuine and unlike others that are admitted to be genuine. In other words the r is not always the same. She makes two kinds of r's.

Q. Is there anything about the n that you can notice? A. I do not think so.

Q. Do you notice whether it is written smoothly or uniformly? A. Yes, there is a uniformity there.

Q. And that you find in the disputed signature also? A. Yes.

Q. How about the D; how many strokes are required for the D? A. It is made by taking the pen off the paper, with a little loop at the first of the downstroke. 10

Q. Is that wider in some cases than in others? A. Yes, in some cases it is hardly discernible, but it is there.

Q. Now the t? A. The t, there is nothing about the t that is in any way different. The t is absolutely true to the admitted signature except in this one. 20

Q. Indicating Exhibit D-9? A. Yes, there it is different. That is the one that is admitted to be genuine; but in the disputed one it is an exact copy I should say.

Cross Examination by Mr. Comen:

Q. You say you have been a teller in that bank for twenty years? A. Yes.

Q. On May 9, 1918, were you a teller in that bank? A. My title was assistant secretary. I was acting as teller. 30

Q. Then what were your duties at that particular time, at about May 9, 1918? A. I was in the teller's cage at that time except during the lunch hour. My job was to receive and pay out money for the bank to customers.

Q. Your job was in that cage all the time at that time? A. Yes.

Q. Were there any tellers disbursing money? A. Yes. 40

Q. Besides yourself? A. Yes.

Q. On that particular day? A. I do not think so on that particular day.

Q. How many tellers were there in that bank on that day? A. Two, and the secretary would act sometimes as teller, my predecessor.

10 Q. The three of you paid out funds about that time? A. Yes, about that time. I will qualify that by saying that ordinarily there is one teller, but during the busy hours there would be two or three. But May is a dull time, and at that time, on that day, probably there was only one, myself.

Q. On May 9, 1918, you cannot say definitely that you were there in the teller's cage and paying out funds? A. Yes, I can state it almost positively, because I know the character of the business.

20 Q. How many depositors are there in your bank? A. Approximately 19,000.

Q. You testified it is impossible for you to know them all. A. Absolutely.

Q. And that you could not identify a good many of them? A. Most decidedly.

Q. You testified as to a signature card when a deposit is opened. Those fingerprints, when were they placed there? A. Last year.

Q. They were not there at the time? A. No.

30 Q. What identification did you make of a person at that time, in 1918, other than asking him a few questions? A. The signature, and these questions relating to pedigree. We do not take the fingerprints now except of those who are unable to write. Depositors object to it. I don't blame them.

40 Q. You testified on direct examination that the signature on that nine hundred dollar withdrawal slip appears to be different from the others because it appears perhaps that a different pen was

used. Isn't that the statement you made? A. I do not think I stated it just that way.

Q. Didn't you say it is different, that it appears to have been made with a different pen than the other? A. Yes.

10

CHARLES A. STURM, sworn.

Direct Examination by Mr. Pierson:

Q. Where are you employed? A. Hudson Trust Company.

Q. How long have you been employed there? A. Since July, 1904.

Q. What have been your duties since 1904? A. Stenographer, general bookkeeper, assistant sav- 20  
ings teller, savings teller, receiving teller, paying teller and assistant secretary.

Q. In your various positions have you been required to pass upon signatures of depositors? A. I have.

Q. Both in the savings department and in the commercial or checking department? A. Yes.

Q. For a portion of that period of employment have you been required to pass upon signatures in both departments? A. Why, yes. From 1905 to 30  
1913 I was assistant savings department teller. That is, I relieved the regular teller during noon-time and in vacation time. In 1912 he was taken sick and I was made regular teller then. He died one year later, and until 1919 I was the regular savings department teller. Then I was made receiving teller in the checking department.

Q. About how long have you been paying teller? A. I was a little mixed on that first statement. From 1913 to 1917, I was savings department teller; 40

then I was made receiving teller, and in my duties as receiving teller I did not examine signatures as I did previously. In 1919 I was made paying teller in the checking department and the examination of signatures on checks came under my duties.

10 Q. You have had a number of years experience in examining signatures and have examined many?

A. Yes.

Q. Yours is a very large institution is it? A. We think so.

Q. You have many depositors in your savings department? A. Yes.

20 Q. What general custom did you have when you were paying teller and somebody came in and wanted to withdraw money? A. They would present the book at the window and say they desired to withdraw such and such an amount. The teller would then fill out the draft with the exception of the signature and hand them that draft or receipt I would call it, and ask them to sign it. They would walk across the corridor to the desk and sign the draft and return with it, whereupon we would count out the money, place it between the leaves of the pass book and pass it to our bookkeeper in the savings department and then ask the depositor his or her name and how much he withdrew, or  
30 signed to withdraw.

Q. How would you identify the depositor? A. By his signature.

Q. How would you do that? A. By comparing the signature on the receipt with the signature on file on the card which was signed at the time the account was opened.

Q. If that was satisfactory, then what? A. Then he would be paid the money.

40 Q. If it was not satisfactory what else would you do? A. We would ask him the different iden-

tification questions which were answered when he opened the account, such as birth place and birthday and father and mother's name, married or single, have any children, wife's name, and so forth.

Q. Is that the accepted method of identification among savings institutions? A. In my opinion it is.

10

Q. Substantially the same as Mr. Pickenbach testified to in your bank? A. Yes.

Q. You did not see the signature P-2 before? A. No, I have not.

Q. Have you compared these other signatures and studied them? Look them over and see if you have seen them before. A. Yes, I have seen these.

Q. In your opinion were they all written by one and the same person? A. That is my opinion.

Q. I call your attention particularly to the one marked D-15 and ask if after you had made the examination you were told that that was disputed and that then you particularly examined that again—did you? A. I did.

20

Q. In your opinion is this signature on D-15 the signature of the depositor as shown on the admitted cards and withdrawal receipts? A. That is my opinion.

Q. Do you think a paying teller would be justified on comparing that signature with the card, in paying the money? A. I do.

30

Q. As a matter of fact, do people ever sign twice exactly alike? A. Well, very often they sign very dissimilarly, and in my experience I have found that in many cases they do not sign exactly alike.

Q. Are the resemblances in these signatures very marked? A. Very.

Q. And you heard Mr. Pickenbach testify, didn't you? A. I did.

40

Q. And do you find those same characteristics of which he spoke? A. Yes.

Q. I call your attention particularly to this admittedly genuine signature on Exhibit D-9 and ask whether that is such as to attract attention? A. I would say it is.

10 Q. What is peculiar about that? A. I would say that looks more attractive as to difference than any of the other signatures.

Q. Do differences in pens make differences in signatures? A. Positively.

Q. Explain that. A. A very fine, stiff steel pen will make a very fine line. The edge of the pen will have a tendency to affect the line. The pen might be of a different kind—stub, medium.

20 Q. And the points corrode some times and get sort of rough? A. Oh, yes.

Q. And that would indicate that this Exhibit D-9 might have been made with such a pen? A. Yes.

Q. And that Exhibit D-15, the disputed one, was made with a sharp, stiff pen? A. Yes.

Q. But do you judge signatures so much by that characteristic as by the shape and slant and form of the letters? A. The general formation of the letters is what guides the teller.

30 Q. As to this disputed signature, does the general formation of the letters correspond with the admittedly genuine signatures? A. On the whole I find them so.

Q. When a depositor wants to withdraw what is the object of this examination and possibly the identification questions you ask, what is the object of all that? A. To establish the ownership of the book.

40 Q. Yes, in other words it is to establish the identity of the depositor? A. Yes.

Cross Examination by Mr. Comen :

Q. On May 9, 1918, what was your position in the bank? A. Receiving teller.

Q. Was that withdrawal slip in your handwriting? A. I am not connected with this institution. I am with the Hudson Trust Company.

10

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Rebuttal.

AUGUSTE BERNDT, recalled.

Direct Examination by Mr. Comen :

Q. I show you a number of withdrawal slips. Is that your signature (indicating D-11)? A. Yes. 20

Q. Is that your signature (indicating D-10)? A. Yes.

Q. Is that your signature (indicating D-9)? A. Yes.

Q. Is that your signature, the withdrawal slip of one hundred and thirty-nine dollars and seventy cents? A. Yes (indicating D-12).

Q. Here is a withdrawal slip in the amount of fifty dollars. Is that your signature? A. Yes (indicating D-8).

30

Mr. Pierson: I submit this is not rebuttal. She has identified them.

Q. Here is a withdrawal slip in the amount of nine hundred dollars, dated May 9, 1918. Is that your signature (indicating D-15)? A. That is not mine; no.

Testimony closed.

40

*Motion for Direction of a Verdict.*

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10 Mr. Pierson: I desire at this time to make a motion for the direction of a verdict on practically the same grounds as I made it before, that a savings bank is only responsible for the exercise of reasonable care in paying out money to depositors upon presentation of the bank book and the signature to a receipt; that the burden of proof of showing lack of that reasonable care is on the depositor, and that in this case the depositor as a matter of law has not met that burden of proof and shown that there was lack of due care; I also base my motion on the ground that the signatures which she admits show that she assents to the by-laws, that the by-laws are printed in the book and are the by-laws to which I especially referred on the motion for non-suit.

20 The Court: I think there is enough to go to jury. I will deny the motion.

Mr. Pierson: Exception.

Mr. Pierson summed up to the jury on behalf of the defendant.

Mr. Comen summed up to the jury on behalf of the plaintiff.

The Court thereupon charged the jury as follows:

30

**Charge.**

40 The Court: Gentlemen of the jury: The defendant in this case is a savings bank, and it receives money of persons on deposit. They have certain rules and regulations in that bank, and those regulations and rules are printed on the pass book which they give to their depositors so that every depositor may know under what terms and conditions he or she places money on deposit with

this bank. It appears that this lady, the plaintiff, had an account in the savings bank; she deposited money from time to time, and she now claims that nine hundred dollars was drawn from that bank without her authority and without her consent; and if you find from all the evidence that the savings bank had been negligent or had not used the proper care in handling her money, then of course she can recover, unless there is something in the by-laws which would work to the contrary. 10

Now, you have a right to read these by-laws and see how it affects this present case. "Drafts for money may be made personally or by order in writing of the depositor or by power of attorney, but no person shall have the right to demand the whole or any part of his or her money without producing the passbook in order that such payment be entered thereon and such entry is to be evidence of the payment of the money specified." 20

Again: "The institution will not be responsible to depositors for any fraud that may be practiced on them by any person presenting a depositor's book and thereby withdrawing money without their knowledge or consent, although the strictest caution will at all times be used to prevent fraud."

Now, while this lady had the money on deposit she from time to time drew out part of the funds, and it is claimed by the bank that she presented her pass book, or that her pass book was presented, a draft or receipt was made out by the bank, turned over to this lady, and that she signed it and received her nine hundred dollars. This lady says she never received the money at all. So you see in the first place you have the question: Did the lady receive the nine hundred dollars called for in this receipt? If she did, of course she cannot ask the bank to pay it to her a second time. 30 40

10 If you find that she did not receive the money, then you are to find from the evidence whether or not the bank exercised reasonable care. Did they pay out the money without using reasonable care to see that the money was paid to the proper person? If you find that the bank did use proper care, why of course that ends the case, because they are only obliged to use proper care in looking after their client's money. But the plaintiff is obliged to establish that fact by a preponderance of the evidence. If she has failed to establish that fact, why, there can be no verdict at your hands against this defendant. And the plaintiff must establish her case by a preponderance of the evidence.

20 That is the case, gentlemen of the jury, which you have to meet. If you find that this lady drew the money herself, why, she cannot recover. If you find that that money was drawn by someone else and that the bank used the care and caution which it should have used under like circumstances, then you cannot hold the defendant liable, because if it used the care and caution which it should have used in caring for this lady's money she cannot ask at your hands a verdict against the bank, for if you find that the bank used the care and caution required, and that they paid out the money on this  
30 bank book after this lady let the bank book get out of her possession and she knew nothing about the fact that the money had been paid or the receipt had been signed, why, you see, she cannot recover. In other words, members of the jury, you have to be satisfied that the bank was negligent. That is the whole basis of this action. If the bank was not negligent there cannot be any recovery. And in determining that question you have a right to  
40 say whether this lady having the bank book in her possession and someone having written in the bank

book, and that someone being one of the officials of the bank—and this nine hundred dollars was withdrawn, whether she should not have made complaint at once instead of waiting for the length of time that she says she did. Of course, members of the jury, in considering that question you have a right to take into consideration that this lady says she did not know very much about these matters and that she did not look at the bank book and it was not until she went to withdraw some money of some amount that she discovered that that money had been taken. Now, you have a right to consider in that connection whether or not it is possible that this lady should have drawn it herself—whether the evidence of the witness that these receipts are in her handwriting and that these withdrawals are in the handwriting of people in the bank—whether she actually did draw the money and forget it. If, on the contrary, you find this lady put the money in the bank and never withdrew it and the bank paid it out to somebody else through negligence on their part, then she can recover the amount of money she deposited with interest at four per cent. from that time down to the present time.

Mr. Pierson: I will have the interest figured out.

Mr. Comen: I will accept the figures of the bank.

Mr. Pierson: It is one thousand one hundred and eight-eight dollars and one cent it would amount to, with interest.

The Court: All right. One thousand one hundred and eighty-eight dollars and one cent is the amount which this plaintiff can recover, if she can recover at all.

**Exhibit P-1.**

76749

**ABSTRACT OF ACCOUNT**

AUGUSTE BERNDT

In account with THE HOBOKEN BANK FOR SAVINGS, Hoboken, N. J.

	Date	Drafts	Balance	✓	Deposits
10	1900 Sep. 10				50
	Dec. 14				30
	1901 Jan. 1	Int.			50
	" 23				20
	July 1	Int.			1 80
	1902 Jan. 1	Int.			2 04
	July 1	Int.			2 08
	Oct. 6				150
	1903 Jan. 1	Int.			2 12
	May 18				60
	July 1	Int.			5 16
	1904 Jan. 1	Int.			6 46
20	July 1	Int.			6 60
	Nov. 29				100
	1905 Jan. 1	Int.			6 72
	July 1	Int.			8 86
	1906 Jan. 1	Int.			9 04
	Apr. 2				50
	July 1	Int.			9 72
	1907 Jan. 1	Int.			10 42
	July 1	Int.			10 62
	1908 Jan. 1	Int.			10 84
	" 23				100
	July 1	Int.			12 04
	1909 Jan. 1	Int.			13 30
30	Jan. 25				80
	July 1	Int.			14 36
	Oct. 23		139 70		
	1910 Jan. 1	Int.			12 64
	Mar. 28				60
	July 1	Int.			13 50
	1911 Jan. 1	Int.			14 38
	July 1	Int.			14 66
	1912 Jan. 1	Int.			14 96
	" 9				50
	Apr. 18				50
	July 1	Int.			16 26
	Sep. 26				50
40	Dec. 19				50

## Exhibit P-1.

	Date	Drafts	Balance	v	Deposits	
1913	Jan.	1 Int.			18 08	
	Mar.	5			50	
	July	1 Int.			20 44	
	Sep.	24			50	
1914	Jan.	1 Int.			21 84	
	"	7			50	
	May	8			50	10
	July	1 Int.			23 78	
1915	Jan.	1 Int.			25 26	
	July	1 Int.			25 76	
	Dec.	30			200	
1916	Jan.	1 Int.			26 28	
	June	1			200	
	July	1 Int.			30 80	
	Aug.	29			200	
1917	Jan.	1 Int.			37 42	
	July	1 Int.			40 18	
	"	5			160	
1918	Jan.	1 Int.			44 18	
	May	9 900				20
	July	1 Int.			27 06	
1919	Jan.	1 Int.			27 60	
	July	1 Int.			28 16	
	"	25			1000	
1920	Jan.	1 Int.			38 72	
	Apr.	1			200	
	May	28			100	
	July	1 Int.			51 48	
1921	Jan.	1 Int.			56 52	
	July	1 Int.			57 64	
1922	Jan.	1 Int.			58 80	
	July	1 Int.			59 98	
	Oct.	1 Int.			30 59	30
1923	Jan.	1 Int.			30 89	
	Apr.	1 Int.			31 20	
	July	1 Int.			31 52	
	Oct.	1 Int.			31 83	
1924	Jan.	1 Int.			32 15	
	Apr.	1 Int.			32 47	
	Apr.	4 505 07				
	"	16 1000				
	July	1 Int.			17 74	
	Oct.	1 Int.			17 92	
	"	1 Balance	1 810 60			
					<u>4 355 37</u>	40
					<u>4 355 37</u>	
1924	Oct.	1 Balance			<u>1 810 60</u>	

## ABSTRACTS FROM THE BY-LAWS.

§2. Deposits of not less than one dollar can be made; and on making the first deposit the depositor's name must be signed in the Signature Book kept at the Bank, and the depositor will thereby be deemed as assenting to the By-Laws and Regulations.

10 §3. The Bank shall be opened every day, legal holidays excepted, from 9 A. M. to 3 P. M., Saturdays from 9 A. M. to 12 A. M., and every Monday evening from 6 to 8 o'clock. All deposits to be made in bankable money, and no fractional part of a dollar will be received or allowed to be drawn out otherwise than as the balance of an account. Sixty days' notice in writing may be required of a depositor's wish to draw any sum exceeding one hundred dollars, and one week's notice to draw any portion of a deposit, stating in each case the amount required to be drawn; but as a matter of accommodation the directors may pay on demand.

20 §4. All deposits and drafts shall be entered in the books of the Bank and in the depositor's pass-book when made or withdrawn, and the Board of Directors shall have power to return or refuse to receive deposits from any individual whenever they may deem it expedient.

§5. Drafts for money may be made personally or by order in writing of the depositor or by power of attorney, but no person shall have the right to demand the whole or any part of his or her money, without producing the pass-book in order that such payment may be entered therein, and such entry is to be evidence of the payment of the money specified.

30 §6. On the third Monday in January and July in each year, a dividend will be declared and payable to depositors, on all sums of five dollars and upwards. Interest will be allowed for six months on all sums deposited on or before the 10th of January and July, and for three months on all sums deposited on or before the 10th of April and October; but no interest shall be paid on the fractional part of a dollar, nor shall any interest be allowed on any sum withdrawn previous to the first days of January and July for a period which may have elapsed since the last dividend. *Dividends if not drawn will bear interest as deposits.*

40 §7. All notices in relation to deposits or depositors, published by order of the Board of Managers in one or more newspapers of the City of Hoboken on three successive days of publication, shall be deemed and taken as an actual notice to each depositor.

*Exhibit P-1.*

§8. All investments will be made in strict accordance with the charter and State Laws.

§16. All applications for loans must be made to the Board of Directors in writing at one of their stated or special meetings; such application must contain the name and residence of the applicant, the amount of the loan required, and a full and specific account of the security proposed, and of the time for which the loan is required. The security must in all cases be of the nature of that required by the charter and State Laws, and, if approved by a two-third majority vote of the Board of Directors, the loan will be granted.

10

§22. This Institution will not be responsible to depositors for any fraud that may be practiced on them by any person presenting a depositor's book, and thereby drawing money without their knowledge or consent, although the strictest caution will at all times be used to prevent fraud.

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REGULATIONS.

§1. Depositors should use the printed forms furnished by the Bank for making their deposits and drafts.

20

§2. Drafts on the balances due to deceased depositors can be paid only on the production of authority from the Surrogate.

§3. Depositors must count their money intended for deposit, and state the amount when it is handed in, or make out a deposit ticket.

§4. Should a depositor lose his pass-book, he is required to give immediate notice thereof to the Bank, and the Bank shall prescribe the conditions on which a new book may be issued.

§5. Depositors assigning or transferring their pass-books are required to give notice of the fact to the Bank, and the assignee of said pass-book is required to place on file with the Bank the original copy of said assignment, acknowledged in due form of law, at least forty-eight hours before any draft can be made thereon.

30

§6. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given, in writing, to the Bank, in the event of the death of the Trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives, provided that no minor shall withdraw any deposits in his or

40

*Exhibit D-1.*

her name, actually made by any person other than such minor, without the consent, in writing, of the person actually making such deposit, or his or her legal representative.

**Exhibit D-1.**

115939

10

**ABSTRACT OF ACCOUNT**

AUGUSTE BERNDT

In account with THE HOBOKEN BANK FOR SAVINGS, Hoboken, N. J.

	Date	Drafts	Balance	✓	Deposits
	1910 Aug. 17				100
	Nov. 22				100
	1911 Jan. 1 Int.				1
	June 2				150
20	July 1 Int.				4 02
	Sept. 5				100
	Oct. 24				50
	1912 Jan. 1 Int.				8 10
	Feb. 23				100
	May 9				60
	June 21				60
	July 1 Int.				11 26
	1913 Jan. 1 Int.				14 88
	" 8				40
	Feb. 21	100			
	July 1 Int.				13 98
	1914 Jan. 1 Int.				14 26
	July 1 Int.				14 54
30	Nov. 17	20			
	1915 Jan. 1 Int.				14 44
	Mar. 16	20			
	May 7	40			
	June 10	50			
	July 1 Int.				12 52
	" 28	50			
	Sep. 17	589			
			869		869

40

Exhibit D-1 has printed therein the same abstract from the by-laws and regulations as Exhibit P-1.

Book No. 115939

D-2

Hoboken, N. J., FEB 27 1914 1914

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

One hundred

Dollars

\$ 100.00

Auguste Bernolt

Book No. 115939

D-3

Hoboken, N. J., NOV 17 1914 1914

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

Twenty

Dollars

\$ 20.00

Auguste Bernolt

Book No. 115939

D-4

Hoboken, N. J., MAR 16 1915 1915

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

Twenty

Dollars

\$ 20.00

Auguste Bernolt

Book

\$

Book

\$

Book

\$

Book No. 115939

D-5-

Hoboken, N. J., APR 28 1911 191

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

*[Handwritten signature]*

Dollars

\$ 40 *Auguste Bernolt*

Book No. 115939

D-6

Hoboken, N. J., 17 191

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

*Four hundred eighty nine*

Dollars

\$ 489 *Auguste Bernolt*

Book No. 115939

D-7

Hoboken, N. J., MAY 7 1911 191

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

*Four*

Dollars

\$ 4 *Auguste Bernolt*

Book

\$

Boo

\$

Book No. 76749

D-9  
Hoboken, N. J., APR 4 1924

Received from the **HOBOKEN BANK FOR SAVINGS**  
IN THE CITY OF HOBOKEN.

*Two hundred five 07* Dollars  
\$ *50 07*  
*H. Bennett* x *Auguste Bennett*  
Present Address

Book No. 45777

D-8  
Hoboken, N. J., JUN 10 1915 191

Received from the **HOBOKEN BANK FOR SAVINGS**  
IN THE CITY OF HOBOKEN.

*Twenty* Dollars  
\$ *20 #*  
*Auguste Bennett*

B  
F  
M  
O  
H  
V  
R

Size  
Re  
S  
P

D-10 other side

115939

Birth ce

Father's Name

Mother's Maiden Name

Occupation

Husband's Name

Wife's Maiden Name

Remarks

*Carl Kernbaun*  
*Ernestine Hunkel*  
*Herrn*

Date of Birth

*11/11/66*

I hereby agree to the By-Laws and Regulations of the Bank

D-10

one side

Signature

Residence

*Auguste Berndt.*  
*19 Garden*





76749 D-10(A)  
 Auguste Bernolt  
 Keep this card here

115939<sup>D-11</sup> I HEREBY AGREE TO THE BY-LAWS AND REGULATIONS OF THE BANK

SIGNATURE *Auguste Bernolt*

TRUSTEE FOR

RESIDENCE *9, Grand St. N.Y.*

WHEN BORN *Nov. 11, 1868* WHERE BORN *Pa.*

FATHER'S NAME *Karl Bernbaum*

MOTHER'S MAIDEN NAME *Ernestine Gulke*

HUSBAND'S NAME

WIFE'S MAIDEN NAME *Henna*

OCCUPATION

PATENTED MAY 25, 1897 LIBRARY BUREAU B34681

Boo

\$

Book

\$

Book No.

76749

D-12

Hoboken, N. J.,

19

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

*One hundred and thirty nine*

20

Dollars

\$ 139<sup>20</sup>

*Auguste Bernolt*

Book No.

6749

D-13

Hoboken, N. J.,

APR 16 1923

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.



Dollars

\$ 100

*Auguste Bernolt*

Present Address



Auguste Bernott

D-14

Auguste Bernott

Auguste Bernott

Auguste Bernott

D-15

Book

76789

Hoboken, N. J.,

MAY 9 1918 191

Received from the **HOBOKEN BANK FOR SAVINGS**

IN THE CITY OF HOBOKEN.

Five hundred

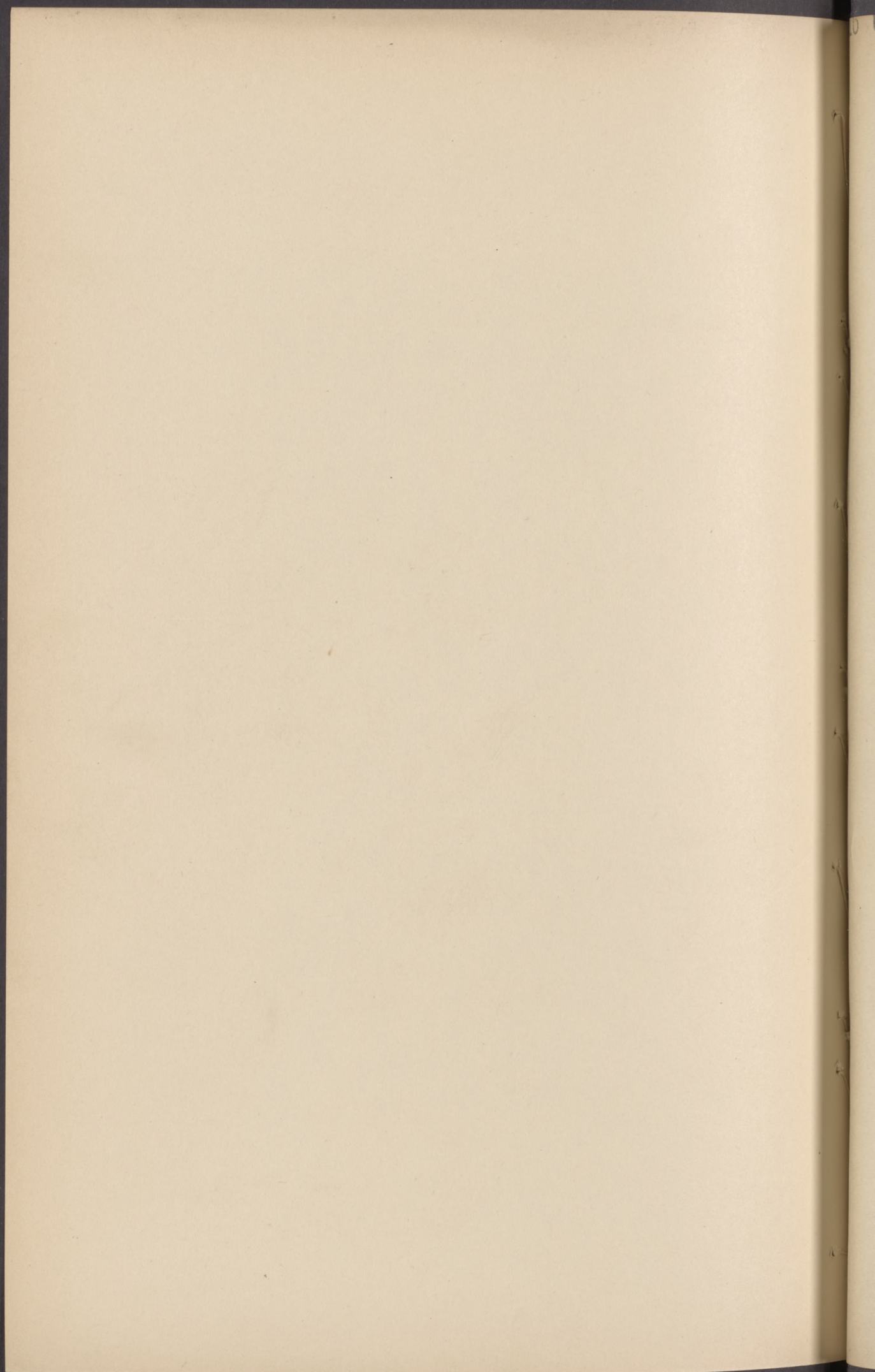
Dollars

\$

700

Auguste Bernott

Present Address



# New Jersey Court of Errors and Appeals

10

<p style="text-align: center;">AUGUSTE BERNDT, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  THE HOBOKEN BANK FOR SAVINGS IN THE CITY OF HOBOKEN,  <i>Defendant-Appellant.</i></p>	}	<p>On Appeal from Su- preme Court.</p>	<p>20</p>
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## BRIEF FOR PLAINTIFF-RESPONDENT.

### Facts.

So far as the facts stated in the brief for the appellant are concerned, this is to be said: That there is no evidence, either on the part of the plaintiff or the defendant as to what actually took place at the time when the \$900 was paid out by the defendant. The only evidence as to what may have taken place at the time is the evidence of Harry E. Pickenbach, the Secretary of the defendant, who testified to his usual practice. He does not purport to state what actually took place at that time.

30

### Argument.

The only grounds of appeal which are stated are, first, the refusal of the trial judge to non-suit at the close of the plaintiff's case (p. 30), and, second, the denial of a motion to direct a verdict at the close of the entire case (p. 48).

40

## I.

**There was no error in the refusal of the court to grant a non-suit at the close of the plaintiff's case.**

10 The complaint (p.5) set up the fact that the plaintiff was a depositor in the defendant's bank; that she had made deposits, and that the \$900 had never been received by her, or paid out on her order, or by anyone who had written power, right or authority to withdraw the same.

20 The evidence at the close of the plaintiff's case was simply to the effect that the plaintiff had made the deposits; that she had not withdrawn the \$900 herself, and had not authorized anyone else to withdraw it. This made a prima facie case for the plaintiff. The action was not one for negligence, but it was an action to recover moneys which were held by the defendant for the plaintiff.

*Noah vs. Bowery Savings Bank*, (1919)  
225 N. Y. 284; 122 N. E. Rep. 235;

*Chase vs. The Waterbury Savings Bank*,  
77 Conn. 295; 69 L. R. A. 329, 340.

In the latter case the court says:

30 "The duty of proving the payment was upon the bank. It was not the duty of the plaintiff to make a prima facie case of negligence. It was brought to recover money which the bank actually received from the plaintiff and had not been paid back to her, and hence it became the duty of the defendant to show that it had made payment in compliance with its by-laws."

40 That payment is an affirmative defense is a well-settled principle. *Fein vs. Meir*, 71 N. J. Law, 12 affirmed by this Court in 74 N. J. Law, 597; *Noah vs. Bowery Savings Bank*, supra.

## II.

**There was no error in the action of the trial court in refusing to direct a verdict.**

**The burden of showing a payment in accordance with its by-laws was on the defendant.**

10

There is no question that the plaintiff was bound by the rules and by-laws of the bank, as contained in the pass-book, and to which she had subscribed. This was laid down in the case of *Cosgrove vs. Provident Institution for Savings*, 64 N. J. Law, 653. That case is not only an authority in this State, but has been cited with approval in a number of other states.

But it will be observed that the doctrine of that case is not involved in the case sub judice, because in that case it was admitted that the bank had exercised due care, and the only question involved was whether a payment to a person other than a depositor was a payment to the depositor.

20

It behooves us, then, to see what is the particular provision of the by-laws applicable to this case. It is to be found in the State of the Case, p. 55, §22, and reads as follows:

“This institution will not be responsible to depositors for any fraud that may be practiced on them by any person presenting a depositor’s book, and thereby drawing money without their knowledge or consent, although the *strictest caution will at all times be used to prevent fraud.*”

30

That establishes a contract with the depositor and the bank was called upon to exercise the strictest caution to prevent fraud. *Allen v. Williams-*

40

*burgh Savings Bank*, 69 N. Y. 314; *Kelley v. Buffalo Savings Bank*, 180 N. Y. 171; *Noah v. Bowery Savings Bank*, 225 N. Y. 284.

The question which should have been submitted to the jury was, therefore, did the bank exercise the strictest caution? The learned trial judge left it to the jury on the question of reasonable care.

10 The appellant could not have objected to this, as it was much more favorable to it than it should have been. Moreover, if the action of the court in refusing to direct a verdict was correct, the ruling must be affirmed irrespective of the reason which actuated the judge.

We respectfully insist that the entire question as to whether the defendant exercised that degree of care which it should have exercised was a jury question.

20 The burden of showing that it did exercise that degree of care necessary was upon the defendant. *Chase v. The Waterbury Savings Bank, supra.* and *Noah v. The Bowery Savings Bank, supra.*

How then did the defendant endeavor to support that burden? It produced, first, a number of withdrawal receipts with the signature of the plaintiff, (D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9), signatures on the record card on the opening of the account, (D-10 and D-11), and the signature to the disputed withdrawal receipt, (D-15).

30 The determination of the similarity of the signatures was of course a jury question.

The defendant also produced some so-called expert testimony.

The first, Mr. Pickenbach. Mr. Pickenbach is the Secretary of the defendant, is the teller who, according to his own testimony, made the payment, and is to that extent an interested witness. His

40 tendency would be to exonerate himself as well as exonerate the bank.

The other expert witness was Mr. Sturm, a teller in another banking institution, the tendency in whose mind would in a large measure be the same as Mr. Pickenbach.

But it was in the province of the jury, if it so desired, to disregard any and all expert testimony.

Expert testimony is given only to aid the jury and nothing more. The rule as laid down in practically every jurisdiction of the United States is stated in 22 Corpus Juris, p. 728, §823, as follows: 10

“The weight to be given to opinion evidence in any case whether the statement is of the inference or conclusion of an observer or the judgment of a question for the determination of the jury or of an expert is within the bounds of reason entirely the court when trying a question of fact. \* \* \*

The judgments of experts or the inferences of skilled witnesses even when unanimous and uncontroverted are not necessarily conclusive on the jury but may be disregarded by it or by the court trying an issue of fact unless the subject is one for experts or skilled witnesses alone and the jury cannot properly be assumed to have or be able to form correct opinions of their own.” 20

And this applies as well to handwriting evidence. The rule is well stated in the case of *In re Thomas*, 155 California, 488, 101 Pacific, 798, as follows: 30

“The jury are at liberty to use their own judgment in the matter of handwriting and are not obliged to follow the opinion of experts.”

In that case the directions of the trial court which were approved by the appellate court were in these words:

“Generally the testimony of experts will not be allowed to overthrow the positive and direct 40

evidence of credible witnesses who testify from their personal knowledge. While the law permits in certain cases expert testimony in reference to handwriting to be given, yet such testimony should be received with great caution and the jury are at liberty to reject it if they should find it not well founded in fact. The jury are at liberty to use their own judgment and are not obliged to follow the opinion of experts."

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The views which various courts have taken of the value of expert testimony are very exhaustively summarized in 22 Corpus Juris, p. 735, supported by notes of cases in various jurisdictions:

"The general uncertainty and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and the consideration that there are other elements of unreliability arising from human frailty, bias, loyalty to one's employer, pride of opinion, self-interest, or the heat engendered by controversy, which more or less unconsciously wrap the mind of the witness, even without the more vulgar elements of venality, and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice. These considerations have caused the courts to characterize this class of evidence unfavorably, as rather unreliable, not of great probative force, weakest and most unreliable, the weakest character of evidence, wholly worthless for any judicial purpose, and of less than no value; to rule that such evidence should be received with caution, with narrow scrutiny and with much caution and even that it should never be received at all except when absolutely

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necessary, and to consider that the statement of an inference or judgment is inferior in probative effect to a statement of fact."

The New York Court of Appeals, speaking by Judge Earl, said:

"Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted." (*Ferguson vs. Hubbell*, 97 N. Y. 507, 514.)

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A few words may be said as to an example of this so called expert testimony of Pickenbach and Sturm. Pickenbach says (for example) on page 39:

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"Q. What is the characteristic of the g throughout all of these signatures? A. Well, the lower loop, for instance, tilts toward the left instead of coming down straight, and the upper part of the g is never joined to this down stroke, there is always a slight space between.

"Q. That is a characteristic of every one of those signatures, is it, including the disputed one? A. Yes."

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Whereas, in the disputed signature, Exhibit D-15, there is no space between the upper part of the g and down stroke.

And on page 40, he says:

"Q. How about the e, the last letter of Auguste? A. There is not anything that is unusual about that. that seems to be uniform."

Whereas the e on the disputed signature is perfect and evidently made with great care.

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Mr. Sturm says, on page 46:

"Q. And that Exhibit D-15, the disputed one was made with a sharp, stiff pen? A. Yes."

10 We think, and the jury would have a right to consider, that the signature was a forgery, made by someone who wrote a much better handwriting than the defendant and endeavored to bring the signature down to the signature ordinarily affected by the plaintiff.

The whole expert testimony, if it can be called such, must be considered very unsatisfactory, but, as we have said, it is not at all binding upon the jury. There was no obligation on the part of the plaintiff to call rebuttal experts. The jury could disregard it all.

20 The other evidence given by Mr. Pickenbach was as to his usual course of conduct. He states this on page 31, line 30, to page 32, line 15.

There is no evidence by him as to what actually took place at the time the payment was made, and there is nothing to show in his testimony that he did anything except to compare those signatures (if he did that) and yet he says, when he testifies as an expert, that there is a great deal of difference in these varying signatures. For example, on page 40, line 33, he says:

30 "Q. Are the e and the r the same practically? A. No. Here the e is a letter where there is not likely to be much of a difference, but the r is different again from some of the other signatures. It is like some that are admitted to be genuine and unlike others that are admitted to be genuine. In other words the r is not always the same. She makes two kinds of r's."

40 "Q. As a matter of fact her admitted signature to card 76749 has a different B

from any other 'Berndt' on any of the other signatures that have been offered in evidence, is that so? A. Yes. There is not one here like it.

"Q. Are those changes in the B and A to which you have called attention characteristic of the signatures of depositors? A. Yes. *That is why we have identification questions.*

"Q. You reject withdrawals because of those changes? A. Yes. *That is why we have the identification questions.*" 10

And still there is nothing to show that Mr. Pickenbach, when he made the payment, did anything beyond comparing the signatures. There is nothing to show by him that he asked any identification questions or that he called for any proof of identity at all.

Mr. Sturm, on page 45, line 29, says, that in his opinion a paying teller would be justified upon comparing the signature with the card in paying the money. This in answer to a question which would probably have been ruled out by the trial judge had an objection been made. But we have not before us the rules of Mr. Sturm's institution, the Hudson Trust Company, to show what degree of care the Hudson Trust Company would be required to exercise in such cases, while an examination of the cases which are cited in the appellant's brief would show that there are no two savings institutions in this vicinity who have the same by-laws and the same rules. The jury had moreover the right to consider whether or not a higher degree of care would be necessary and should have been exercised on the withdrawal of so large a sum of money from what was otherwise a small savings bank account. 20 30 40

*The degree of care to be used by the bank was a jury question.*

In the case of *Allen v. Williamsburgh Savings Bank*, 69 N. Y., 314, the language of the bank rule was:

10 "Drafts may be made personally, or by the order in writing of the depositor (if the bank have the signature of the party on their signature book, or by letters of attorney duly authenticated); but no person shall have the right to demand any part of his or her principal or interest, without producing his or her bank book, that such payments may be entered therein.

20 "The bank will use its *best efforts to prevent fraud*; but all payments made to persons producing the deposit books, shall be deemed good and valid payments to depositors respectively."

Judge Folger says, at page 319: "The officers of savings banks, acting under rules such as those shown to us in this case, are bound to the exercise of care and diligence, up to the mark which is fixed for the bank by those rules. \* \* \*

30 "The trial court having inspected the signatures, has held that the difference in them was such, as that, in connection with other circumstances of the case, it was proper to submit to the jury the question of negligence.

40 Judge Folger held that the court had nothing before it from which it could determine that question, and went on to say: "The defendant had stipulated with the plaintiff to use its best efforts. Unless that phrase has the same meaning as ordinary care and diligence, it would have been a misleading of the jury to have put the latter to them. And we may not say, that

the best efforts of such an institution, through its officers, are the same as its ordinary care and diligence. It is true that the opinion in 62 N. Y. (*Appleby vs. Erie County Savings Bank*, which is so much relied upon by the appellant) does use the last phrase. The contract of the defendant there did not call for its best efforts; only for its endeavor."

And on page 322 Judge Folger says:

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"When it (the bank) prescribed rules, and its depositors has assented to them, they are the agreement, and each party must keep it, to preserve rights against the other. The extent of the duty which the savings bank is under, will in some degree be measured by the strictness or extent of the rule it has put upon itself. Ordinarily, it is bound to the exercise of reasonable care and diligence, which will be a question of law or fact, as the proofs are conclusive and undisputed, or debatable and conflicting. It may have used terms which will, as in this case, bind it to the exercise of greater care and diligence."

20

The case of *Kelley vs. Buffalo Savings Bank*, 180 N. Y., 171, which is so much relied upon by the appellant, does not support the appellant's contention. In that particular case the deposit stood in the name of Ellen Neville, and after her death was drawn upon by orders purporting to be signed by her, but actually signed by her mother or one of her sisters.

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The language of the bank rule was this: "The secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books or duplicates thereof, shall be good and valid payment to the depositors respectively."

The case was tried below before a judge without a jury who found for defendant; was affirmed by the Appellate Division and came up to the

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Court of Appeals upon *the trial judge's findings of fact, which were these:*

10 "That by a critical examination and comparison of the said signatures on each of the aforesaid drafts or orders, with the true signature of said Ellen Neville, entered and signed as aforesaid in the book of signatures, it would have been apparent to a competent bank officer that neither of the signatures to said drafts or orders was the genuine signature of said Eleen Neville.

"That at the respective times at which such drafts or orders were presented to the defendant for payment, the defendant made no critical examination or physical comparison of the signatures thereon with that of the said Ellen Neville entered and signed in the book of signatures of depositors kept by the defendant aforesaid."

20 "That the said drafts or orders were paid by defendant on presentation of the same with the pass book, and the defendant made no effort by a critical examination or physical comparison to ascertain the genuineness of the signatures of any of said drafts or orders, or to ascertain the identity of the person presenting the same."

30 "That there does not exist such a disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon said five checks, or any or either of them, as to create doubt or misgiving concerning the genuineness of said five signatures, or any or either of them, in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bank book, and, therefore, the defendant exercised due care and caution, and was not guilty of negligence in paying the five checks in question, nor in paying any or either of them."

40 The Court of Appeals *in reversing the Appel-*

*late Division, and necessarily also the trial judge,* in following the general rule that the bank would only be held to the ordinary care in the absence of a special provision in its by-laws, says (p. 181):

“It is possible that there may be special cases in which it may not be necessary for bank officers to make a physical comparison between one signature on file with a bank and another upon a draft or check presented to it for payment, but if so, there must exist some unusual and pertinent excuse that is not discoverable in the findings now before us tending to show that the failure to make such a comparison is not at variance with the requirements of ordinary care. We think the findings most favorable to the appellant, to wit, that the defendant made no physical comparison of the signatures upon the five drafts with the signature of Ellen Neville in the defendant’s signature book does not support the conclusion of law to the effect that the complaint should be dismissed, and for that reason the judgment herein should be reversed.”

The appellant’s counsel citing this particular case is probably without intending to be somewhat disingenuous. He says in his brief on page 10: “The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon five checks, as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bank book, and that, therefore, the bank exercised due care and caution and was not guilty of negligence is really a conclusion of law and not a finding of fact.”

It is true that this language does appear in the Kelley case, but the court does not intend to imply that it in any way justifies such a finding of law; it simply means that the trial judge in the guise of a finding of fact made a finding of law. That is all that that statement implies. The Court of Appeals recognizes that the question was one of fact.

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A few words only as to the cases in the inferior courts of New York which are cited in the appellant's brief.

The appellant in its brief refers to *Ferguson vs. Harlem Savings Bank*, 86 N. Y. Supplement, 825, and says that the circumstances in that case were quite similar to those in the present case. We respectfully insist that the circumstances in that case were far from similar. The facts in that case were these: The teller who made the payment observed a few slight irregularities in the signature; *he thereupon asked all the test questions requisite for identification. The person applying for the payment, with the pass-book in his possession and claiming to be the plaintiff, correctly answered all of the test questions, and that thereupon the payment was made.* An entirely different situation.

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In the case of *Krishkan vs. New York Savings Bank*, 156 N. Y. S., 298, the facts were that the person who presented the draft signed his name several times, both on the face and on the back of the receipt, and also the old and the new address of the depositor. *The teller compared the signature on the record card with the draft, asked the drawer the same questions that had been asked of the depositor and they corresponded except the date of birth which was given as 1885, whereas the record showed 1884. The teller then*

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*conferred with his associate and they decided to honor the draft. Again an entirely different situation.*

A very recent case is *Koutis vs. Zion's Savings Bank & Trust Company* (Utah), 225 Pacific, 339, and we quote from the opinion of the Court:

"The receipt presented was not signed in the presence of the teller, and the amount of money to be withdrawn was not written in the receipt when presented, but was inserted by the teller. The signature on the receipt and on the signature card were introduced in evidence. While the paying teller testified that the similarity of the signatures was sufficient to convince him at the time that they were made by the same person, he admitted that there were differences to which his attention was called at the trial, which he did not observe at the time of payment. On the signature card was indicated the address of the plaintiff, the year of his birth and his father's name. The paying teller made no inquiry of the person requiring payment as to these means of identification. In view of these circumstances, we are of the opinion that there was sufficient evidence to be submitted to the jury on the question of whether the bank exercised ordinary care and diligence in making the payment."

The judgment, however, was reversed for a different reason.

### III.

**The question was one for the jury, and the court had no right to control it.**

There being no error in the record, we respectfully urge that the judgment of the Supreme Court should be affirmed.

LEVENSON, COMEN & LEVENSON, 40  
Attorneys for Plaintiff-Respondent.

M. T. ROSENBERG,  
Of Counsel.

The first part of the book is devoted to a general  
 description of the country and its resources. The  
 author then proceeds to a detailed account of the  
 various tribes and their customs. He describes the  
 manner of their life, their habits, and their  
 mode of thought. He also mentions the different  
 languages spoken by them, and the names of their  
 principal chiefs and warriors. The second part  
 of the book contains a list of the names of the  
 various tribes, with a description of their  
 territory and the number of their people. The  
 third part of the book is a collection of  
 anecdotes and stories which the author has  
 collected from the natives. These stories are  
 very interesting and give a good idea of the  
 character of the people. The fourth part of  
 the book is a list of the names of the  
 various places, with a description of their  
 situation and the number of their people. The  
 fifth part of the book is a list of the  
 names of the various rivers, with a description  
 of their course and the number of their  
 people. The sixth part of the book is a  
 list of the names of the various mountains, with  
 a description of their height and the number  
 of their people. The seventh part of the  
 book is a list of the names of the various  
 lakes, with a description of their size and  
 the number of their people. The eighth part  
 of the book is a list of the names of the  
 various islands, with a description of their  
 situation and the number of their people. The  
 ninth part of the book is a list of the  
 names of the various seas, with a description  
 of their depth and the number of their  
 people. The tenth part of the book is a  
 list of the names of the various bays, with  
 a description of their size and the number  
 of their people. The eleventh part of the  
 book is a list of the names of the various  
 straits, with a description of their width and  
 the number of their people. The twelfth part  
 of the book is a list of the names of the  
 various canals, with a description of their  
 length and the number of their people. The  
 thirteenth part of the book is a list of the  
 names of the various rivers, with a description  
 of their course and the number of their  
 people. The fourteenth part of the book is a  
 list of the names of the various mountains, with  
 a description of their height and the number  
 of their people. The fifteenth part of the  
 book is a list of the names of the various  
 lakes, with a description of their size and  
 the number of their people. The sixteenth part  
 of the book is a list of the names of the  
 various islands, with a description of their  
 situation and the number of their people. The  
 seventeenth part of the book is a list of the  
 names of the various seas, with a description  
 of their depth and the number of their  
 people. The eighteenth part of the book is a  
 list of the names of the various bays, with  
 a description of their size and the number  
 of their people. The nineteenth part of the  
 book is a list of the names of the various  
 straits, with a description of their width and  
 the number of their people. The twentieth part  
 of the book is a list of the names of the  
 various canals, with a description of their  
 length and the number of their people.

## New Jersey Court of Errors and Appeals

<p style="text-align: center;">AUGUSTE BERNDT, Plaintiff-Respondent,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">THE HOBOKEN BANK FOR SAVINGS in the City of Hoboken, Defendant-Appellant.</p>	}	<p>On Appeal from New Jersey Supreme Court.</p> <p>Brief in behalf of Appellant.</p>
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**BRIEF OF PIERSON & SCHROEDER  
IN BEHALF OF THE DEFEND-  
ANT-APPELLANT, THE HOBOKEN  
BANK FOR SAVINGS IN  
THE CITY OF HOBOKEN.**

I.

**Statement of Fact.**

This is an appeal from a judgment obtained in the New Jersey Supreme Court by the plaintiff against the defendant. The action arose out of the following circumstances:

Plaintiff in the year 1900 opened an account No. 76749 in defendant's bank. There were various deposits and withdrawals as shown on Exhibit P-1, page 52.

On May 9, 1918, a counter receipt was obtained at the bank, filled in for \$900.00, was signed Auguste Berndt, was presented with the bank book and paid by the bank and the amount entered in the

book. This is Exhibit D-15, page 63, testimony, pages 34 and 36.

On April 4, 1924, the depositor for the first time claimed that she had not received the amount called for by said receipt and shown by said entry. In the meantime the bank book had been in her possession and had been presented for a deposit of \$1,000 on July 25, 1919, for crediting the July 1, interest for 1919, on April 1, 1920, when a deposit of \$200 was made and again for the January 1, 1921, interest. It was presented again on May 28, 1920, for a deposit of \$100. It was then presented again on April 4, 1924, for an interest credit when the \$900 withdrawal was disputed for the first time. See page 35, line 29, and Exhibit P-1, page 52.

Suit was subsequently brought for the recovery of the \$900 besides interest, which resulted in the judgment under review.

The plaintiff was the only witness sworn in her behalf. Her testimony showed the opening of the deposit, certain withdrawals and a denial of the withdrawal of the \$900 in issue. She said (p. 15, l. 35), that she signed a withdrawal card every time and never sent any one to the bank with a withdrawal card and did not authorize anybody to withdraw funds in her behalf. She then testified as follows:

“Q. On May 9, 1918, there is shown in your bank book a withdrawal of Nine hundred Dollars. Did you withdraw that money? A. No, sir, I did not need any.”

There was some evidence as to sources of moneys which she had deposited. Her bank book was offered and received in evidence and marked Exhibit P-1, page 19, top. This is the pertinent evidence offered in her behalf.

At the close of plaintiff's case a motion for a non-suit was made on the ground that the plaintiff had not shown any negligence or lack of ordinary care on the part of the bank and on the further ground that she was properly charged with the withdrawal because of the by-laws printed in her bank book which had been consented to by her and referred to in Point III. This motion was overruled and exception allowed. See page 30.

Two witnesses were sworn in behalf of the defendant. One of these was Harry E. Pickenbach, at the time secretary and formerly a paying teller of the bank, who qualified as an expert on signatures and who had also made the payment in dispute. A number of admitted standard signatures were produced and received in evidence. See Exhibits D-2 to D-15 inclusive, pages 57 to 63. The secretary also testified as to the entry in question and produced the receipt, Exhibit D-15, page 34, line 3. This was a receipt dated May 9, 1918, for \$900, bearing the name, Auguste Berndt. The witness then testified from his examination of the disputed signature and the admitted signatures that in his opinion the signature on the \$900 withdrawal receipt in dispute was the genuine signature of the plaintiff. See page 36, line 35.

He further testified that in his opinion any paying teller would have been justified in making a payment on that signature and the production of the bank book. He then gave at length his reasons for this opinion. See pages 38 to 43 of the testimony.

Charles A. Sturm, an employee of another banking institution, was also sworn and qualified as an expert. He gave similar testimony. This testimony will be found on pages 43 to 47.

In rebuttal the plaintiff denied her signature to the disputed receipt, page 47 at the bottom.

“Q. Here is a withdrawal slip in the amount of Nine Hundred Dollars, dated May 9, 1918. Is that your signature (indicating D-15)? A. That is not mine; no.”

At the close of the case a motion was made for the direction of a verdict (p. 48), on the ground that a Savings Bank is only responsible for the exercise of reasonable care in paying out money to depositors upon presentation of the bank book and the signature to a receipt; that the burden of proof of showing lack of that reasonable care is on the depositor, and that the depositor had as a matter of law not met that burden of proof, and shown that there was lack of due care. The motion was also made on the ground that there was no liability on the part of the bank because of by-laws printed in plaintiff's bank book and consented to by her. These are referred to in Point III.

This motion was denied and exception allowed.

## II.

### Grounds of Appeal.

*The only grounds of appeal question the propriety of the refusal of the motion to non-suit and for the direction of a verdict.*

*It is conceded that this court does not consider weight of testimony provided there is any evidence to support a verdict. The insistence is, that the evidence fails to show any lack of reasonable care on the part of the bank, but does show reasonable care, and that under the circumstances the Bank was entitled to the direction of a verdict.*

*It is further insisted that there was no proof that the Bank failed to take the caution required by its*

*by-laws and that, therefore, as a matter of law, the depositor was bound by the withdrawal of the money without her consent under the circumstances in question.*

### III.

**The Bank was not responsible for the payment of the draft in dispute because of by-laws by which the plaintiff was bound.**

**A depositor is bound by the by-laws of a savings bank printed in the bank-book to which he subscribes.**

Cosgrove v. Provident Institution for Savings, 64 N. J. L., page 653 and cases;  
 Kelley v. Buffalo Savings Bank, 180 N. Y., 171;  
 Gifford v. Rutland Savings Bank, 63 Vt., 108, 11 L. R. A., 794;  
 3 Ruling Case Law, page 706, Sec. 338 and cases;  
 Langdale v. Citizens Bank, 121 Ga., 105;  
 Wilson v. Citizens & Southern Bank, 99 S. E., 239 (Ga.).

Section 5 of the by-laws printed in the bank book (see p. 54), provides that "drafts for money may be made personally or by order in writing of the depositor or by power of attorney, but no person shall have the right to demand the whole or any part of his or her money, without producing the pass-book in order that such payment may be entered therein, and such entry is to be evidence of the payment of the money specified."

The cases hold that a depositor is bound by by-

laws printed in his book, at least, where there is ordinary care. When without such lack of care, an entry was made of this payment in the bank book, it became evidence of the payment of the money therein specified.

Section 22 of the by-laws also printed in the bank book is as follows:

“This Institution will not be responsible to depositors for any fraud that may be practiced on them by any person presenting a depositor’s book, and thereby drawing money without their knowledge or consent, although the strictest caution will at all times be used to prevent fraud.”

We think in this case that the bank has amply shown, as will appear more at length by reference to the testimony hereafter, that it met all the requirements and that the bank is not therefore legally responsible for any fraud that may have been practiced on it.

The case of *Langdale v. Citizen’s Bank*, 121 Ga., 105, contains a rather complete discussion of by-laws rather similar to the one in question. In this case the depositor had agreed to these rules:

“A depositor must always present his or her pass-book when depositing or withdrawing. If not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal.”

“Every effort will be made to protect depositors against fraud, but payment made to a person presenting pass book shall be good and valid on account of the owner, unless the pass book has been lost and notice in writing given to the bank before such payment is made.”

The court said with respect to this:

“Much stress is laid, in the brief of counsel for the plaintiff-in error, upon the rule that unless the depositor is personally present with the pass-book when drawing money, ‘an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal,’ and it is urged that because the plaintiff did not appear in person, and the person who did present the pass-book had no order as required by the rule, the bank is liable for the payment of the money. Thoughtful consideration must show that this argument is entirely specious. Plainly, this rule has no application to a case like this, where the check drawn was in fraud of both the plaintiff and the bank. Its purport is merely to show that a savings-bank account is not negotiable. The delivery of the pass-book, and to prescribe that when a depositor wishes to assign his funds on deposit, he must do it in a certain manner. It is also urged that the rule reciting that ‘Every effort will be made to protect depositors against fraud’ required that the cashier or teller to whom the check was presented should at least compare the signature to the check with that of the plaintiff on file with the bank; and that the ensuing clause, ‘but payment made to a person presenting pass-book shall be good and valid on account of the owner,’ etc., when taken in connection with the first part of the rule, conveys the meaning that the bank will only be excused from liability when it pays the money after having exerted ‘every effort’ and used extreme caution to prevent fraud. We cannot agree

with this construction of the rule. Giving it what seems to us a reasonable intendment, the rule means this: We will do what we can to keep you from being defrauded, but as the pass-book is prima facie evidence of the right to draw money, you must look well after your pass-book and see that it does not fall into the hands of a thief or forger. Our means of identification are imperfect, and if your pass-book is presented by some one other than yourself, with apparent right to draw your money, we will, unless our suspicions are aroused, honor this check without further question, we will deal honestly and fairly with you, but you must take every precaution to protect yourself by the preservation of your pass-book. Such a rule is reasonable, and as the plaintiff in the present case assented to it in writing, he is bound by its terms."

This was followed in the case of *Wilson v. Citizens & Southern Bank*, 99 S. E., 239.

#### IV.

**A savings bank is liable to a depositor for money paid upon a forged draft or receipt to a person presenting the bank book only in the absence of ordinary care on the part of the bank.**

*Campbell v. Schenectady Savings Bank*,  
114 App. Div., 337, 99 N. Y. S., 927;  
*Kelley v. Buffalo Savings Bank*, 180 N. Y.,  
171, 72 N. E., 995, 69 L. R. A., 317;  
*Appleby v. Erie County Savings Bank*, 62  
N. Y., 12;

- Krishkan v. New York Savings Bank, 156  
N. Y. S., 298, 93 Misc. Rep., 52;  
Donlan v. Provident Institution for Sav-  
ings, 127 Mass., 183;  
Gifford v. Rutland Savings Bank, 63 Vt.,  
108;  
Brown v. Merrimack River Savings Bank,  
67 N. H., 549;  
Sullivan v. Lewiston Institution of Sav-  
ings, 56 Me., 507.

This rule of law was conceded at the trial and the judge charged to that effect.

The defendant contends that there was no evidence from which the jury could legally find a lack of ordinary care and that the evidence of defendant clearly established due care and that the court should, therefore, have nonsuited the plaintiff or directed a verdict for the defendant.

The rule of law is well established by the cases.

The court, in *Appleby v. Erie County Savings Bank*, 62 N. Y., 12 in speaking of savings banks among other things says page 18:

“The officers of these institutions are held to the exercise of reasonable care and diligence (56 Me., 507; 27 Conn., 229; 46 N. H., 78). In this case if the two signatures were so dissimilar as when compared the discrepancy would be easily and readily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence which should have been passed upon by the jury. It would not be evidence of negligence if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the dis-

crepancy was one as to which competent persons might honestly differ in opinion."

In this case the court directed a verdict for the defendants which was affirmed on appeal. The evidence in this case is quite similar to that, in the case at bar, except that it was stronger for plaintiff as witness testified for the plaintiff as to the difference in the signatures.

In *Kelley v. Buffalo Savings Bank*, 180 N. Y., 171, the court said at page 178:

"Upon reflection it becomes obvious, therefore, that the only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. This is the rule that has been laid down by this court in a variety of similar cases." Citing cases.

The court further on at page 181 said:

"The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon five checks, as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bank book, and that, therefore, the bank exercised due care and caution and was not guilty of negligence is really a conclusion of law and not a finding of fact."

In the case of *Campbell v. Schenectady Savings Bank*, 114 App. Div., 337, 99 N. Y. S., 927, the court discussed the evidence and then held at the end:

“Upon the whole case, I am satisfied there was no evidence before the jury tending to show that the defendant paid this money otherwise than in the ordinary prudent conduct of its business, and that it exercised at least ordinary care for the preservation of the plaintiff’s money. The defendant’s motion for a non-suit should therefore have been granted.”

This case refers to the rule laid down in *Kelley v. Buffalo Savings Bank*, 180 N. Y., 177.

*A MERE DIFFERENCE IN THE SIGNATURE DOES NOT REQUIRE THE SUBMISSION OF THE CASE TO THE JURY.*

*Ferguson v. Harlem Savings Bank*, 43 Misc. Rep., 10, 86 N. Y. S., 825;  
*M’Kenna v. Bowery Savings Bank*, 157 N. Y. S., 16, 93 Misc. Rep., 135;  
*Israel v. Bowery Savings Bank*, 9 Daly, 507.

“If, for instance, the signature of the receiving person should present a marked and noticeable dissimilarity to that of the depositor upon the bank’s book, the failure to discover it would evidence negligence to be passed upon by a jury. In the case at bar, the record contains no proof of any such facts, and none upon which negligence by the bank officials could possibly be predicated. (*Shoenwald v. Met. Savings Bank*, 57 N. Y., 418; *Appleby v. Erie County Savings Bank*, 62 N. Y., 12.)

There was no question, therefore, for submission to the jury, and the motion to dismiss should have been granted."

Israel v. Bowery Savings Bank, 9 Daly, N. Y., at page 509.

It appears from the foregoing cases that even where it is found that the money was paid by a savings bank on a forged draft, the bank is not responsible unless there is negligence or the lack of ordinary care. Whether or not there was such lack of ordinary care is in some instances a jury question, but in the absence of any evidence of lack of such ordinary care, the court should control the verdict.

It is insisted that in the case at bar there was no evidence from which a jury could find lack of ordinary care. The whole purport of plaintiff's testimony, both in direct examination and on rebuttal, is summed up in the two assertions that she did not get the \$900.00 in question entered on her book and that the receipt for this payment was not her signature. The jury must have found this to be so.

This leaves, however, another element of the case to be considered, namely, the lack of ordinary care. Surely it is not enough in such cases to show that the signature is a forgery and the money paid to an imposter, else there would be no distinction between savings banks and ordinary commercial banks. There is such a distinction clearly recognized by the cases. The plaintiff, therefore, in order to recover must prove more. She failed to prove more.

But in this case the evidence goes further. Two witnesses were sworn, who testified that the disputed signature so much resembled the admitted

standards, that it should be accepted as an original and further that the resemblance was such that a paying teller would be justified in passing it as a genuine signature. Elaborate reasons were given for this, amply borne out by the exhibits from which they were testifying.

*Not a single witness was called by the plaintiff to refute this testimony in any way.*

It is insisted, therefore, that this undisputed evidence should have been taken as conclusive by the court below and should be so taken by this court. They were entirely reputable witnesses giving clear and cogent reasons for their testimony. It is singular that plaintiff called no expert or person familiar with the examination of signatures to testify in her behalf. It must be that she could find none who would so testify. It must be that the testimony of defendant's witnesses was not refuted because it could not be. It follows, therefore, that at the close of the plaintiff's case there was no proof of lack of ordinary care and at the close of defendant's case the lack of ordinary care was negatived.

In this situation there clearly should have been a direction of a verdict.

The following language from *Ferguson v. Harlem Savings Bank*, 86 N. Y. S., 825, 43 Misc. Rep., 10, 13, the circumstances being quite similar, is quite in point. "The testimony of the said bank officer was in no way or manner contradicted or impeached, and there was nothing improbable or suspicious about it; and hence full credit should have been given to it, and, upon defendant's motion for a direction of a verdict in its favor, a verdict should have been directed against it for only \$18.61" the admitted balance.

In *Krishkan v. New York Savings Bank*, 156 N. Y. S., 298, 93 Misc. Rep., 52, the plaintiff as in

the case at bar denied that he signed the receipt for \$900, but furnished no other evidence on the subject, a verdict for plaintiff was reversed on appeal, and, on the ground that a verdict should have been directed for defendant, the complaint was dismissed.

It is undisputed that the bank has a regular practice in the payment of such deposits (Case, p. 31, l. 31) :

“Q. When a depositor comes there whom you do not know what is your practice, regular practice, if any? A. The practice is a careful examination of the signature to see that it compares with our signature of record, and then if there is any doubt in the teller’s mind he is to ask the questions which we record from the depositor when the account is opened relating to the depositor’s pedigree, as a further means of identification.

Q. And if the signature compares, then what do you do—if the signature compares when you do that—I mean compares favorably? A. If there is no question in the teller’s mind as to the validity of the signature the money is paid without asking the questions—which, of course, would be unnecessary.

Q. And if after both the questions are asked and the signatures compared there was still any doubt then what would the bank do, or what would you do? A. We would require personal identification of the depositor.

Q. Has that been the system you have uniformly practiced in this twenty odd years you occupied as teller? A. Absolutely.

Q. Do you have a very large number of depositors in that bank? A. At the present time about 19,000.”

Then further on the witness testified (p. 34, l. 5) :

“Q. I show you a paper purporting to be a withdrawal receipt under date of May 9, 1918, and ask you what that is? A. That is a receipt that was signed, Auguste Berndt, for nine hundred dollars, book number 76749, dated May 9, 1918. It is one of our regular counter receipts. It is not a negotiable order. It is not negotiable outside the bank. It is signed by the depositor in the presence of the teller.

Q. Are these receipts kept at a counter for the public or do they ask for them when they want to withdraw? A. These receipts have never been kept outside of the counter inside the bank. They have never been kept outside the bank. Our reason for that is that it would be a nuisance to the depositor to have these receipts outside, for the class of the majority of our depositors is such that they would use these slips just as often for deposit slips and it would lead to a great deal of confusion. We prefer to make out our own receipt, which was done in this case. That is why I can say positively these receipts were never kept outside.

Q. Who filled in this receipt? A. I did in my capacity as teller at that time.

Q. In other words, when this was withdrawn you were at the window and filled out this at the request of the person who drew the money?

A. Yes.

Q. And it was then taken to the counter?

A. Yes.

Q. You have counters there for that purpose? A. Yes.

Q. And in whose writing is the number of the bank book, this number (indicating)? A. That is my writing.

Q. So that you had the number when the slip was given out? A. Yes.

Q. So that the bank book had been presented at the time you filled in the slip? A. Yes.

Q. Then the person, with the bank book and the slip went to a counter which was provided, signed it and brought it back? A. No, the depositor presents the book and says, 'I want nine hundred dollars.' The teller makes out this slip and puts the book aside. The depositor signs that slip. Then the teller takes the nine hundred dollars and puts it in this book and has it ready for the depositor when this slip comes in. The book is not passed out again, it is put aside to await the return of the signed receipt.

Q. When is the book passed out? A. After the payment is made.

Q. Will you look at the entry of the payment? In whose handwriting is that? A. That is mine.

Q. And it bears the same date as the receipt? A. Yes."

The witness then goes on to point out the resemblance between the disputed signature and the admitted standards, pages 38 to 41. These were the reasons which justified the witness in the answer to the following question, page 36 at bottom:

"Q. Being of that opinion (that disputed signature was the genuine signature of the plaintiff) you feel that any paying teller would have been justified in making a payment on that signature and the production of the bank book? A. Yes."

This method seems to be the accepted method among savings banks. Charles A. Sturm a witness called by the defendant testified as to this as follows page 44, line 15:

“Q. What general custom did you have when you were paying teller and somebody came in and wanted to withdraw money? A. They would present the book at the window and say they desired to withdraw such and such an amount. The teller would then fill out the draft with the exception of the signature and hand them that draft or receipt I would call it, and ask them to sign it. They would walk across the corridor to the desk and sign the draft and return with it, whereupon we would count out the money, place it between the leaves of the pass book and pass it to our bookkeeper in the savings department and then ask the depositor his or her name and how much he withdrew, or signed to withdraw.

Q. How would you identify the depositor?  
A. By his signature.

Q. How would you do that? A. By comparing the signature on the receipt with the signature on file on the card which was signed at the time the account was opened.

Q. If that was satisfactory, then what? A. Then he would be paid the money.

Q. If it was not satisfactory what else would you do? A. We would ask him the different identification questions which were answered when he opened the account, such as birth place and birthday and father and mother's name, married or single, have any children, wife's name, and so forth.

Q. Is that the accepted method of identification among savings institutions? A. In my opinion it is.

Q. Substantially the same as Mr. Pickenbach testified to in your bank? A. Yes."

He testified also that in his opinion all the signatures were written by the same person.

With reference to the disputed signature and Exhibit D-15 he testified as follows (p. 45, l. 25):

"Q. In your opinion is this signature on D-15 the signature of the depositor as shown on the admitted cards and withdrawal receipts? A. That is my opinion.

Q. Do you think a paying teller would be justified on comparing that signature with the card, in paying the money? A. I do.

Q. As a matter of fact, do people ever sign twice exactly alike? A. Well, very often they sign very dissimilarly, and in my experience I have found that in many cases they do not sign exactly alike.

Q. Are the resemblances in these signatures very marked? A. Very.

Q. And you heard Mr. Pickenbach testify, didn't you? A. I did.

Q. And do you find those same characteristics of which he spoke? A. Yes.

Q. I call your attention particularly to this admittedly genuine signature on Exhibit D-9 and ask whether that is such as to attract attention? A. I would say it is.

Q. What is peculiar about that? A. I would say that looks more attractive as to difference than any of the other signatures.

Q. Do differences in pens make differences in signatures? A. Positively.

Q. Explain that. A. A very fine, stiff steel pen will make a very fine line. The edge of the pen will have a tendency to affect the line. The pen might be of a different kind—stub, medium.

Q. And the points corrode some times and get sort of rough? A. Oh, yes.

Q. And that would indicate that this Exhibit D-9 might have been made with such a pen? A. Yes.

Q. And that Exhibit D-15, the disputed one, was made with a sharp, stiff pen? A. Yes.

Q. But do you judge signatures so much by that characteristic as by the shape and slant and form of the letters? A. The general formation of the letters is what guides the teller.

Q. As to this disputed signature, does the general formation of the letters correspond with the admittedly genuine signatures? A. On the whole I find them so."

Surely in view of this testimony the case is brought well within the cases above where the verdicts were directed by the courts. For these reasons we urge that the court erred in refusing a nonsuit and the motion for the direction of a verdict and that the judgment below should be reversed.

Respectfully submitted,

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